

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FEDERAL TRADE COMMISSION)

Plaintiff,)

v.)

TRONOX LIMITED)

NATIONAL INDUSTRIALIZATION)
COMPANY)

**CIVIL ACTION
1:18-cv-01622 (TNM)**

NATIONAL TITANIUM DIOXIDE)
COMPANY LIMITED)

and)

CRISTAL USA INC.)

Defendants.)

)

**DEFENDANTS' MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S EMERGENCY MOTION FOR A STATUS CONFERENCE**

Tronox Limited ("Tronox"), National Industrialization Company ("TASNEE"), the National Titanium Dioxide Company Limited ("Cristal"), and Cristal USA Inc. ("Cristal USA") (collectively, the "Defendants") oppose Plaintiff's Emergency Motion For a Status Conference. There is no need for an emergency status conference this afternoon and Plaintiff's request for a minute order is unnecessary.

First, Tronox did not provide "notice of [its] intention to call a Tronox executive as a live witness on [its] behalf" at the hearing tomorrow. Pl's. Emerg. Mot. for a Status Conf. at 1 (Dkt.

No. 36). Rather, Tronox stated that “it will be prepared at the hearing to present testimony by Tronox Chief Executive Officer Jeffrey N. Quinn in support of Tronox’s opposition.” *See* Eml from M. Williams to D. Vote (July 12, 2018) (Dkt. No. 36-1 at 3). Tronox provided its notice as soon as practicable to the FTC in case the Court determined (as is not uncommon in cases concerning an application for a temporary restraining order) that it wanted to hear evidence in support or in opposition of the application. Tronox also asked the FTC to disclose “as soon as possible what witnesses or evidence the FTC intends to present in support of its motion at the hearing.” *Id.* The FTC took the position that “live testimony is neither necessary nor appropriate in this matter.” Eml from D. Vote to M. Williams (July 12, 2018) (Dkt. No. 36-1 at 2). Tronox responded that it had “provided [the FTC] 24-hour notice of that we are making our witness available in case the Court wishes to hear testimony on any points.” Eml. from D. Vote to M. Williams (July 12, 2018) (Dkt. No. 36-1 at 1). As disclosed to the FTC, Mr. Quinn will be in attendance and available in case the Court wishes to hear testimony on any points tomorrow.

Second, there is no emergency warranting this Court’s immediate intervention. Tronox was merely disclosing at the earliest practicable opportunity that it would have a witness available for testimony, and also asking the FTC whether it intended to bring any witnesses or other evidence. It is entirely up to the Court whether to hear or not hear witness testimony at the hearing tomorrow. Tronox’s disclosure that it would be prepared to present evidence to the Court tomorrow (and its inquiry as to whether the FTC was planning for the same) is the sort of correspondence that counsel ordinarily undertakes in advance of a hearing where there are disputed facts. It is not a judicial emergency. For that reason, Tronox responded that it “would strongly recommend against calling the Court for an emergency status conference today to address an issue that Judge McFadden will address in his discretion tomorrow.” *Id.*

Third, the FTC is incorrect in arguing that live testimony is either forbidden or not necessary when an agency of the United States is seeking a temporary restraining order and there are significant factual disputes. With respect to whether testimony is forbidden, the 21-day notice requirement of Local Rule 65.1(d) applies, by its terms, to “Hearings on Applications for Preliminary Injunction.” See D.D.C. Local R. 65.1(d). It does not extend to hearings on an application for a temporary restraining order where, as here, there will have been less than 72 hours’ notice between the filing of the application and the hearing.

With respect to whether testimony is necessary, the FTC has not cited a single case where a party has asked to present live evidence and a court nevertheless held a preliminary injunction hearing without live testimony. In *FTC v. ProMedica Health Sys., Inc.* and *FTC v. Libbey, Inc.*, no party requested the presentation of live testimony. *FTC v. ProMedica Health Sys. Inc.*, No. 3:11-cv-00047 (DAK), Dkt. 68 (N.D. Ohio, 2011) (proposed stipulated preliminary injunction hearing schedule, agreed by parties without inclusion of live testimony); *FTC v. Libbey, Inc.*, 1:02-cv-00060 (RBW), (D.D.C. 2002), Minute Entry of 01/25/2002 (indicating court’s adoption of parties’ stipulated briefing schedule, which did not include presentation of live testimony). In *FTC v. Inova Health Sys. Found.*, the defendants abandoned their transaction before any preliminary injunction hearing took place, with or without the presentation of live testimony. No. 1:08-cv-00460 (CMH, JFA), Dkt. 47 (E.D. Va. 2008) (order granted joint stipulated motion for order dismissing complaint). In short, the FTC provides no example of a court actually deciding a preliminary injunction that would block an unconsummated merger without the benefit of live witness testimony. This Court should not be the first.

Finally, the FTC is particularly in error when it claims the “role of this Court is to determine only whether the FTC’s Complaint Counsel has demonstrated a likelihood of success

on the merits before the Commission.” Pls’. Mot. at 2. While the FTC relies upon *FTC v. Heinz*, 246 F.3d 708, 714 (D.C. Cir. 2001) for that proposition, that case actually states the opposite. The Court stated that “[a]lthough the FTC’s showing of likelihood of success creates a presumption in favor of preliminary injunction relief, we must still weigh the equities in order to decide whether enjoining the merger would be in the public interest.” *Id.* at 726.

As Tronox is prepared to demonstrate at the hearing tomorrow, the FTC cannot demonstrate a likelihood of success on the merits, and it cannot demonstrate that the equities favor injunctive relief in this case. Tronox is also prepared to demonstrate that the presentation of live witnesses, as is typical in merger cases brought by both the FTC and the Department of Justice in the District Court, provides the most fair, efficient, and expeditious way forward for resolving the FTC’s motions. Tronox respectfully submits that it is not necessary for the Court to convene the parties for an emergency conference this afternoon to discuss these issues.

Dated: July 12, 2018

Submitted By:

/s/ Michael F. Williams, P.C.

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