

**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)

Emergency Motion For a Status Conference

The Court has scheduled a hearing on Plaintiff Federal Trade Commission's Motion for a Temporary Restraining Order for 10 a.m. on Friday, July 13, 2018. Just this morning, only 24 hours before that hearing is to commence, Defendants provided the Federal Trade Commission with notice of their intention to call a Tronox executive as a live witness on their behalf at that hearing. For the reasons laid out below, we oppose this request. Plaintiff requests a status conference this afternoon at the Court's earliest convenience to address this dispute or, in the alternative, that the Court enter a minute order precluding live testimony at tomorrow's hearing.

We oppose Defendants' efforts to present testimony from a live witness for several reasons. First, Defendants' request does not comply with the local rule governing "Temporary Restraining Orders and Preliminary Injunctions" that addresses how and when those hearings should be conducted. D.D.C. L. Civ. R. 65.1. That rule does not even contemplate the possibility of live witnesses testimony at a hearing for a temporary restraining order, nor has the Court made any such request here. And even in preliminary injunction hearings, "the practice in this jurisdiction is to decide preliminary injunction motions without live testimony where possible." D.D.C. L. Civ. R 65.1(d). Indeed, federal courts in previous Federal Trade

Commission preliminary injunction actions have concluded that live witness testimony was not necessary:

This case needs to be tried before the Commission. The issue before me is a very narrow one, as to whether or not a preliminary injunction should be issued... As far as live witnesses are concerned, I find that is not necessary. You can present to me by declaration and exhibits whatever evidence you want to present as far as that is concerned.

FTC v. Inova Health Sys. Found., Docket No. 1:08-cv-460 (E.D. Va. May 30, 2008) (Hrg. Tr. at 12:6-21); *see also FTC v. ProMedica Health Sys., Inc.*, No. 3:11 CV 47, 2011 WL 1219281, at *1 (N.D. Ohio Mar. 29, 2011); *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34 (D.D.C. 2002).

Moreover, although this matter was recently filed, the Local Rules provide that even where live testimony is appropriate in a preliminary injunction hearing, parties must provide 72-hours' notice before the hearing to both the Court and other parties of the witnesses to be examined as well as an estimate of the time required for that testimony. D.D.C. L. Civ. R 65.1(d).

Defendants provided neither, waiting until just a day before the hearing to raise the possibility of live testimony, resulting in considerable prejudice to the Plaintiff.

Second, as we explained at the status conference on Tuesday, July 10, 2018, Plaintiff's position is that there is no need for the Court to hear any new live testimony in deciding the Plaintiff's Motions for a Temporary Restraining Order and for a Preliminary Injunction. 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. *FTC v. Heinz*, 246 F.3d 708, 714 (D.C. Cir. 2001). Therefore, the Court should consider only the substantial, and closed, evidentiary record developed over the course of a month-long merits trial. In reaching its decision, the Commission itself cannot consider evidence outside the record developed during that hearing, and nor should this Court in determining whether the Commission could rule in Complaint Counsel's favor.

Further, allowing such live testimony here would be unnecessarily duplicative and burdensome. Both Complaint Counsel and the Defendants already presented testimony from a large number of live witnesses, including senior executives at various businesses, during the administrative trial. It is unduly burdensome to require those same executives, many of whom traveled long distances, to once again appear on short notice and testify a second time. As Local Rule 65.1 expressly contemplates, the Court should “decline to hear witnesses where the need for live testimony is outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” D.D.C. L. Civ. R. 65.1(d). Duplicating an already completed trial by requiring live testimony falls squarely within the scope of that rule.

Plaintiff has met and conferred with the Defendants.¹ We respectfully request that the Court convene a status conference at its earliest convenience this afternoon to resolve this matter, or, in the alternative, that the Court enter a minute order precluding live testimony at tomorrow’s hearing. A quick resolution is necessary to allow the parties to properly prepare for tomorrow’s hearing.

Dated: July 12, 2018

By: /S/ Dominic Vote
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¹ See Exhibit A (E-mail thread between Dominic Vote, Deputy Assistant Director, Federal Trade Commission, Bureau of Competition, and Michael Williams, Kirkland & Ellis (July 12, 2018)).