IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION Plaintiff, v. TRONOX LIMITED NATIONAL INDUSTRIALIZATION COMPANY NATIONAL TITANIUM DIOXIDE COMPANY LIMITED and CRISTAL USA INC. Defendants.	**CIVIL ACTION NO. 1:18-cv-01622 (TNM)**

THIRD PARTIES' JOINT MOTION AND STATEMENT OF POINTS OF AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE

Third parties PPG Industries, Inc. ("PPG"), Benjamin Moore & Co., The Sherwin-Williams Company, BASF Corporation, and Masco Corporation ("the Intervening Third Parties"), by and through their undersigned counsel and pursuant to Federal Rule of Civil Procedure 24, respectfully move this Court to intervene in this case to file a Motion for Protective Order, which is filed concurrently herewith as Exhibit A, because the Intervening Third Parties' confidential and proprietary information will not be adequately protected if

Defendants' designated in-house counsel are allowed to review their confidential and proprietary information, as Defendants have proposed.

BACKGROUND

Defendants Tronox Limited ("Tronox"), National Industrialization Company, National Titanium Dioxide Company Limited, and Cristal USA, Inc. ("Cristal") are manufacturers and suppliers of titanium dioxide ("TiO2"), a raw material that is used by the Intervening Third Parties as a key ingredient in paint and other coatings products. In February 2017, Defendants announced their plans to merge. In December 2017, after a non-public investigation, the Federal Trade Commission ("FTC") filed an administrative complaint with the Federal Trade Commission, seeking to block the proposed merger. Immediately after the FTC filed its complaint, Judge Chappell, who presided over the administrative proceeding, entered a standard protective order, which prohibited Defendants from sharing confidential information with their employees, including in-house counsel.

In the weeks that followed, the parties conducted extensive discovery, serving subpoenas on the Intervening Third Parties, which sought competitively sensitive information relating to their purchasing, pricing, volume, contract negotiations, projections, and sourcing strategy relating to titanium dioxide ("TiO2"). The Intervening Third Parties collectively produced thousands of documents in response to the subpoenas. In response to additional subpoenas, some of them produced witnesses for depositions, at which their employees testified for hours. A full trial on the merits was held over the course of five weeks, during which employees of the Intervening Third Parties gave hours of additional testimony. Much of this testimony was conducted *in camera* because of the competitively sensitive nature of the documents and testimony that were introduced and elicited.

At all stages of the administrative proceeding, the Intervening Third Parties took great care to protect their competitively sensitive information. Pursuant to the Protective Order entered in the FTC administrative proceeding, the Intervening Third Parties reviewed their documents for confidentiality, and designated them accordingly before production. When Defendants moved to amend the Protective Order to allow certain in-house counsel access to confidential third party information – the same counsel they propose here – some third parties opposed Defendants' motion. After full briefing on the issue, Judge Chappell, who presided over the administrative hearing, denied Defendants' request. The Intervening Third Parties also designated their deposition transcripts confidential. They prepared detailed declarations explaining why their documents were competitively sensitive for purposes of keeping them *in camera* at the trial on the merits.

On July 10, 2018, the FTC brought this action against Defendants, seeking a temporary restraining order and preliminary injunction to enjoin the merger of Tronox and Cristal until a decision on the merits is reached in the FTC administrative proceeding. On the same day they brought their complaint, the FTC moved the Court to enter a protective order. Defendants opposed this motion and advocated for an alternative protective order, which would permit Defendants' designated in-house counsel to review competitively sensitive material, including from third parties.

Because the Intervening Third Parties face serious competitive harm if their confidential information is shared with Defendants' designated in-house counsel, the Intervening Third Parties now move to intervene so that they may file a Motion for Protective Order, which is filed concurrently herewith as Exhibit A, to prevent disclosure of their competitively sensitive information to Defendants' in house counsel.

ARGUMENT

I. THE INTERVENING THIRD PARTIES ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT.

Under Rule 24(a) of the Federal Rules of Civil Procedure, "the court must permit anyone to intervene who:

> . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2). A non-party seeking to challenge a party's use of confidential information may properly move to intervene as a matter of right. *See Appleton v. FDA*, 310 F. Supp. 2d 194, 197 (D.D.C. 2004) (granting motion to intervene as a matter of right when "disclosures resulting from the disposition of this action could impair the applicants' ability to protect their trade secrets or confidential information"); *see also 100Reporters L.L.C. v. United States Dep't of Justice*, 307 F.R.D. 269, 275-76 (D.D.C. 2014) ("Indeed, preventing the disclosure of commercially-sensitive and confidential information is a well-established interest sufficient to justify intervention under Rule 24(a).") (collecting cases).

To prevail on a motion to intervene as of right: "(1) the motion for intervention must be timely; (2) intervenors must have an interest in the subject of the action; (3) their interest must be impaired or impeded as a practical matter absent intervention; and (4) the would-be intervenor's interest must not be adequately represented by any other party." *In re Brewer*, 863 F.3d 861, 872 (D.C. Cir. 2017). The D.C. Circuit has also held that "a party seeking to intervene as of right must demonstrate that it has standing under Article III of the Constitution." *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 731-32 (D.C. Cir. 2003). The Intervening Third Parties satisfy all of these requirements.

A. The Intervening Third Parties' Motion is Timely.

"[T]he requirement of timeliness is aimed primarily at preventing potential intervenors from unduly disrupting litigation, to the unfair detriment of the existing parties." *Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014). There is also "a growing consensus among the courts of appeals that intervention to challenge confidentiality orders" should be permitted even "long after a case has been terminated." *E.E.O.C. v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1047 (D.C. Cir. 1998) (internal quotation marks and citations omitted) (finding motion for intervention timely almost two years after original parties had settled case).

In this case, Defendants filed their Opposition to Plaintiffs' Motion for Protective Order on July 12, 2018. *See* Dkt. No. 32 ("Defs.' Opp."). It was in this opposition brief that Defendants first proposed a protective order that would allow Defendants to share confidential third party information with designated in-house counsel. The Intervening Third Parties are seeking to intervene only a week later, and on the same day the FTC's reply in support of its motion for protective order is due. The Intervening Third Parties' motion is timely. *Fund For Animals*, 322 F.3d at 735 (finding motion to intervene timely because it was filed less than two months after the plaintiffs filed their complaint and before the defendants filed an answer); *Appleton*, 310 F. Supp. 2d at 197 (holding motion timely when filed within two months of FDA's notification of the pending suit").

B. The Intervening Third Parties Have an Interest in the Subject Matter of the Action.

In response to third party subpoenas, the Intervening Third Parties produced some of the most competitively sensitive information they generate, including trade secret information and information related to their product formulations, pricing, volume, contracts, projections, and TiO2 sourcing strategy. In producing these confidential and proprietary materials in the

administrative proceeding, the Intervening Third Parties relied on the protective order that protected their information from disclosure to Defendants' employees, including their in-house counsel.

If Defendants' in-house counsel are allowed to access this information, the Intervening Third Parties are likely to suffer severe financial harm and competitive disadvantage, as Defendants are able to utilize this information in future contract negotiations with them, or with their competitors. As a key input material for their products, pricing and supply of TiO2 are critical to the Intervening Third Parties' businesses. Further, to the extent Defendants gain access to any documents bearing on how they may respond to Defendants' merger, this will also put the Intervening Third Parties at a significant competitive disadvantage. These outcomes are all but certain because Defendants' designated in-house counsel are involved in competitive decision-making, as they provide legal advice relating to "competition with other titanium dioxide suppliers" and "pricing strategies." Defs.' Opp. at Ex. B (Kaye Decl.), ¶ 8; *id.* at Ex. C (Koutras Decl.), ¶ 8. Given the importance of this information to the Intervening Third Parties' businesses, they have a strong interest in the subject matter of the parties' proposed protective orders. *See, e.g., Org. for Competitive Markets v. Office of Inspector General*, CA. No. 14-1902, 2016 U.S. Dist. LEXIS 153045 at *15-17 (D.D.C. Oct. 25, 2016) (characterizing as "unavailing" arguments that oppose the "well-established interest" in intervening to "prevent[] the disclosure of commercially-sensitive and confidential information") (citation and internal quotation marks omitted).

C. The Intervening Third Parties' Interests Will Be Impaired Absent Intervention.

The Intervening Third Parties seek to intervene in this action for the limited purpose of moving the Court to grant the FTC's proposed protective order, and to deny Defendants'

proposed protective order, to prevent Defendants' designated in-house counsel from being able to access their competitively sensitive information. This is necessary to prevent Defendants from gaining an unfair advantage in negotiations with the Intervening Third Parties. If Defendants' designated in-house counsel are granted access to confidential third party information, there is significant risk that Defendants' in-house counsel will disclose the Intervening Third Parties' confidential information through advice, discussions, or documents, because they are involved in the competitive decision-making process. Defendants' employees cannot "unlearn" the information after obtaining it. The D.C. Circuit has recognized that "it is very difficult for the human mind to compartmentalize and selective[ly] suppress information once learned, no matter how well-intentioned the effort may be to do so." *FTC v. Exxon Corp.*, 636 F.2d 116, 1350 (D.C. Cir. 1980).

This is why, in merger cases, courts routinely deny in-house counsel access to confidential material in such circumstances because there is a "risk that such information will be used or disclosed inadvertently because of the lawyer's role in the client's business decisions." *United States v. Aetna, Inc.*, No. 1:16-cv-01494 (JDB), 2016 WL 8738420, at *5 (D.D.C. Sept. 5, 2016) (quoting *FTC v. Sysco Corp.*, 83 F. Supp. 3d 1, 3-4 (D.D.C. 2015)). Only by intervening in this action can the Intervening Third Parties adequately protect their interests and prevent the disclosure of its most competitively sensitive documents and information to Defendants' employees.

D. The Interests of the Intervening Third Parties Are Not Adequately Represented by Any Other Party.

To show that their interests are not adequately represented, the Intervening Third Parties have only a "minimal" burden. *Fund for Animals*, 322 F.3d at 735 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). They must show that "representation of [their]

interests *may be* inadequate." *Id.* (emphasis added) (quoting *Trbovich*, 404 U.S. at 538 n.10). Further, the D.C. Circuit "ha[s] often concluded that governmental entities do not adequately represent the interests of aspiring intervenors." *Id.* at 736. This is so even as "the intervenor and the government entity involved in the litigation frequently may agree on a legal position or course of action[.]" *100Reporters L.L.C.*, 307 F.R.D. at 279. Here, only the Intervening Third Parties have an interest in protecting their most competitively sensitive information. The FTC's interest is in prevailing on its motion for a preliminary injunction and at the administrative hearing. Defendants' interests are directly adverse to the Intervening Third Parties in this instance, as they seek to give two of their employees competitively sensitive information about their customers' pricing, contracts, purchasing, volume, and supply strategy. Without any party in this action to adequately protect their interests, the Intervening Third Parties must intervene to protect their competitively sensitive information. Indeed, the FTC agrees: it has asked the Court to hear from Intervening Third Parties with regard to the proposed protective orders.

E. The Intervening Third Parties Have Standing under Article III of the Constitution.

The Intervening Third Parties also have Article III standing to intervene as a matter of right. In order to show Article III standing, an intervenor must show that it has an "injury in fact, causation, and redressability." *Id.* at 283. Courts in the D.C. Circuit "generally treat the standing analysis for intervention as a matter of right as equivalent to determining whether the intervenor has a 'legally protected' interest under Rule 24(a)." *Id.* at 276 (citations omitted); *Appleton*, 310 F. Supp. 2d at 197 (holding that applicants satisfied standing requirement when they showed in the Rule 24(a) analysis that "FDA's disclosure of their trade secrets or confidential information would cause them to suffer an injury-in-fact that intervention" could redress). For all of the reasons discussed in Sections B and C, *supra*, permitting Defendants' in-house counsel to access

competitively sensitive third party information would cause an injury-in-fact to the Intervening Third Parties that could be redressed by intervention in this action.

II. THE INTERVENING THIRD PARTIES MAY PERMISSIVELY INTERVENE FOR THE PURPOSE OF CHALLENGING DEFENDANTS' PROPOSED PROTECTIVE ORDER.

Federal Rule of Civil Procedure 24(b) provides that: "[o]n timely motion, the court may permit anyone to intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b). "[E]very circuit court that has considered the question has come to the conclusion that nonparties may permissively intervene for the purpose of challenging confidentiality orders." *Nat'l Children's Ctr., Inc.*, 146 F.3d at 1045. The D.C. Circuit has "construe[d] Rule 24(b) as an avenue for third parties 'to have their day in court to contest the scope or need for confidentiality.'" *Id.* at 1046 (citation omitted); *see also In re Vitamins Antitrust Litig.*, No. MDL 1285, 2001 WL 34088808, at *5 (D.D.C. Mar. 19, 2001) ("Like every other circuit to consider the issue, this Circuit has held that permissive intervention is the proper procedure for a non-party to seek modification of a protective order."). Accordingly, the Intervening Third Parties should be allowed to permissively intervene in this action to challenge Defendants' proposed protective order to permit Defendants' designated in-house counsel to access the Intervening Third Parties' competitively sensitive information.

CONCLUSION

The Intervening Third Parties satisfy the requirements for intervention under Rule 24(a) and Rule 24(b). This Court should enter an order allowing the Intervening Third Parties to intervene in this case so they have an opportunity to protect their most competitively sensitive

documents and information from disclosure to Defendants' designated in-house counsel, as is requested by Defendants.

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Respectfully submitted,

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