IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, Plaintiff, v. **TRONOX LIMITED, et al.,** Defendants.	Civil Action No. 18-1622 (TNM)

PLAINTIFF'S BENCH MEMORANDUM REGARDING THE STATUS OF THE ADMINISTRATIVE RECORD

In this proceeding, the parties have jointly submitted a comprehensive listing of all the materials in the administrative record of the Federal Trade Commission ("FTC") Part 3 proceeding,[1] and, for the convenience of the Court, the parties have also each designated the most important materials from that record in separate Appendices.[2] Consistent with the proceedings to date—as well as the long-standing practice of the federal courts in proceedings, like this one, that relate to an underlying administrative hearing—the entire administrative record from the FTC Part 3 proceeding is in evidence in this Court.

To be clear: the FTC does not anticipate that, as a practical matter, the Court will need to refer to materials other than those designated in Appendices B and C, supplemented by the additional testimony in this Court. But the principle of the integrity of the administrative record is of great importance to the FTC (and, no doubt, to other similarly situated agencies), which

[1] Joint Submission of the Administrative Record and Appendices of Materials from the Administrative Record, July 31, 2018 (Docket Entry 86), Appendix A.
[2] *Id.*, Appendices B & C.

routinely undertakes federal court litigation collateral to, or otherwise relating to, its administrative proceedings. The FTC's practical freedom to designate materials of particular salience for the attention of a reviewing court, *without compromising the underlying record,* must be preserved to promote judicial economy in federal court without compromising its administrative process. Accordingly, the FTC respectfully submits that the entire administrative record from the Part 3 proceeding is in the record and in evidence in this Court.

ARGUMENT

This proceeding for a preliminary injunction under Section 13(b) of the FTC Act is being conducted on the basis of the record of an administrative trial before an FTC Administrative Law Judge ("ALJ"),[3] which was jointly submitted by the parties to this Court on July 31, 2018, as Appendix A to the Joint Submission of the Administrative Record and Appendices of Materials from the Administrative Record ("Joint Submission of the Administrative Record").[4] This has been supplemented to a limited extent by additional testimony, as the Court directed.[5] For the Court's convenience—and guided by Local Civil Rule 7(n)'s mandate to refrain from "burden[ing] the appendix with excess material from the administrative record" in cases to which it applies[6]—the parties have designated the most important materials by inclusion in Appendices

[3] Scheduling Conf. Tr., July 20, 2018, at 17-18 (the Court stating that "I think we all agree there's not going to be any more discovery; that we are limiting the documentation and the evidence here to the administrative record" and "I think we all agree that the record from before is the record that would be here").

[4] Joint Submission of the Administrative Record and Appendices of Materials from the Administrative Record, July 31, 2018 (Docket Entry 86), Appendix A ("Administrative (Part 3) Pleadings and Filings").

[5] Scheduling Conf. Tr., July 20, 2018, at 20–21.

[6] Local Rule 7(n) is patterned after, among other things, D.C. Circuit Rule 17, which expressly states in relevant part that "[a]ll parts of the [administrative] record retained by the agency are a part of the record on review for all purposes[.]" D.C. Circuit Rule 17(b)(3).

B and C to the Joint Submission of the Administrative Record.[7] But the designations in Appendices B and C do not narrow the underlying evidentiary record as described in Appendix A. Rather—just as the designation of an appendix under Local Civil Rule 7(n) supplements a certified list of the contents of the administrative record—it is a matter of administrative convenience, "intended to assist the Court in cases involving a voluminous record . . . by providing the Court with copies of *relevant portions of the record relied upon* in any dispositive motion." Comment to Local Civil Rule 7(n) (emphasis added). The entire administrative record remains formally in evidence.

This is consistent with the essential purpose of this Court's review of the administrative record: an assessment of the likely outcome of the administrative proceeding as it was actually conducted. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers a federal court to grant a temporary restraining order or a preliminary injunction after notice to the defendant if, "weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest[.]" 15 U.S.C. § 53(b). The court's inquiry into the likelihood of ultimate success focuses on the likely outcome *in the underlying administrative proceeding*. *See, e.g.*, *FTC. v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001) ("To determine likelihood of success on the merits we measure the probability that, *after an administrative hearing on the merits*, the Commission will succeed in proving [a violation of law].") (emphasis added; citation omitted); *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34, 44 (D.D.C. 2002) ("In determining the FTC's likelihood of success on the merits, the Court must measure the probability that, *after an administrative hearing on the merits*, the Commission will succeed in proving [a violation.]") (emphasis added; internal quotation marks and citation omitted). The likely outcome of the

[7] Joint Submission of the Administrative Record and Appendices of Materials from the Administrative Record, July 31, 2018 (Docket Entry 86).

administrative proceeding is, in turn, a function of the record actually introduced and considered by the Administrative Law Judge in that administrative proceeding.

Extensive federal court precedent compels the same conclusion. In proceedings relating to underlying administrative hearings in a range of contexts, federal courts routinely acknowledge that the entire administrative record is before the court. *See, e.g., Pryor v. Comm'r of Soc. Sec.*, 690 F. App'x 42, 42 (2d Cir. 2017) ("We . . . examine the entire administrative record to determine whether substantial evidence supports the Commissioner [of Social Security]'s determination[.]"); *Kartasheva v. Holder*, 582 F.3d 96, 103 (1st Cir. 2009) (in a review of a Board of Immigration Appeals decision affirming a denial of asylum, the court should "review the entire administrative record to assess whether the [Immigration Judge's] findings were supported by substantial evidence"); *McLaurin v. Colvin*, 121 F. Supp. 3d 134, 139 (D.D.C. 2015) ("A court evaluating [a Social Security Administration] decision must carefully examine the entire administrative record to determine if the ALJ [satisfied applicable requirements]."") (citations omitted).

The principle of integrity of the administrative record applies even with respect to materials that would be actually *inadmissible* under the Federal Rules of Evidence if presented for the first time in federal court. *See, e.g., McVey Company, Inc. v. United States*, 111 Fed. Cl. 387, 394 n.3 (Fed. Cl. 2013) ("A judgment on the administrative record is properly understood as intending to provide for an expedited trial on the record, in which evidence is restricted to the agency record, as may be supplemented in limited circumstances. . . . Therefore, documents that are properly included in the administrative record may be considered by the court regardless of whether they would meet other evidentiary standards.") (citations, alterations, and internal quotation marks omitted); *Black v. Long Term Disability Ins.*, 582 F.3d 738, 746 n.3 (7th Cir.

2009) ("The Federal Rules of Evidence . . . do not apply to an ERISA administrator's benefits determination, and we review the entire administrative record, including hearsay evidence relied upon by the administrator.") (citation omitted); *New Dynamics Foundation v. United States*, 70 Fed. Cl. 782, 797 (Fed. Cl. 2006) ("[C]ontrary to plaintiff's importunings, courts generally have refused to consider collateral attacks upon the materials in administrative records based upon the post hoc application of evidence rules.") (citations omitted); *California State Grange v. National Marine Fisheries Service*, Case Nos: 1:06-cv-00308-OWW-DLB & 1:06-cv-00453-OWW-DLB, 2008 WL 4427954 (E.D. Cal. Sept. 26, 2008), at *2 ("The controlling rule is the general principle that when conducting a review of agency action under the APA, courts must 'review the whole record or those parts of it cited by a party . . . .' 5 U.S.C. § 706. Allowing relevancy objections to evidence that is *already part* of an administrative record would defeat this general principle, primarily because the Administrative Record review a court conducts requires that the court examine everything in the Administrative Record that constitutes the information the agency considered, whether such information is or is not technically admissible in evidence under the Federal Rules of Evidence.") (emphasis in original); *Brown v. Board of Trustees of the Building Service 32B-J Pension Fund*, 392 F. Supp. 2d 434, 446 (E.D.N.Y. 2005) ("[I]n determining whether the Trustees' denial of benefits was arbitrary and capricious, it is proper to consider nothing more and nothing less than the administrative record.") (citations omitted).

The FTC (like a number of other similarly situated agencies) frequently appears in federal court in proceedings, like this one, that relate to a prior or pending administrative matter that has generated a voluminous record. The FTC (as well as similarly situated agencies) must retain the freedom to designate documents of particular importance for the convenience of the court without compromising the underlying evidentiary record. This promotes both judicial

economy and the integrity of the record, particularly in proceedings that—like the present action for a preliminary injunction—are conducted on an expedited basis in the interests of both the parties and the efficient administration of justice alike.

CONCLUSION

For the foregoing reasons, the FTC respectfully submits that the entire administrative record from the FTC Part 3 proceeding is in evidence in this Court.

Dated: August 9, 2018

/s/ Dominic Vote
Dominic Vote (D.C. Bar 985637)
Charles A. Loughlin (D.C. Bar 448219)
Cem Akleman
Meredith R. Levert (D.C. Bar 498245)
Jon J. Nathan (D.C. Bar 484820)
Z. Lily Rudy (D.C. Bar 1023073)
Federal Trade Commission
Bureau of Competition
400 Seventh Street SW
Washington, D.C. 20024
(202) 326-3505; dvote@ftc.gov
(202) 326-2114; cloughlin@ftc.gov
(202) 326-2397; cakleman@ftc.gov
(202) 326-2881; mlevert@ftc.gov
(202) 326-2457; jnathan@ftc.gov
(202) 326-3390; zrudy@ftc.gov

Counsel for Plaintiff Federal Trade Commission