

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, DC 20590,

Plaintiff,

v.

TRONOX LIMITED
263 Tresser Boulevard, Suite 1100
Stamford, CT 06901,

**NATIONAL INDUSTRIALIZATION
COMPANY**
Building C3, Business Gate
Eastern Ring Road, Cordoba Area
Riyadh 11496, Kingdom of Saudi Arabia,

CIVIL ACTION NO. 1:18-cv-01622 (TNM)

**NATIONAL TITANIUM DIOXIDE
COMPANY LIMITED**
17th Floor, King Road Tower
King Abdulaziz Street, Beach District
Jeddah 21414, Kingdom of Saudi Arabia,

and

CRISTAL USA INC.
6752 Baymeadow Drive
Glen Burnie, MD 21201,

Defendants.

**DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION FOR PROTECTIVE ORDER**

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Tronox Limited (“Tronox”), National Industrialization Company (“TASNEE”), the National Titanium Dioxide Company Limited (“Cristal”), and Cristal USA Inc. (“Cristal USA”) (collectively, the “Defendants”), agree that a protective order should be issued in this case pursuant to Rule 26(c) of the Federal Rules of Civil Procedure to prevent public disclosure of confidential information from Defendants and third parties. But the protective order proposed by Plaintiff Federal Trade Commission (“FTC”) improperly restricts the Defendants from access to the evidence that the FTC plans to use against them at trial. Accordingly, Defendants oppose Plaintiff’s Motion for a Protective Order and respectfully ask the Court to enter Defendants’ Proposed Protective Order in this matter. *See* Exhibit A.

The FTC is attempting to block a world-wide, multi-billion merger that has been pending since February 2017. The core antitrust issues in dispute involve intertwined business and legal issues which require the input of in-house counsel. To effectively defend against this regulatory action, Defendants need an in-house attorney who can fully participate in these proceedings and direct the course of litigation.

Courts long have recognized that “[i]t would be unfair ... for the government to attempt to prevent a private business transaction based, even in part, on evidence that is withheld from the actual Defendants (as distinct from their outside counsel).” *Fed. Trade Comm’n v. Sysco Corp.*, 83 F. Supp. 3d 1, 5 (D.D.C. 2015). But that restriction is expressly what the FTC is proposing in this case, as they claim their “protective order will protect against unwarranted disclosure either *to Defendants* or to the public.” *See* Dkt. 4, at 2 (emphasis added). In short, the FTC’s proposed order asks the Court to impose a blanket ban preventing all of Defendants’ employees—including in-house counsel who supervise this litigation—from accessing any confidential material. *See*

Dkt. 4-1, at 3-4 (describing persons authorized to access confidential information). That restriction is inappropriate and unwarranted.

The objective of the protective order should be to prevent the disclosure of confidential material to those who are “competitive decision-makers” or “involved in competitive decision-making.” *Fed. Trade Comm'n v. Whole Foods Market, Inc.*, Civ. A. No. 07-1021 (PLF), 2007 WL 2059741, at *3 (D.D.C. July 6, 2007). “Competitive decision-making” includes “business decisions that the client would make regarding, for example, pricing, marketing, or design issues when that party granted access has seen how a competitor has made those decisions.” *Sysco Corp.*, 83 F. Supp. 3d at 3. Accordingly, absent evidence that in-house counsel is a “competitive decision-maker” or “involved in competitive decision-making,” district courts ordinarily allow in-house counsel access to confidential information. *See Whole Foods Market, Inc.*, 2007 WL 2059741, at *3; *Intervet, Inc. v. Merial Ltd.*, 241 F.R.D. 55, 58 (D.D.C. 2007) (allowing access by in-house counsel to confidential information); *United States v. Sungard Data Sys.*, 173 F. Supp. 2d 20, 21 (D.D.C. 2001) (allowing access by in-house counsel to confidential information). This is true even in cases where third parties have provided confidential to the FTC during investigations under the assumption that those materials would be subject to the FTC’s confidentiality rules. *See Whole Foods Market, Inc.*, 2007 WL 2059741; *Sysco Corp.*, 83 F. Supp. 3d 1.

Defendants’ proposal will accomplish this objective while still allowing Defendants to access the evidence the FTC intends to use against them. In the Proposed Protective Order, Defendants have each identified individuals who are not “competitive decision-makers” as designees who would have access to confidential material. *See* Exhibit B, Decl. of Steven Kaye (Tronox); Exhibit C, Decl. of James Koutras (Cristal). These designees are senior legal officers whose ability to direct outside counsel will be materially impaired if denied access to the

confidential information underlying the Commission's allegations. *Id.* Neither of the designees is involved in any competitive decision-making at or for Defendants. *Id.* Except in connection with providing legal advice, these in-house lawyers are not involved in decisions about competition with other titanium dioxide suppliers, pricing strategies, marketing, or product design at or for Defendants. *Id.*

In an abundance of caution, Defendants are willing to put in place extensive safeguards to protect against inadvertent disclosure of Confidential Material. Specifically, Defendants will provide access to the in-house designees through a secure electronic data room or document review platform (such as Relativity) where authorized persons would be provided individual login identification and passwords. *See Sysco Corp.*, 83 F. Supp. 3d at 5 (revising protective order to require access to confidential material via secure electronic data room or document review platform with individual login identification and password requirements). As with all protective orders, Defendants' Proposed Protective Order would be enforceable by the sanctions set forth in Rule 37(b) of the Federal Rules of Civil Procedure and such other sanctions as may be available to the Court, including the power to hold parties or other violators of the Protective Order in contempt.

Finally, Defendants' Proposed Protective Order is based closely upon the protective order proposed (jointly) by the FTC and entered by Judge Tanya S. Chutkan on March 15, 2018 in another pending injunction case. *See Protective Order*, Dkt. 29, *Fed. Trade Comm'n v. Wilhelmsen et al.*, 1:18-cv-00414-TSC, (D.D.C.), attached as Exhibit D. Defendants have attempted to meet-and-confer with Plaintiffs' counsel about their objections to the FTC's proposed protective order, which is based on the protective order that governed the FTC's administrative proceeding in this matter. *See Exhibit E.* For the reasons set forth above, Defendants respectfully submit that

their Proposed Protective Order is more appropriate for this litigation pending in the United States District Court.

Dated: July 12, 2018

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