

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

**IN RE: FLAT GLASS ANTITRUST  
LITIGATION (II)**

**Master Docket  
Misc. No: 08-180 (DWA)  
MDL No.: 1942**

**This Document relates to:  
All Actions**

**ELECTRONICALLY FILED**

**CLASS PLAINTIFFS' REPLY MEMORANDUM IN FURTHER SUPPORT OF THEIR  
MOTION TO COMPEL DEFENDANT GUARDIAN INDUSTRIES CORP.'S  
PRODUCTION OF ALL DOCUMENTS RESPONSIVE TO PLAINTIFFS' FIRST  
REQUEST FOR PRODUCTION OF DOCUMENTS  
REQUEST NUMBERS 1-4**

Requests 1-4 are relevant and reasonable requests, and Guardian should be compelled to produce responsive documents. The Court's previous rulings on unrelated document requests do not relieve Guardian of its discovery obligations with regards to Requests 1-4. Production of EC documents will not violate principles of comity, and at a minimum, Guardian should be required to produce all preexisting documents it produced to the EC. Plaintiffs are entitled to broad discovery where, as here, the requests are relevant to the ongoing litigation. Finally, the burden of production is minimal. Guardian has already produced many of the requested documents to EC authorities; they have already been reviewed by counsel.

**ARGUMENT**

**I. Requests 1-4 Are Separate And Distinct From The Requests Addressed In The Court's April 3, 2009 Order**

Requests 1-4 are a narrow set of document requests seeking documents provided to, and obtained from, the European Commission during its investigation. The Court's April 3, 2009

Order (“Order”) does not address the current discovery dispute. Rather, the earlier proceeding involved Plaintiffs’ Second Set of Requests for Production of Documents, Requests 8, 32 and 39 and Guardian’s offer of compromise for these three specific discovery requests. Request 8 concerned the relationship between the European and U.S. Construction Flat Glass businesses; Request 32 sought information about Guardian’s reaction to the EC investigation (not documents provided to the EC); and Request 39 sought information related to a single Guardian employee. These requests were separate and distinct from Requests 1-4. Accordingly, Guardian cannot use the Court’s Order as a shield to avoid its discovery obligations.

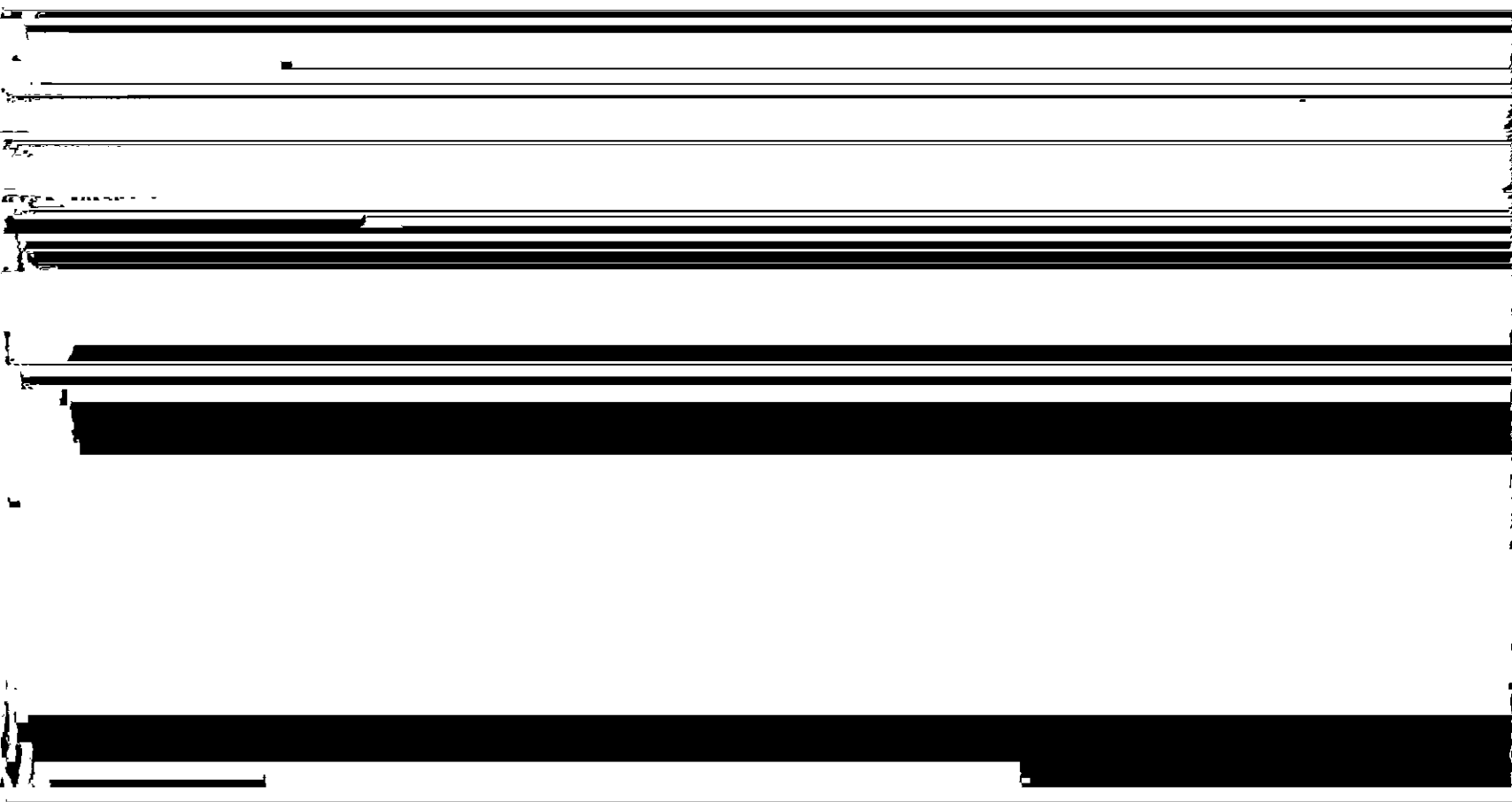
In response to Requests 1-4, seeking documents related to the EC investigation, Guardian has produced one document—the EC decision. Although Guardian acknowledged having other responsive documents, it unilaterally ended the parties’ discovery conferences and told Plaintiffs that they must bring a motion to compel.

## **II. Production Of The EC Documents Would Not Violate Principles Of International Comity**

Production in response to Plaintiffs’ requests would not violate principles of international comity. The EC does not require that all documents making up its administrative file be protected from discovery in U.S. civil cases. *See* EC Statement to U.S. Antitrust Modernization Commission (Apr. 2006) (“Statement”) at 6 (Doc. No. 179-7). The EC recognizes that “pre-existing documents that have not been specifically drafted for the purpose of the Leniency application are discoverable,” discouraging only disclosure of documents produced solely for the purpose of its own investigations. *Id.* at 1, 9. Requests 1, 2 and 4 include preexisting documents that Guardian produced to the EC for the investigation—not materials prepared specifically for the investigation. At a minimum, nothing prevents Guardian from producing these responsive, preexisting documents.

Moreover, the EC's disclosure concerns decrease where, as here, the leniency applicant is not involved and the investigation has concluded. The EC discourages disclosure of documents that were *voluntarily* submitted during the course of the investigation to avoid dissuading leniency applicants from reporting illegal cartels and to prevent the disruption of on-going investigations. *Id.* at 6, 8. But Guardian was not the leniency applicant and did not submit information voluntarily—the EC had to seize Guardian's documents in an official raid based on information from another company. Further, because the EC investigation has concluded—resulting in adjudicated findings and a €148 million fine against Guardian— there can be no investigation disruption.

Finally, Guardian's own actions undermine its comity argument. Guardian produced an unredacted version of the EC decision pursuant to the Court's protective order without regard for whether or not the decision included information provided by the EC's leniency applicant. Thereafter, Guardian also offered to produce additional documents provided that confidentiality



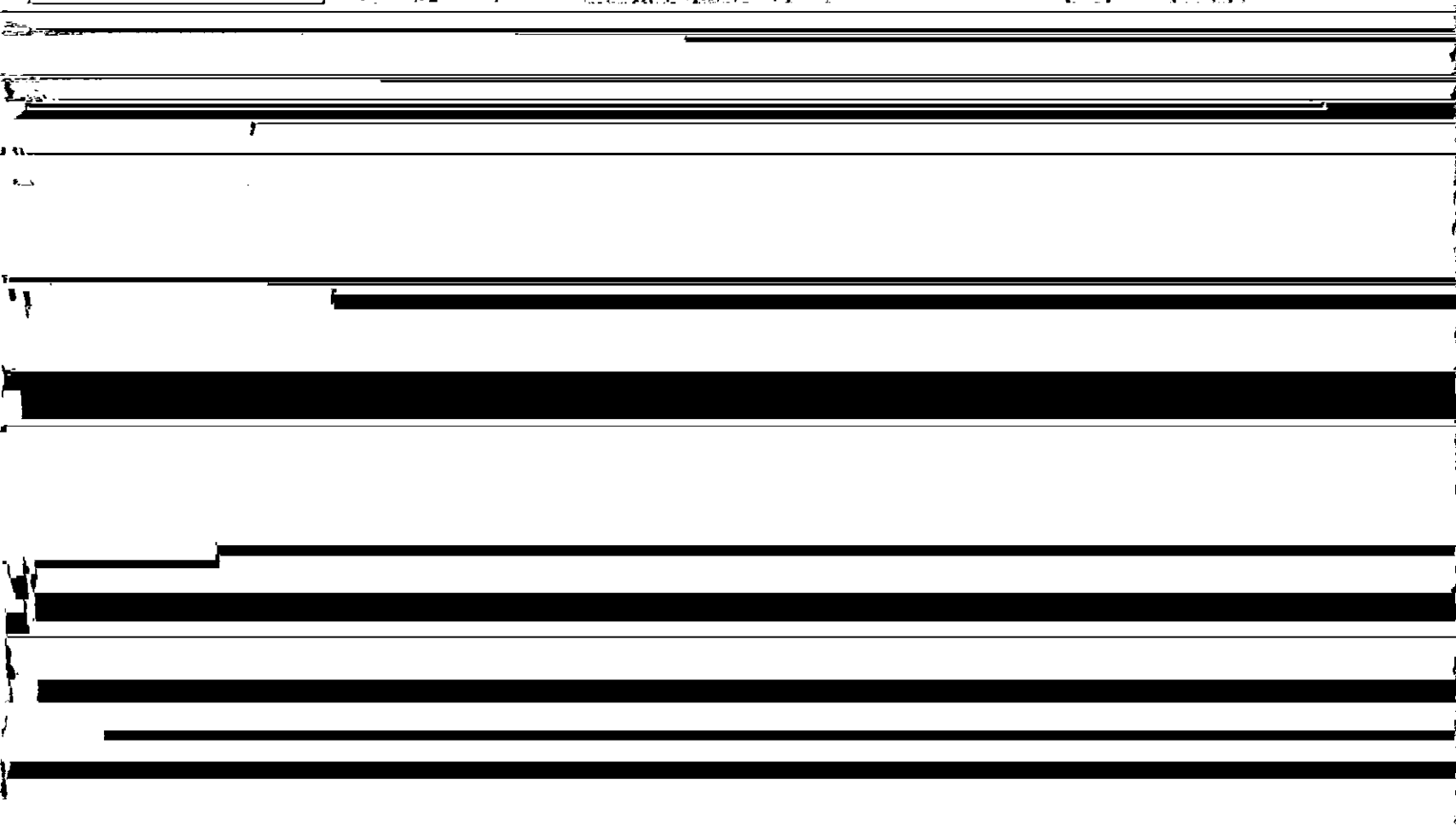
2000 WL 62315, at \*3 (E.D. Pa. Jan. 13, 2000) (“Discovery in antitrust litigation is most broadly permitted and the burden or cost of providing the information sought is less weighty a consideration than in other cases.” (quoting *U.S. v. Int’l Bus. Machs. Corp.*, 66 F.R.D. 186, 189 (S.D.N.Y. 1974)).

Here, Defendants were involved in parallel cartels during the class period. Their pricing behavior in the United States did not change until the EC raided Defendants’ European counterparts. The cartel in Europe involved Defendants’ foreign affiliates selling the same products, and occurred during the same time period. Plaintiffs need not allege a global conspiracy for the EC documents to be discoverable. *See, e.g., In re Plastics Additives Antitrust Litig.*, No. Civ.A. 03-2038, 2004 WL 2743591, at \*13-14 (E.D. Pa. Nov. 29, 2004) (documents produced to foreign investigative bodies are relevant even though no global conspiracy was alleged). Contrary to Guardian’s assertion, the EC decision concluded that the cartel activity occurred *at least* in Europe, its area of jurisdiction. Commission Decision (Nov. 28, 2007) ¶¶ 1.2(2), 5.4.1(369), (370) (Doc. No. 179-3 under seal). Thus, the EC documents are relevant to motive and opportunity for Defendants to conspire in the U.S., the scope and nature of the U.S. conspiracy, and how Defendants concealed their unlawful activities.

Guardian’s “compromise” offer, which addresses entirely different document requests, to produce documents reflecting discussion of the EC investigation as it relates to CFG sold in the U.S. artificially narrows the range of responsive materials—no doubt in an effort to minimize the information provided, to dilute its utility, and to cabin off events in Europe from those in the U.S. However, under the rules of discovery, EC documents may be relevant even if they do not directly discuss CFG sold in the U.S.

**IV. Plaintiffs' Requests Do Not Pose An Undue Burden**

Guardian's assertion of hardship is exaggerated. First, Plaintiffs do not seek any documents protected by the attorney/client privilege or the work product doctrine. The requests seek primarily preexisting documents already produced to the EC. Guardian has already collected, segregated and reviewed the documents, and as noted in Section II, the EC recognizes their discoverability. Guardian can make these documents available to Plaintiffs in short order and with virtually no additional effort. *See, e.g., In re Auto. Refinishing Paint Antitrust Litig.*, 2004 U.S. Dist. LEXIS 29160, at \*20 ("[A] number of Plaintiffs' requests deal with documents previously produced to federal, state or foreign governmental entity or investigatory body, and



W. Joseph Bruckner  
Richard A. Lockridge  
Heidi M. Siltan  
Anna M. Horning Nygren  
**LOCKRIDGE GRINDAL NAUEN P.L.L.P.**  
100 Washington Avenue South, Suite 2200  
Minneapolis, MN 55401  
Telephone: 612-339-6900  
Facsimile: 612-339-0981  
Email: [wjbruckner@locklaw.com](mailto:wjbruckner@locklaw.com)  
[ralockridge@locklaw.com](mailto:ralockridge@locklaw.com)  
[hmsilton@locklaw.com](mailto:hmsilton@locklaw.com)  
[amhorningnygren@locklaw.com](mailto:amhorningnygren@locklaw.com)

Michael D. Hausfeld  
Robert G. Eisler  
Hilary Ratway Scherrer  
**HAUSFELD LLP**  
1700 K Street NW  
Suite 650  
Washington, D.C. 20006  
Telephone: (202) 540-7200  
Facsimile: (202) 540-7201  
Email: [mhausfeld@hausfeldllp.com](mailto:mhausfeld@hausfeldllp.com)  
[reisler@hausfeldllp.com](mailto:reisler@hausfeldllp.com)  
[hscherrer@hausfeldllp.com](mailto:hscherrer@hausfeldllp.com)

Steig D. Olson  
**HAUSFELD LLP**  
11 Broadway, Suite 615  
New York, NY 10004  
Telephone: (212) 830-9850  
Facsimile: (212) 480-8560  
Email: [solson@hausfeldllp.com](mailto:solson@hausfeldllp.com)

Steven A. Kanner  
Douglas A. Millen  
Michael E. Moskovitz  
Robert J. Wozniak  
**FREED KANNER LONDON  
& MILLEN LLC**  
2201 Waukegan Road, Suite 130  
Bannockburn, IL 60015  
Telephone: (224) 632-4500  
Facsimile: (224) 632-4521  
Email: [skanner@fkmlaw.com](mailto:skanner@fkmlaw.com)  
[dmillen@fkmlaw.com](mailto:dmillen@fkmlaw.com)  
[mmoskovitz@fkmlaw.com](mailto:mmoskovitz@fkmlaw.com)  
[rwozniak@fkmlaw.com](mailto:rwozniak@fkmlaw.com)

Bernard Persky  
Hollis L. Salzman  
Jay Himes  
Kellie Lerner  
Morissa Falk  
**LABATON SUCHAROW LLP**  
140 Broadway  
New York, New York 10005  
Telephone: (212) 907-0700  
Facsimile: (212) 818-0477  
Email: [bpersky@labaton.com](mailto:bpersky@labaton.com)  
[hsalzman@labaton.com](mailto:hsalzman@labaton.com)  
[jhimes@labaton.com](mailto:jhimes@labaton.com)  
[klerner@labaton.com](mailto:klerner@labaton.com)  
[mfalk@labaton.com](mailto:mfalk@labaton.com)

*Plaintiffs' Class Co-Lead Counsel*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing **Class Plaintiffs' Reply Memorandum in Further Support of Their Motion to Compel Defendant Guardian Industries Corp.'s Production of All Documents Responsive to Plaintiffs' First Request for Production of Documents Request Numbers 1-4** was filed electronically with the Clerk of Courts using the CM/ECF system, which will send notification of such filing to all counsel of record on the 24<sup>th</sup> day of July, 2009.

s/David J. Manogue  
David J. Manogue