

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



COMMISSIONERS: Joseph J. Simons, Chairman
Maureen K. Ohlhausen
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter

In the Matter of

Tronox Limited
a corporation,

National Industrialization Company
(TASNEE)
a corporation,

National Titanium Dioxide Company
Limited (Cristal)
a corporation,

And

Cristal USA Inc.
a corporation.

Docket No. 9377

**COMPLAINT COUNSEL’S OPPOSITION TO
RESPONDENTS’ MOTION TO STAY AND TEMPORARILY WITHDRAW THIS
MATTER FROM ADJUDICATION**

On December 5, 2017, the Commission voted to issue an administrative complaint challenging Tronox’s proposed acquisition of Cristal and “to authorize agency staff to seek a temporary restraining order and preliminary injunction in federal court, if necessary, to maintain the status quo pending an administrative trial on the merits.”¹ On the eve of that trial, Respondents now ask the Commission to stay the Part III proceedings and “temporarily”

¹ Press Release, Federal Trade Commission, FTC Challenges Proposed Merger of Major Titanium Dioxide Companies (Dec. 5, 2017), available at <https://www.ftc.gov/news-events/press-releases/2017/12/ftc-challenges-proposed-merger-major-titanium-dioxide-companies>.

withdraw the case from adjudication.² Respondents' stated rationale for the relief is "to explore settlement discussions with the Commission."³ Alternatively, Respondents ask the Commission "to reconsider whether to file a federal preliminary-injunction proceeding."⁴ A premise underlying both requests is Respondents' belief that the Commission's administrative proceeding entails "tremendous waste" and "ineffectual litigation."⁵

The Commission should deny Respondents' motion in full because it is procedurally improper and violates Commission rules; lacks any basis in law or fact; and is just another of several unsuccessful attempts by Respondents to delay or avoid the trial on the merits that is about to begin.

ARGUMENT

I. Respondents' Request for a Stay and Removal is Procedurally Improper and Contradicts Respondents' Stated Aims

A. A Stay and Removal is Procedurally Improper, and Would Undermine the Commission's Administrative Process

Respondents seek a stay and removal of the matter from adjudication because they wish to engage in "settlement discussions with the Commission."⁶ Tronox put a finer point on it in its May 10, 2018 investor presentation, saying the stay and removal "would allow settlement negotiations directly with FTC Commissioners."⁷ Remarkably, Respondents cite no legal authority in their motion, and in fact the request squarely contradicts Commission rules. That alone is troubling. But further still, Respondents' relief would threaten the integrity and efficient functioning of the Commission's administrative hearing process.

² Respondents' Mot. to Stay and Temporarily Withdraw this Matter from Adjudication, May 7, 2018 ("Mot.").

³ Mot. at 2.

⁴ Mot. at 2.

⁵ Mot. at 2, 5.

⁶ Mot. at 2.

⁷ Tronox, First Quarter 2018 Conference Call, at 3 (May 10, 2018), *available at* http://files.shareholder.com/downloads/TRX/6010884169x0x979878/5C7A4290-6FFD-440D-AD93-5161C2DE66C4/1Q18_CONF_CALL_SLIDES_-_FINAL_5-9-18_002_.pdf.

Respondents' motion fails to mention the only Commission rule—Rule 3.25—that provides for the withdrawal of a Part III matter from adjudication. That rule also provides the only process by which the Commission considers potential settlements after issuing an administrative complaint. Under Rule 3.25, Respondents must engage in settlement negotiations with Complaint Counsel—not with the Commission or Commissioners.⁸ And only when there is a specific settlement proposal that Complaint Counsel has signed or that the Administrative Law Judge (“ALJ”) determines presents a reasonable possibility of settlement is a matter removed from adjudication. Rule 3.25 is plainly unsatisfied here. Respondents' motion does not provide any settlement proposal, much less one that Complaint Counsel supports or that the ALJ has determined makes settlement reasonably possible.

Respondents not only ignore the Commission's rules, but cite no authority supporting their motion. Their motion appears to rest solely on their belief that they have a right to engage in settlement negotiations with the Commission, at a time they choose, untethered from any Commission rules. That view cannot be squared with the considered process established in Rule 3.25. There would be no need for the Rule's procedures if the Commission would entertain ad hoc settlement discussions with parties even after issuing an administrative complaint.

The rules also reflect sound policy by enabling the administrative litigation to proceed apace, without fits and starts whenever Respondents decide they want to discuss settlement (or other issues) with the Commission. One of Respondents' “recent developments” underscores the point.⁹ Respondents cite the completion of Part III discovery as a “recent event” that justifies discussions with the Commission about settlement.¹⁰ But the end of discovery happens in every

⁸ Rule 3.42(c)(7), relating to settlement conferences with the ALJ, similarly indicates that settlement negotiations are to take place between Respondents and Complaint Counsel.

⁹ Mot. at 2-3.

¹⁰ Mot. at 3.

case. And the fact that discovery is over and the case is on the threshold of trial is a reason to proceed—not suddenly stop.

Respondents’ second “recent development”—their “ongoing” discussions with the European Commission—also provides no support for direct settlement discussions with Commissioners in contravention of Commission rules.¹¹ As an initial matter, contrary to any suggestion in the motion, the EC’s investigation is not set to be resolved by May 16, 2018.¹² Rather, as Tronox explained in its earnings call, Respondents have a deadline to submit a proposed remedy to the EC by May 16. After that, the EC must still evaluate the proposal and reach a decision on whether to accept it—a process that is set to run until July 12, 2018, well after the Part III trial will likely conclude.¹³

In any event, Respondents provide no explanation for how any contemplated remedy proposal to the EC impacts the competitive concerns and settlement possibilities in this litigation. As Respondents have acknowledged, the EC’s review is independent of this proceeding.¹⁴ Indeed, the Commission’s complaint alleges that the transaction will harm competition for North American customers, which is not the EC’s focus. Thus, this second “recent development” likewise does not support contravening Commission rules.

Moreover, Respondents’ approach threatens to corrode the Commission’s administrative proceedings. The unspoken, but obvious fact underlying Respondents’ motion is the recent change in the makeup of the Commission.¹⁵ But short-circuiting the Part III process—in

¹¹ Mot. at 2-3.

¹² Mot. at 3.

¹³ Tronox, Q1 2018 Earnings Call Webcast (May 10, 2018), available at <http://investor.tronox.com/>

¹⁴ ALJ Sch. Conf. Tr. at 11 (Dec. 20, 2017) (Counsel for Tronox: “Our understanding is the EU proceeding can stop the merger, but we view that, as Your Honor said, as totally independent to this.”).

¹⁵ Mot. at 3 (offering commentary on the purported merits of the proposed transaction).

violation of established rules—because of a change of one or more Commissioners undermines the proceeding’s role as a deliberative, bipartisan, and expert agency function.

B. There is No “Substantial Harm” from Proceeding with the Part III Litigation

Respondents’ disregard of the Commission’s rules is more than enough reason to deny their request. But it is worth noting that Respondents’ claims of “substantial harm”—i.e., that continuing with the litigation will entail “needless cost and tremendous waste,” and that there is “no likely prospect” of a Commission decision by March 2019—are baseless.¹⁶ This motion is just the latest example of Respondents’ repeated efforts to avoid or delay a trial on the merits while ignoring applicable rules and law.

To start, Complaint Counsel disputes the contention that a final Commission decision by March 2019 is unlikely. But if that were truly Respondents’ concern, the logical course would be to request that the Commission (or the ALJ as appropriate) *expedite*, rather than stay, proceedings. Yet Respondents have never asked the Commission or the ALJ to expedite or advance any of the pre-hearing or post-hearing deadlines.¹⁷ Indeed, Respondents’ request for a stay would more likely cause the very delay they say they want to avoid.

Respondents’ complaints also cannot be squared with their professed interest in demonstrating “in any forum, at any time” that their transaction is procompetitive.¹⁸ This echoes statements Respondents have made previously, professing only to want a “trial on the merits.”¹⁹

¹⁶ Mot. at 3-5.

¹⁷ Nor have Respondents ever asked Complaint Counsel to agree to such a motion to shorten any deadlines, which is contemplated by the Commission’s rules. *See* Rule 3.1 (“The Commission, at any time, or the Administrative Law Judge at any time prior to the filing of his or her initial decision, may, with consent of the parties, shorten any time limit prescribed by these Rules of Practice.”).

¹⁸ Mot. at 2.

¹⁹ ALJ Sch. Conf. Tr. at 11 (Dec. 20, 2017) (Counsel for Tronox: “[W]e would like to just get to the trial on the merits, whether it’s in front of Your Honor -- and I understand the schedule there -- or in front of a [federal court] judge.”).

The hearing beginning next week—far from being a waste—is the trial on the merits Respondents say they seek. There is no reason to delay it.

Finally, Respondents’ current complaints should be understood in the context of their efforts from the outset of this litigation to stall and delay. For example, at the start of this case, Tronox, rather than moving promptly to defend this case on the merits, wasted weeks in pursuing a frivolous and procedurally baseless collateral federal action against the Commission.²⁰ Respondents also served almost no discovery for the first three weeks of the Part III discovery period, later put depositions on hold for three weeks, and, even before this motion, asked Complaint Counsel to agree to a two-month stay. Respondents did not even seek expedited treatment of this motion, despite the looming trial date.²¹ Given this pattern, Respondents’ claims of substantial harm stemming from a purported timing exigency carry no weight.

II. Respondents’ “Alternative” Requested Relief is Also Procedurally Improper and Misunderstands the Nature of Part III and Preliminary Injunction Proceedings

In the “alternative” to a stay and removal of the Part III case, Respondents request that the Commission “reconsider” whether to file a preliminary injunction action in federal court.²² This request is also untethered from the Commission’s rules.

The Part III rules provide a specific process for seeking Commission review of defined aspects of the litigation. Specifically, the rules provide for interlocutory appeals of certain rulings of the ALJ, *see* Rule 3.23, and for motions to the Commission for summary judgment on

²⁰ Complaint, *Tronox Limited v. FTC*, Civ. Action No. 1:18cv10-SA-RP (N.D. Miss. Jan. 23, 2018). Tronox did not file the federal complaint until three weeks after its attorneys executed *pro hac vice* applications to appear in the federal court. And Tronox then did not properly serve the complaint for another three weeks. That fact, along with the fact that Tronox provided “no authority to support its request for an expedited hearing,” prompted the federal court to twice deny Tronox’s motions for an expedited schedule. Order, *Tronox Limited v. FTC*, Civ. Action No. 1:18cv10-SA-RP (N.D. Miss. Jan. 25, 2018); Order, *Tronox Limited v. FTC*, Civ. Action No. 1:18cv10-SA-RP (N.D. Miss. Feb. 2, 2018). Tronox eventually voluntarily dismissed the federal action.

²¹ As a result, Complaint Counsel’s response to this motion is not due until May 17, 2018. Understandably, with the hearing looming, the ALJ has asked about the impact of the pending motion. Complaint Counsel files this response early to aid the Commission if it wants to address the motion in an expedited fashion.

²² Mot. at 2, 5.

issues being adjudicated. *See* Rule 3.24. The rules nowhere provide for Respondents to move the Commission to weigh in on Complaint Counsel’s approach to litigating the case, including when or whether to file a preliminary injunction case in federal court.

In this matter, the Commission has already authorized staff to seek a preliminary injunction in federal court, if necessary. No further Commission action is required with respect to that issue, and FTC staff is prepared to execute on that authorization if the need arises. To date, and consistent with past practice,²³ FTC staff has not done so because the EC proceedings prevent Respondents from closing until at least July, as noted above. FTC staff has thus avoided the expense of a duplicative, overlapping proceeding that may never be necessary.

While the foregoing procedural deficiencies are dispositive, it is worth noting that Respondents’ request fundamentally misunderstands the nature of a federal preliminary injunction action and a Part III proceeding. In particular, Respondents assert that the preliminary injunction action will “fully resolve this matter.”²⁴ While many merger challenges brought by the FTC require expedited temporary relief in the form of a federal court preliminary injunction, that relief is merely designed to protect the status quo while the administrative proceeding on the merits takes place. *See, e.g., FTC v. H.J. Heinz Co.*, 246 F.3d 708, 726-27 (D.C. Cir. 2001) (Congress enacted the FTC preliminary injunction provision to “preserve [the] status quo” until the administrative proceeding). Federal court preliminary injunction proceedings are not themselves trials on the merits. *See, e.g., FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 21-22 (D.D.C. 2015) (preliminary injunction prevents the merger pending “adjudication of the merger’s legality” in the administrative proceeding). Thus, Respondents’ request for a federal preliminary

²³ When there was no imminent threat that a merger could close, and thus no need for preliminary relief in federal court, the FTC has often pursued only administrative litigation. *See Cabell/St. Mary’s; Pinnacle/Ameristar; Omnicare/PharMerica.*

²⁴ Mot. at 6.

injunction action to “resolve this matter” makes no sense. The function of such a federal court action is merely to preserve the status quo pending the administrative trial; it is not the “trial on the merits.”

Moreover, Respondents never articulate why they think a federal court preliminary injunction decision is capable of being dispositive, but an administrative trial on the merits is not. This disrespectful attitude toward the ALJ’s initial decision on the merits, which Respondents apparently believe is not a “fair day in court,”²⁵ lacks any merit, as does their disregard for the Commission’s role.

Finally, even if the EC proceedings ultimately end in a way that allows Respondents to close, requiring a preliminary injunction, the Part III litigation will not have been a waste.²⁶ By the time the EC proceedings conclude—likely not earlier than July 2018—the administrative hearing will be concluded or at least substantially advanced. A federal court therefore would have a detailed record and could in a prompt fashion determine whether preliminary relief to maintain the status quo pending the Commission decision is warranted.

CONCLUSION

For the foregoing reasons, the Commission should deny Respondents’ motion.

²⁵ Mot. at 2.

²⁶ Mot. at 2.

Dated: May 11, 2018

Respectfully submitted,

/s/ Dominic Vote

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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2018, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

May 11, 2018

By: /s/ Blake Risenmay
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