IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

RAG-STIFTUNG,

EVONIK INDUSTRIES AG,

EVONIK CORPORATION,

EVONIK INTERNATIONAL HOLDING B.V.,

ONE EQUITY PARTNERS SECONDARY FUND, L.P.,

ONE EQUITY PARTNERS V, L.P.,

LEXINGTON CAPITAL PARTNERS VII (AIV I), L.P.,

PEROXYCHEM HOLDING COMPANY LLC,

PEROXYCHEM HOLDINGS, L.P.,

PEROXYCHEM HOLDINGS LLC,

PEROXYCHEM LLC,

AND

PEROXYCHEM COOPERATIEF U.A.,

Defendants.

Civil Action No. 1:19-cv-02337-TJK

PLAINTIFF FEDERAL TRADE COMMISSION'S OPPOSITION TO DEFENDANTS' REQUEST FOR JUDICIAL NOTICE

Defendant Evonik recently signed an agreement with the Canadian Competition Bureau, and Defendants now ask this court to take judicial notice of it, months after discovery closed in this matter and more than a month after closing arguments.[1] The FTC does not dispute that the submitted document is authentic, but Defendants go on to assert as "fact" that their agreement "resolves all competition issues related to Evonik's acquisition of PeroxyChem … in Canada." Defs.' Req. for Judicial Notice ("Request"), at 1. This is an argument rather than a fact, so not appropriate for judicial notice. *See* Fed. R. Evid. 201(a) ("[t]his rule governs judicial notice of an adjudicative fact only"). Moreover, the document does not support Defendants' claim. It neither identifies the specific competition issues the CCB found nor shows that the agreement resolves them. It simply shows that the CCB – operating under Canadian law – accepted the deal that Defendants offered. Parties make compromises in reaching settlement agreements based on any number of factors (e.g., resource constraints, litigation risk), and the document tells us nothing about any compromises the CCB made or the reasons why. With it adding so little new information, taking judicial notice of this agreement is unnecessary.

The mere fact that this agreement has been executed has no bearing on the question before this court – whether under U.S. law the FTC is likely to succeed on the merits in demonstrating that Evonik's proposed acquisition of PeroxyChem is illegal. The FTC presented substantial evidence at the hearing – through live witness testimony and documents – showing that Defendants failed to demonstrate, as required under U.S. law, that the proposed remedy will replace the competition eliminated by their merger. As we showed during the hearing, that proposed remedy does nothing to solve the significant competitive concerns the FTC proved in

[1] Defendants have filed that agreement – along with their request for judicial notice – under seal, so we will not discuss the terms of the agreement.

the Southern and Central United States, and there are significant questions as to whether it will even effectively replace competition in the Pacific Northwest. The proposed divestiture involved a rushed process with limited due diligence, an extremely low purchase price, a divested business that had recently lost its largest and most profitable customer, and in addition to these other red flags a buyer with no specific plans for how it intends to run the business. On this record, under U.S. law, Defendants' showing is insufficient. That the CCB, operating under Canadian law, signed this agreement despite the myriad concerns highlighted above, does nothing to alleviate the failure by Defendants to demonstrate that their proposed remedy fully restores the competition eliminated by their merger.[2]

Defendants cite language from Rule 201 that the court "must take judicial notice if a party requests it and the court is supplied with the necessary information." Request at 2, *citing* FRE 201(c)(2). The law is clear, however, that the Federal Rules of Evidence do not apply in a preliminary injunction context, and the court has broad discretion to decide what it will consider. *See Cobell v. Norton*, 391 F. 3d 251, 261 (D.C. Cir. 2004); *FTC v. CCC Holdings Inc.*, No. 08-cv-2043, ECF # 66, at 2-3 (D.D.C. Jan. 30, 2009) ("the Federal Rules of Evidence do not apply to preliminary injunction hearings"). Even if the court is inclined to take judicial notice of the proffered agreement, Defendants have supplied information sufficient to show simply that Evonik and the CCB executed that agreement – nothing more.

Given the agreement's lack of probative value, the court should decline Defendants' request. Even if the court does take judicial notice of the fact that the agreement has been executed, we respectfully submit that it deserves little – if any – weight in the court's analysis.

[2] Canadian law appears to differ from U.S. law in the standard for judging merger remedies. *See* Brian A. Facey & Dany H. Assaf, Competition and Antitrust Law: Canada and the United States 220 (3d Ed 2006). ("The goal of merger remedies is expressed somewhat differently in Canada and the U.S. In the U.S., the goal is to fully restore competition. … [I]n Canada, the goal is to get competition to a point where it may still be less than it was (*i.e.,* not full restoration) but not *substantially* less.") (emphasis in original).

Dated: January 17, 2020

Respectfully Submitted,

/s/ James Rhilinger
James Rhilinger
Amy Dobrzynski
Daniel Matheson
Michael Lovinger
James Weingarten

Federal Trade Commission
Bureau of Competition
400 Seventh Street, S.W.
Washington, DC 20024
Telephone: (202) 326-2871
Facsimile: (202) 326-2286
Email: jrhilinger@ftc.gov

Counsel for Plaintiff Federal Trade Commission

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of January, 2020, I served the foregoing on all counsel of record via the Court's ECF filing system.

/s/ James Rhilinger
James Rhilinger
Attorney for Plaintiff Federal Trade Commission