PUBLIC - REDACTED

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of Tronox Limited a corporation, National Industrialization Company (TASNEE) a corporation AND Cristal USA Inc. a corporation.	Docket No. 9377

<u>NON-PARTY BENJAMIN MOORE & CO.'S CONSENT MOTION FOR *IN CAMERA* TREATMENT</u>

Pursuant to Rule 3.45 of the Federal Trade Commission's ("FTC") Rules of Practice, 16 C.F.R. § 3.45, non-party Benjamin Moore & Co. ("BM") respectfully moves for *in camera* treatment of the competitively sensitive, confidential business document (the "confidential document," Exhibit Number PX4231, Bates Range PX4231-001 – PX4231-003). On July 10, 2017, BM produced the confidential document in response to the FTC's June 14, 2017 Civil Investigative Demand ("CID") related to the proposed merger of Tronox Limited, Inc. and Cristal USA Inc. (Exhibit A). Counsel for the FTC informed BM's Counsel on April 19, 2018 that the FTC may offer BM's confidential document as evidence in the administrative trial in the above-captioned matter.

If the confidential document is made public, BM—as well as other titanium dioxide suppliers—would suffer significant competitive harm. As the attached declaration from David L. Jenne, BM's Vice President of Global Procurement (Exhibit B) demonstrates, the information in the confidential document would allow BM's competitors to understand the volumes and forms of titanium dioxide BM acquires, who it acquires titanium dioxide from, and the prices at which it does so. [redacted]—BM's competitors could use the information to compete against BM and distort the ordinary competitive process.[1] Moreover, the information contained in the confidential document, if disclosed, would allow titanium dioxide suppliers to gain insight into *each other's* pricing and sales strategy to a major purchaser—BM. This would separately distort the competitive process among titanium dioxide suppliers.

Particularly since this is an antitrust trial—and the antitrust laws restrict the sharing of competitively sensitive information among horizontal competitors in order to preserve the competitive process—the confidential document should be accorded *in camera* treatment. According such treatment also would be consistent with BM's expectation that, in responding to the CID, the Protective Order would guard against disclosure of its competitively sensitive information. "As a policy matter, extensions of confidential or *in camera* treatment in appropriate cases involving third party bystanders encourages cooperation with future adjudicative discovery requests." *In re Kaiser Aluminum & Chem. Corp.*, 103 FTC 500, 500 (1984). For this reason, "[t]here can be no question that the confidential records of businesses involved in Commission proceedings should be protected insofar as possible." *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1186 (1961). Accordingly, BM respectfully requests the confidential document be accorded *in camera* treatment. None of the parties to this proceeding oppose BM's request for *in camera* treatment.

[1] Redaction is an insufficient remedy to the competitive injury posed by disclosure because the *entire document* details price and volume information, among other things.

I. Description of the Confidential Document

BM seeks *in camera* treatment of the document attached as Exhibit A. This confidential document was produced to the FTC pursuant to its June 14, 2017 CID under the confidentiality provisions therein.

The confidential document sets out the total volumes of titanium dioxide BM has purchased over the past several years, the suppliers from whom it purchases, and the total amounts paid to each supplier, broken down by type of titanium dioxide. *See* Exhibit A. As a result, anyone with access to this information would gain insight into the price paid by BM to these suppliers. Jenne Decl. ¶¶ 5-6. Notably, the confidential document includes volumes and costs paid by BM to suppliers that are not parties to these proceedings. *See* Exhibit A. These suppliers have an interest in preventing disclosure of their competitively sensitive information.

BM is careful to guard against disclosure of the competitively sensitive information in the confidential document. Jenne Decl. ¶ 8. [redacted] When the FTC requested this information, BM provided it based on the understanding that the CID's confidentiality provisions protected the information, and counsel for FTC subsequently confirmed that a Protective Order was entered that would preserve this document's confidentiality. *See* Jenne Dec. ¶ 2. BM has not shared this confidential document—or any of the information contained therein—with anyone outside of BM. Jenne Decl. ¶ 8.

II. The Confidential Document Is BM's Core Business Material that Reveals Competitively-Sensitive Information

Under FTC Rule 3.45(b), an Administrative Law Judge "shall order" that material offered into evidence "be placed *in camera* only after finding that its public disclosure will likely result in a clearly defined, serious injury to the person, partnership or corporation requesting *in camera* treatment . . . ." 16 C.F.R. § 3.45(b). The moving party (here, BM) must show that the confidential document is "'sufficiently secret and sufficiently material to [its] business that disclosure would result in serious competitive injury.'" *In re Jerk*, LLC, 2015 FTC LEXIS 39, at *2 (Feb. 25, 2015) (quoting *In re General Foods Corp.*, 95 F.T.C. 352, at *10 (Mar. 10, 1980)). "The likely loss of business advantages is a good example of a clearly defined, serious injury." *In re Dura Lube Corp.*, 1999 F.T.C. 255, at *7 (Dec. 23, 1999) (internal quotation marks omitted). A movant may make this showing through a declaration that "describes in detail the confidential nature of the document[], . . . the measures [the movant] has taken to protect the confidentiality of the document[] . . . and explains the competitive harm [the movant] would suffer if the[] document[] w[as] made publicly available." *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55, at *9 (Apr. 4, 2017); *see also In re Bristol-Meyers Co.*, 90 F.T.C. 455, at 456-57 (1977).

Here, as Mr. Jenne's declaration explains, BM is a global leader in formulating, manufacturing, and retailing a broad range of architectural coatings. Jenne Decl. ¶ 3. [redacted] The confidential document reflects the results of BM's efforts and effectively provides insights into BM's purchasing strategy, which BM is careful not to disclose. Jenne Decl. ¶ 8.

[redacted]

[redacted]

But it is not just BM's competitively sensitive information that is at stake. With the information in the confidential document, titanium dioxide suppliers could gain valuable insight into the pricing of their competitors and, more generally, their position with a major purchaser—BM. Jenne Decl. ¶ 5. [redacted] BM also is careful to ensure that the information contained in the confidential document is not disclosed outside of BM. Jenne Decl. ¶ 8.

For all these reasons, the confidential document contains precisely the type of competitively sensitive information that FTC Rule 3.45(b) was intended to protect. Indeed, failure to accord *in camera* treatment effectively would reveal competitively sensitive information to two different sets of horizontal competitors: suppliers of titanium dioxide and suppliers of coatings. Such a result would be antithetical to the antitrust laws, which recognize that exchange of information among direct competitors can distort the competitive process. *See* FTC/DOJ Antitrust Competitor Collaboration Guidelines § 3.31(b) (recognizing "the sharing of information relating to price, output, costs, or strategic planning is more likely to raise competitive concern"); *Todd v. Exxon Corp.*, 275 F.3d 191, 198-99, 208-09 (2d Cir. 2001) (explaining that "information exchange," even if not used to infer a price-fixing agreement, may nevertheless evidence an antitrust violation "under a rule of reason analysis").

Given the competitive sensitivity of this information, five-year *in camera* treatment is appropriate. *See* 16 C.F.R. § 3.45(b)(3); *see also 1-800 Contacts*, 2017 FTC LEXIS at *6 ("Where *in camera* treatment is granted for ordinary business records, it is typically provided for two to five years."). As Mr. Jenne's declaration explains, BM's purchasing strategy, as well as the types of titanium dioxide purchased, size of the purchases, and the major suppliers used will be relevant for many years. Jenne Decl. ¶ 9.

In addition to granting *in camera* treatment, disclosure of BM's confidential document should be limited to only those persons "permitted [to see it] under the Protective Order entered in this case." *1-800 Contacts*, 2017 FTC LEXIS at *10 & n.1. As this Court knows, the Protective Order entered here "does not include access to confidential materials for in-house counsel." *See* ALJ Order Denying Respondents' Motion to Amend the Protective Order, at *2 (Feb. 5, 2018). This Court recognized, when denying Respondents' Motion to Amend the Protective Order to afford access to designated in-house counsel, that "[t]he Protective Order was issued to protect the rights of parties and non-parties from disclosure of their confidential information by limiting disclosure to the narrow set of persons listed in Paragraph 7 of that Order." *Id.* at 3 n.2. BM's same rights are at stake now.

III. Conclusion

As described above, the information in the confidential document, if disclosed, will cause serious competitive injury and distort the competitive process—contrary to the purpose of antitrust. Moreover, the critical importance of ensuring third-party cooperation in FTC investigations warrants giving third-party requests for *in camera* protection "special solicitude." *In re Kaiser Aluminum & Chem. Corp.*, 103 FTC at 500. Should BM's confidential document—which also includes confidential information of BM's suppliers—fail to receive *in camera* treatment, it will send a chilling message to future third-parties. BM respectfully requests that its unopposed motion for *in camera* treatment be granted, the confidential document at issue receive the maximum possible amount of *in camera* treatment, and that the confidential document's disclosure "may be made only as permitted under the Protective Order entered in this case." *1-800 Contacts*, 2017 FTC LEXIS at *10 & n.1.

Dated: May 1, 2018

Respectfully submitted,

Benjamin Moore & Co.

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<u>STATEMENT REGARDING MEET AND CONFER</u>

I hereby certify that I notified counsel for the parties that Benjamin Moore & Co. would be seeking *in camera* treatment of the confidential document. Counsel for the parties indicated that they would not object to this motion.

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Notice of Electronic Service

I hereby certify that on May 4, 2018, I filed an electronic copy of the foregoing Public Non-Party Motion for In Camera Treatment and accompanying exhibits with:

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I hereby certify that on May 4, 2018, I served via E-Service an electronic copy of the foregoing Public Non-Party Motion for In Camera Treatment and accompanying exhibits upon:

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I hereby certify that on May 4, 2018, I served via other means, as provided in 4.4 (b) an electronic copy of the foregoing Public Non-Party Motion for In Camera Treatment and accompanying exhibits upon:

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[PROPOSED] ORDER

Upon consideration of Non-Party Benjamin Moore & Co.'s Motion for *In Camera* Treatment, it is HEREBY ORDERED that the document is to be provided permanent *in camera* treatment from the date of this Order in its entirety, and it is HEREBY ORDERED that this document may be viewed only by those permitted to view it under the Protective Order entered in this case.

Exhibit No.	Beginning Bates No.	Ending Bates. No.
PX4231	PX4321-001	PX4321-003

ORDERED:

____
D. Michael Chappell
Chief Administrative Law Judge

Date: ______________________