

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

05 01 2018
590662

In the Matter of)

Tronox Limited)
a corporation,)

National Industrialization Company)
(TASNEE))
a corporation)

AND)

Cristal USA Inc.)
a corporation.)

Docket No. 9377



NON-PARTY BENJAMIN MOORE & CO.'S CONSENT MOTION FOR IN CAMERA TREATMENT

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 camera treatment of the competitively sensitive, confidential business document (the "confidential document," Exhibit Number PX4231, Batch 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]

[REDACTED]—BM's competitors could use the information to compete against BM and distort the ordinary competitive process. Moreover, the information contained in the confidential document, if disclosed, would allow titanium dioxide suppliers to gain insight into each other's pricing and

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 could gain insight into the price paid by BM to these suppliers. Jenne Decl. ¶¶ 5-6. Notably, the confidential document includes volumes and

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 compet

[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 compe

Given the competitive sensitivity of this information, five-year camera treatment is appropriate. See 16 C.F.R. § 3.45(b)(3); see also 1-800 Contacts 2017 FTC LEXIS at *6 (“Wherein 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 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 camera treatment, it will send a chilling message to future th

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:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
Suite 172
Washington, DC, 20580

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

Seth Wiener
Arnold & Porter Kaye Scholer LLP
seth.wiener@apks.com
Respondent

Matthew Shultz
Arnold & Porter Kaye Scholer LLP
matthew.shultz@apks.com
Respondent

Albert Teng
Arnold & Porter Kaye Scholer LLP
albert.teng@apks.com
Respondent

Michael Williams (served non-public version as well)
Kirkland & Ellis LLP
michael.williams@kirkland.com
Respondent

David Zott
Kirkland & Ellis LLP
dzott@kirkland.com
Respondent

Matt Reilly
Kirkland & Ellis LLP
matt.reilly@kirkland.com
Respondent

Andrew Pruitt
Kirkland & Ellis LLP
andrew.pruitt@kirkland.com
Respondent

Susan Davies
Kirkland & Ellis LLP
susan.davies@kirkland.com
Respondent

Michael Becker
Kirkland & Ellis LLP
mbecker@kirkland.com
Respondent

Karen McCartan DeSantis
Kirkland & Ellis LLP
kdesantis@kirkland.com
Respondent

Megan Wold
Kirkland & Ellis LLP
megan.wold@kirkland.com
Respondent

Michael DeRita
Kirkland & Ellis LLP
michael.derita@kirkland.com
Respondent

Charles Loughlin
Attorney
Federal Trade Commission
cloughlin@ftc.gov
Complaint

Cem Akleman
Attorney
Federal Trade Commission
cakleman@ftc.gov

Complaint

Thomas Brock
Attorney
Federal Trade Commission
TBrock@ftc.gov
Complaint

Krishna Cerilli
Attorney
Federal Trade Commission
kcerilli@ftc.gov
Complaint

Steven Dahm
Attorney
Federal Trade Commission
sdahm@ftc.gov
Complaint

E. Eric Elmore
Attorney
Federal Trade Commission
eelmore@ftc.gov
Complaint

Sean Hughto
Attorney
Federal Trade Commission
shughto@ftc.gov
Complaint

Joonsuk Lee
Attorney
Federal Trade Commission
jlee4@ftc.gov
Complaint

Meredith Levert (served on-public version as well)
Attorney
Federal Trade Commission
mlevert@ftc.gov
Complaint

Jon Nathan
Attorney

Cecelia Waldeck
Attorney
Federal Trade Commission
cwaldeck@ftc.gov
Complaint

Katherine Clemons
Associate
Arnold & Porter Kaye Scholer LLP
katherine.clemons@arnoldporter.com
Respondent

Eric D. Edmondson
Attorney
Federal Trade Commission
eedmondson@ftc.gov
Complaint

David Morris
Attorney
Federal Trade Commission
DMORRIS1@ftc.gov
Complaint

Zachary Avallone
Kirkland & Ellis LLP
zachary.avallone@kirkland.com
Respondent

Rohan Pai
Attorney
Federal Trade Commission
rpai@ftc.gov
Complaint

Rachel Hansen
Associate
Kirkland & Ellis LLP
rachel.hansen@kirkland.com
Respondent

Peggy D. Bayer Femenella
Attorney
Federal Trade Commission
pbayer@ftc.gov
Complaint

Grace Brier
Kirkland & Ellis LLP
grace.brier@kirkland.com
Respondent

I hereby certify that on May 4, 2018, I served ~~other~~ 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:

Ryan Watts (served ~~non~~ public version as well)
Attorney
Arnold & Porter Kaye Scholer LLP
ryan.watts@apks.com
601 Massachusetts Avenue, NW, Washington, DC 20001-3743
Respondent

/s/ Ryan A. Shores

Attorney

