

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



COMMISSIONERS: **Joseph Simons, Chairman**
Maureen Ohlhausen
Rohit Chopra
Noah Phillips
Rebecca 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

**RESPONDENTS' MOTION TO STAY AND TEMPORARILY
WITHDRAW THIS MATTER FROM ADJUDICATION**

Respondents Tronox Limited (“Tronox”) and the National Titanium Dioxide Company of the Kingdom of Saudi Arabia (“Cristal”) respectfully ask the Federal Trade Commission (the “Commission”) to enter a stay of the Part 3 evidentiary hearing scheduled to begin on May 18, 2018 and temporarily withdraw this administrative case from adjudication. Respondents are working cooperatively and constructively with the European Commission to reach an agreement on a proposed remedy by May 16, 2018, which is the sole remaining obstacle to obtaining the European Commission’s conditional approval of the transaction. Discovery is also substantially complete for the Part 3 hearing. In this context, renewed and well-informed settlement discussions

could avoid the need for a lengthy and expensive trial. Failure to grant a stay and temporary withdrawal will require the parties to proceed with a lengthy administrative process, at taxpayer expense, that is unlikely to fully resolve the dispute before Respondents' transaction agreement expires, thereby increasing the cost and expense of an already expensive undertaking and potentially denying Respondents a fair day in court. These reasons supply good cause for issuing a temporary stay and withdrawal of this matter.

To be sure, Respondents are prepared to demonstrate in any forum, at any time, that their transaction is procompetitive, for it will both increase the global supply of titanium dioxide ("TiO₂") and make the combined company's TiO₂ plants more competitive in the global marketplace. In economic terms, the transaction will lower cost, expand output, and reduce prices for consumers.

But in light of the progress Respondents have made in the European Commission proceedings, and given the likelihood that Part 3 proceedings would waste significant resources for no gain, Respondents seek a short stay to explore meaningful settlement discussions with the Commission. In the alternative, Respondents ask the Commission to reconsider whether to file a federal preliminary-injunction proceeding. A preliminary injunction has many advantages, including resolving this matter before the expiration of the transaction agreement, providing Respondents' their fair day in court, and avoiding tremendous waste.

I. THE COMMISSION HAS GOOD CAUSE TO STAY THE PART 3 HEARING TO ALLOW RENEWED SETTLEMENT DISCUSSIONS.

The Commission has good cause to stay and temporarily withdraw this Part 3 administrative case from adjudication to afford Respondents the opportunity to renew discussions with the Commission about the pro-competitive nature of this transaction in light of recent

developments in the EC proceedings and the substantial completion of discovery for the Part 3 proceeding. These recent events are likely to make settlement discussions productive.

Tronox's acquisition of Cristal is a procompetitive transaction that will benefit consumers. The combination of the Tronox and Cristal TiO₂ businesses would create a highly integrated TiO₂ producer. The financial success of the entire transaction is dependent on the combined company increasing its production and therefore increasing the global supply of TiO₂, enhancing competition, and benefitting consumers. In addition, the combined company will realize significant cost improvements through efficiencies at all levels of the organization. The result will be a more efficient, more vertically-integrated TiO₂ producer, prepared to compete with global market leaders (including low-cost producer Chemours and the emerging competitive threat from Asian TiO₂ producers), by producing more high-quality TiO₂ at lower cost.

In the time since Complaint Counsel initiated these proceedings in December 2017, Respondents have made significant progress in obtaining the approval of other regulators for this procompetitive transaction. Respondents have received clearance from all non-U.S. regulators except the European Commission. The European Commission's conditional clearance of the transaction is now only dependent on reaching agreement on a proposed remedy by May 16, 2018. Respondents are working cooperatively and constructively with the European Commission and are discussing remedy proposals to resolve the European Commission's remaining objection. Discussions with the European Commission are ongoing as are negotiations with potential purchasers that would be required to effect the proposed remedy being considered by the European Commission.

Given this significant progress, good cause for a stay and temporary withdrawal from adjudication exists because, at a minimum, a short stay and withdrawal will allow the parties to

explore the possibility of resolving the Commission's legal objections without litigation, similar to the resolution taking shape before the European Commission. A stay and withdrawal is necessary to facilitate such settlement discussions due to the risk that talks might violate *ex parte* rules if the Part 3 proceedings were ongoing. Furthermore, the development of this case through discovery has created a more complete factual basis for discussing potential remedies. Settlement discussions today will benefit from a complete development of the factual record and the delivery of expert reports and would therefore have a higher likelihood of succeeding than the parties' earlier discussions.

II. SUBSTANTIAL HARM IS LIKELY IF A STAY IS NOT ISSUED.

A stay and temporary withdrawal is further justified by the likelihood of substantial harm that will result without such action, in the form of wasted resources and pointless litigation. As the parties approach the commencement of the Part 3 hearing, there remains no likely prospect that the Commission will reach a final decision on the legality of the proposed acquisition before the expiration of Respondents' extended transaction agreement in March 2019. That deadline is already more than *two years* after Respondents announced their transaction. There can be no assurance that Respondents will succeed in agreeing to yet another extension of their acquisition agreement, nor is it fair that they be required to do so.

Without a stay and temporary withdrawal, the evidentiary hearing will begin on May 18, 2018. Under the Commission's rules, the parties will present 30 non-consecutive days of testimony, which will extend through June or July of 2018. After the submission of post-hearing briefing and closing argument, there will be no initial decision in this case until October or November 2018. The parties can expect to argue the *de novo* appeal to the Commission in January 2019. Optimistically, that would leave the Commission only 45 days to issue its final decision

before the extended transaction agreement underlying the transaction expires. On that timeline, it is highly unlikely that the Part 3 process will resolve this matter.

Given the low likelihood that the matter will be finally resolved by the date on which the transaction agreement expires, Respondents should not be required to proceed with an evidentiary hearing for this \$2.4 billion unconsummated acquisition, which will be costly and burdensome. The parties have already taken more than fifty depositions, produced millions of documents, and exchanged detailed expert reports. An evidentiary hearing will only multiply this effort and expense, consuming enormous resources of both Respondents and United States taxpayers. To make matters worse, little, if anything, will be gained by conducting these proceedings because the Part 3 process will almost certainly not provide a timely resolution of the matter in dispute.

The risk of needless cost and tremendous waste as a result of ineffectual litigation is a substantial harm. Avoiding that harm is a further justification for entering a temporary stay in this matter.

III. IN THE ALTERNATIVE, THE COMMISSION SHOULD REASSESS WHETHER TO FILE FOR A PRELIMINARY INJUNCTION IN FEDERAL COURT.

There is no question that the faster and more efficient means to resolve this matter is through a preliminary injunction proceeding in federal court. At the pretrial conference, the Chief Administrative Law Judge recognized this fact and specifically instructed the parties “to work together to delay the start date of this trial” until the parties had some clarity about whether the Commission would seek an injunction in this case. Dec. 20, 2017 Pretrial Conf. Tr. at 9. Chief Judge Chappell further told the parties “to think about what you can do to move this trial date so that before we actually go to trial, there’s going to be a merger.” *Id.* at 10.

Federal-court litigation for resolving challenges to unconsummated mergers has well-recognized advantages, including maintaining consistency between U.S. enforcement agencies,

ensuring predictability in antitrust regulation, and avoiding circumstances (as here) where a transaction remains mired in uncertainty, potentially causing a loss of customers and employees. Unlike the Part 3 proceedings, a preliminary injunction action in federal court will almost certainly fully resolve this matter before the merging parties' transaction agreement expires.

Nothing prevents the Commission from filing now for a preliminary injunction in federal court. In fact, the European Commission proceedings have now reached the same critical moment that justified Complaint Counsel in seeking a preliminary injunction in federal court to challenge the Staples/Office Depot merger. From this point forward, it is possible for the European Commission proceedings to terminate on short notice, because Respondents are in the process of working out a remedy to permit the European Commission's conditional clearance of that transaction. If that happens and the remedy is effected, Respondents will be free to consummate their transaction regardless of the status of the Part 3 proceeding, unless the Commission chooses to seek a preliminary injunction in federal court. If the Part 3 evidentiary hearing has already occurred by the time the Commission seeks a preliminary injunction, the sunk costs of the Part 3 hearing will be entirely duplicative of the costs of the preliminary injunction proceedings.

For all these reasons, Respondents respectfully request, in the alternative, that the Commission reassess whether to seek a preliminary injunction in federal court to resolve this matter.

Dated: May 7, 2018

Respectfully Submitted By:

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