

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

In the Matter of

Illumina, Inc.,
a corporation,

and

GRAIL, Inc.,
a corporation,

Respondents.

Docket No. 9401

**RESPONDENTS' OPPOSITION TO COMPLAINT COUNSEL'S
MOTION TO CLOSE THE RECORD EARLY**

Respondents oppose Complaint Counsel's motion to close the record early and to expedite the post-trial briefing schedule. Like Complaint Counsel, Respondents are interested in a prompt resolution of this case. However, Respondents also want to ensure that any post-trial briefing is based on a full and complete record, and done in a practical manner. As it stands, Complaint Counsel has introduced evidence from Caris Life Sciences ("Caris"), but Respondents have not had the opportunity to rebut that evidence. Closing the record prematurely and beginning briefing only to reopen the record after receiving discovery from Caris would prejudice Respondents, be impractical for the parties and this Court, and unnecessarily delay resolution of this case. Respondents respectfully submit that this Court should either (1) wait until discovery from Caris is completed to close the record or (2) grant Respondents' pending motion *in limine* to exclude evidence from Caris.

Even if this Court decides to close the record before receiving evidence from Caris, this Court should not accept Complaint Counsel's proposed briefing schedule because it is

inconsistent with this Court’s prior guidance, contrary to the Part III rules and unwarranted. Complaint Counsel proposes to close the record without a hearing and while other issues remain outstanding. Moreover, Complaint Counsel proposes a schedule shorter than the default schedule under 16 C.F.R. § 3.46 despite the complex nature of this case. If this Court chooses to close the record, Respondents propose, consistent with the briefing schedules in other merger cases, that opening briefs and findings be due 30 days after close of the record and reply briefs and findings be due 40 days after opening briefs.

STATEMENT OF FACTS

A. Outstanding Discovery from Caris

In its motion to close the record early, Complaint Counsel takes the position—for the first time—that the record should be closed because Respondents delayed enforcing their subpoenas seeking documents and testimony from Caris. But as this Court and the Commission have both held, Respondents made every effort to reach a compromise with Caris and moved to compel promptly upon reaching impasse. (Order Granting Mot. to Certify (“Certification Order”) at 4–5 (Aug. 16, 2021); Order Directing General Counsel to Enforce Nonparty Subpoenas (“Commission Enforcement Order”) at 5–6 (Aug. 24, 2021).) In addition, Complaint Counsel’s position—with selective citations to only some of the correspondence between Respondents and Caris¹—is inconsistent with its prior positions and with the Commission’s pending motion to enforce Respondents’ subpoenas in District Court.

This case is about whether Illumina’s reacquisition of GRAIL is likely to substantially lessen competition. [REDACTED]

¹ Curiously, Complaint Counsel cites to Respondents’ correspondence only until June 2021 and omits the voluminous correspondence from June to August 2021. (Respondents Mot. To Certify (Aug. 3, 2021) Exs. 24–30.)

[REDACTED]

During the FTC’s investigation, Caris produced its chief scientific officer, Dr. David Spetzler, to testify in an investigational hearing (“IH”) and produced certain documents. (Certification Order at 2). [REDACTED]

[REDACTED]

[REDACTED] Complaint Counsel even mentioned Caris in its opening statement. (Trial Tr. 39.)

[REDACTED] Respondents have not received necessary discovery from Caris. Under the investigation rules, Respondents were not present for Dr. Spetzler’s IH and could not seek documents from Caris during the investigation stage. In the litigation, Respondents issued both a document subpoena to Caris and a deposition subpoena for Dr. Spetzler, but Caris refused to comply. (Certification Order at 3.) Respondents repeatedly offered to narrow the scope of the subpoenas. (*Id.* at 3–4.) After four months of negotiations, more than 10 separate telephonic meet and confers and countless letters, Respondents filed a motion to certify enforcement. (*Id.* at 4.) Caris opposed, arguing, *inter alia*,

that Respondents had delayed in making their motion. (*Id.*) Complaint Counsel *took no position* on Respondents' motion.²

On August 16, 2021, this Court granted Respondents' motion to certify the subpoenas with the recommendation that the district court enforcement be sought. (Certification Order at 6.) This Court held that Respondents and Caris had actively tried to reach agreement until they reached impasse, at which point "[t]he Motion was thereafter promptly filed". (Certification Order at 5.)

On August 24, 2021, the Commission agreed with this Court's recommendation and voted to seek court enforcement of the subpoena. (Commission Enforcement Order.) The Commission agreed that Respondents had worked to limit the scope of the subpoena and should not be "barred from enforcing the subpoena[]" by reason of delay. (*Id.* at 5.) This Court deferred ruling on Respondents' motion to exclude evidence from Caris pending enforcement of the subpoena. (Order Memorializing Bench Rulings (Aug. 25, 2021) at 2.)

The Commission filed a petition seeking to enforce the subpoenas in the District Court for the District of Columbia on September 9, 2021. (Compl. Counsel's Mot. to Close the Record ("Motion") (Sept. 9, 2021), Ex. D.) On October 5, 2021, the District Court ordered Caris to file any opposition by November 5, 2021, and the FTC to file a reply on November 12, 2021. (*Id.*) The Commission in its District Court filing seeks to require Caris to produce documents within one week of an order and to produce Dr. Spetzler for a deposition promptly thereafter.

² Respondents also filed a motion *in limine* to exclude evidence from Caris. (Respondents MIL to Exclude Evidence from Caris (Aug. 5, 2021).) Complaint Counsel opposed that motion arguing that the Court should first decide Respondents' motion to compel discovery from Caris. (Complaint Counsel's Opposition to Caris MIL at 4 (Aug. 18, 2021).)

Assuming a prompt resolution of the petition, Caris could be ordered to provide and complete its discovery as early as the end of November.

B. The Court's Guidance

On September 24, 2021, the parties completed their presentation of live testimony, but several issues remained outstanding, including: (1) trial depositions of expert witnesses, (2) objections regarding proposed exhibits, (3) redaction of Dr. Navathe's and Dr. Rothman's expert opinions in light of the exclusion of Mr. Serafin's testimony and (4) discovery from Caris. (*See* Trial Tr. 4574–75.)

On the last day of live testimony, Complaint Counsel noted that enforcement proceedings regarding Caris were ongoing in District Court. (*See id.* at 4579.) The Court stated that “because this discovery is outstanding and it's like tentacles on an octopus, there might be additional evidence to be offered into the record depending on where the trails lead when this deposition is taken. In that regard the hearing record is not complete until this is resolved.” (*Id.* at 4580.) The Court directed the parties to contact the Court by email once discovery was complete “and at that time provide me with dates both sides are available to reconvene the trial”. (*Id.* at 4574.) The Court stated that “[a]fter we reconvene for the completion of that evidentiary hearing, I will issue an order closing the record within the three days of that date. And at that time we'll go over deadlines and requirements for the posttrial briefs and proposed findings of fact when we reconvene.” (*Id.* at 4580–4581.) Complaint Counsel did not raise any objections to the Court's approach, which Respondents have relied on. (*See id.* at 4581.) As of the date of this opposition, the parties have completed (1) expert trial depositions, but multiple items— (2) the objections regarding JX3 (and potentially JX4, if needed), (3) the dispute regarding redactions to the reports of Dr. Navathe and Dr. Rothman and (4) discovery from Caris—remain outstanding.

ARGUMENT

Like Complaint Counsel, Respondents seek an efficient resolution of this case. However, closing the record prematurely before the Caris issue is resolved will prejudice Respondents and inject chaos into the briefing process. Accordingly, this Court should either stand by its previous decision to wait for the Caris issues to be resolved to close the record or grant Respondents' motion to exclude evidence from Caris.

Closing the record before resolving the Caris issues will prejudice Respondents.

[REDACTED]

[REDACTED] Respondents have not had a chance to cross-examine Dr. Spetzler or received the documents necessary to verify or refute Complaint Counsel's claims, and both this Court and the Commission have held that the documents Respondents seek in their subpoenas are relevant.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Under Complaint Counsel's proposal, Respondents would be forced to file post-trial briefing without the benefit of any additional evidence from Caris, and without subjecting any of Caris's statements to cross examination.

Perhaps recognizing the unfairness of its position, Complaint Counsel suggests that Respondents could reopen the record later and supplement their briefing. (Motion at 4.) But such piecemeal supplementation would not allow Respondents to present their evidence in a coherent manner and would disadvantage them vis-à-vis Complaint Counsel, which already has the evidence from Caris it intends to use to support its case. Complaint Counsel also says that it would be unfair to allow a third party to hold up the administrative process by refusing to comply with discovery requests. (*Id.*) What is really unfair is forcing Respondents to close the

record that is decidedly one-sided as to Caris and submit briefing without the benefit of a full record because of a third party's refusal to cooperate with Respondents (after fully cooperating with Complaint Counsel during the FTC's investigation).³

Closing the record prematurely would also pose serious practical and logistical challenges. As this Court explained, the Caris issue is "like tentacles on an octopus, there might be additional evidence to be offered into the record depending on where the trails lead when this deposition is taken". (Trial Tr. 4580.) [REDACTED]

[REDACTED] the evidence from Caris will certainly require supplementation of the record. It will also require briefing to explain the significance of the new evidence. Doing all of this after the record is closed and briefing is submitted is not only inconvenient but will require the submission of additional piecemeal briefing that will further delay this Court's process. This is why this Court stated that "the hearing record is not complete until this is resolved". (Trial Tr. 4580.)

By contrast, waiting to resolve the Caris issue will not result in undue delay. As Complaint Counsel admits, briefing before the district court will be completed by mid-November. (*See* Motion at 4.) In the meantime, the parties can resolve the outstanding disputes regarding JX3 and the redactions to Complaint Counsel's expert reports. And Respondents will work diligently to complete all discovery so that the record can be closed by early December. A single exchange of post-trial briefing and replies following the completion of that discovery—as is standard in every other merger case—would likely result in a shorter timeline than Complaint

³ Complaint Counsel says that "[n]one of the evidence that Respondent Illumina sought to exclude in its motion *in limine* has been admitted into evidence, except for certain Caris-produced documents introduced by Respondents themselves." (Motion at 4–5.) But Dr. Scott Morton's expert report, which has been introduced into evidence in JX2, contains extensive citations to Caris documents and testimony. (*See* PX6090, Report of Dr. Scott Morton). And the remainder of Caris's documents have been reserved by Complaint Counsel. (*See* JX2 Exs. Pending MIL.)

Counsel's staggered approach.⁴

Even if this Court decides to grant Complaint Counsel's motion to close the record early, it should not accept Complaint Counsel's proposed schedule. *First*, Complaint Counsel's proposal is contrary to the Part III Rules and inconsistent with this Court's guidance. Complaint Counsel proposes to file opening briefs 14 days after the close of the record, *seven days shorter* than the default 21 days provided for under 16 C.F.R. § 3.46. Respondents are not aware of any case where this Court has expedited post-trial briefing in this manner and Complaint Counsel cites none. In fact, this Court has rejected a joint request to shorten the post-trial briefing timeline. (*See* Ex. 1, Order Denying Mot. for Expedited Briefing Schedule, *In re Tronox Ltd.*, FTC Dkt. No. 9377 (F.T.C. Jun. 13, 2018) (rejecting joint motion to expedite opening briefing to 14 days following closing of the record).)⁵ Complaint Counsel seeks to close the record early on the papers before the submission of JX3, without resolution of outstanding expert report disputes and without scheduling the final evidentiary hearing contemplated by this Court. *Second*, given this case's complexity, Complaint Counsel's expedited briefing schedule is unwarranted. This case is the first vertical merger adjudicated by the FTC in decades and involves complex technical, economic and legal issues and 10 expert witnesses. (Order Granting Respondents' Motion for Leave to Allow Additional Expert Witnesses, at 3 (July 28, 2021) (granting Respondents leave to designate two additional experts because "the Complaint involves numerous, complex issues and technical areas").)

Accordingly, Respondents request a modest extension to the default schedule,

⁴ Exclusion of all evidence from Caris would allow for one set of briefing.

⁵ Complaint Counsel states that 16 C.F.R. § 4.3(b) permits this Court to change the deadlines for post-trial filings upon good cause shown. (Motion at 4.) But 16 C.F.R. § 4.3(b) is titled "Extensions" and only permits this Court to *extend* any time period for good cause shown.

consistent with extensions this Court has granted in other complex merger cases:⁶

- Opening briefs and findings shall be due 30 days after the record is closed; and
- Reply briefs and findings shall be due 40 days after the exchange of opening briefs.

CONCLUSION

For the reasons stated above, Respondents respectfully request that Complaint Counsel's motion be denied.

Dated: November 1, 2021

/s/ Sharonmoyee Goswami

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⁶ For example, in *In re Tronox Ltd.*, opening briefs and findings were due 41 days after close of the record and replies were due 34 days later. F.T.C. Dkt. No. 9377, 2018 WL 3249718, at *1 (F.T.C. Jun. 27, 2018). In *In re Otto Bock HealthCare N. Am.*, opening briefs and findings were due 34 days after the record closed, and replies were due 30 days later. F.T.C. Dkt. No. 9378, 2018 WL 5023742, at *1 (F.T.C. Oct. 10, 2018).

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I hereby certify that on November 1, 2021, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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November 1, 2021

Respectfully submitted,

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Sharonmoyee Goswami

CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

November 1, 2021

/s/ Sharonmoyee Goswami

Sharonmoyee Goswami

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

In the Matter of

Illumina, Inc.,
a corporation,

and

GRAIL, Inc.,
a corporation,

Respondents

Docket No. 9401

DECLARATION OF SHARONMOYEE GOSWAMI

I, Sharonmoyee Goswami, declare and state:

1. I am a partner at Cravath, Swaine & Moore LLP and counsel for Respondent Illumina, Inc. (“Illumina”) in this matter. I make this declaration in support of Respondents’ Opposition to Complaint Counsel’s Motion to Close the Record Early.

2. Attached as Exhibit 1 is a true and correct copy of the Order Denying Motion for Expedited Briefing Schedule in *In re Tronox Ltd.*, F.T.C. Dkt. No. 9377, dated June 13, 2018.

3. Attached as Exhibit 2 is a true and correct copy of the Joint Motion to Set Expedited Post-Trial Briefing Schedule in *In re Tronox Ltd.*, F.T.C. Dkt. No. 9377, dated June 13, 2018.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 1st day of November, 2021 in New York, New York.

/s/ Sharonmoyee Goswami
Sharonmoyee Goswami

Exhibit 1



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

ORIGINAL

In the Matter of)
)
Tronox Limited,)
a corporation,)
)
National Industrialization Company)
(TASNEE))
a corporation,)
)
National Titanium Dioxide Company)
Limited (Cristal))
a corporation, and)
)
Cristal USA Inc.)
a corporation,)
)
Respondents.)

DOCKET NO. 9377

ORDER DENYING MOTION FOR EXPEDITED BRIEFING SCHEDULE

On June 13, 2018, Respondents Tronox Limited, National Industrialization Company (TASNEE), the National Titanium Dioxide Company Limited, and Cristal USA Inc. (collectively, "Respondents") and Federal Trade Commission ("FTC") Complaint Counsel filed a Joint Motion to Set Expedited Briefing Schedule ("Motion").

For the reasons stated on the record at trial on June 13, 2018, the Motion is DENIED.

ORDERED:

Dm Chappell
D. Michael Chappell
Chief Administrative Law Judge

Date: June 13, 2018

Exhibit 2

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



ORIGINAL

In the Matter of)
)
Tronox Limited,)
a corporation)
)
National Industrialization Company)
(TASNEE),)
a corporation,)
)
National Titanium Dioxide Company Limited)
(Cristal),)
a corporation, and)
)
)
Cristal USA Inc.,)
a corporation,)
)
)
Respondents.)
)

DOCKET NO. 9377

JOINT MOTION TO SET EXPEDITED POST-TRIAL BRIEFING SCHEDULE

Complaint Counsel and Respondents jointly move the Court to set the following expedited post-trial briefing schedule, to which the parties have agreed: (1) following the close of trial, the parties will have two business days to determine whether the record is complete or requires supplementation; (2) following the close of the record, the parties will submit within 14 days proposed findings of fact, conclusions of law, and rule or order, together with the reasons therefor and briefs in support thereof; (3) following service of the initial proposed findings, the parties will submit within 10 days reply findings of fact, conclusions of law, and briefs.

This proposed schedule expedites the schedule for post-trial briefing set out in the Part III rules. See 16 C.F.R. §3.46(a). The parties respectfully request that the Court issue this expedited post-trial briefing schedule by entering the proposed order offered with this motion.

Dated: June 13, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2018, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

June 13, 2018

By: /s/ Michael F. Williams
Michael F. Williams

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

In the Matter of

**Tronox Limited
a corporation,**

**National Industrialization Company
(TASNEE)
a corporation,**

**National Titanium Dioxide Company
Limited (Cristal)
a corporation,**

And

**Cristal USA Inc.
a corporation.**

Docket No. 9377

**[PROPOSED] ORDER ON JOINT MOTION TO
SET EXPEDITED POST-TRIAL BRIEFING SCHEDULE**

Upon consideration of the Joint Motion to Set Expedited Post-Trial Briefing Schedule filed by Complaint Counsel and Respondents, it is **HEREBY ORDERED** that the following schedule will govern post-trial briefing in this matter:

1. Following the close of trial, the parties will have 2 business days to determine whether the record is complete or requires supplementation.
2. Following the close of the record, the parties will submit within 14 days proposed findings of fact, conclusions of law, and rule or order, together with the reasons therefor and briefs in support thereof.

3. Following service of the initial proposed findings, the parties will submit within 10 days reply findings of fact, conclusions of law, and briefs.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Notice of Electronic Service

I hereby certify that on June 13, 2018, I filed an electronic copy of the foregoing Joint Motion to Set Expedited Post-Trial Briefing Schedule, with:

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I hereby certify that on June 13, 2018, I served via other means, as provided in 4.4(b) of the foregoing Joint Motion to Set Expedited Post-Trial Briefing Schedule, upon:

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Attorney