

**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' CORRECTED MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER**

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INTRODUCTION

The Federal Trade Commission is deviating from its own ordinary course procedures to run out the clock on a \$2.4 billion transaction so that it never has to explain to a federal court why it is blocking a pro-competitive proposed acquisition. Tronox Limited, a company based in the United States, is trying to acquire Cristal, a company based in Saudi Arabia. The entire purpose of the acquisition is to allow the combined entity to increase the output of titanium dioxide (“TiO₂”) available to customers around the world. There is no legitimate case for blocking the transaction under the antitrust laws because an output-enhancing combination such as this one necessarily benefits consumers. Yet by using unprecedented and lengthy procedural tactics, the FTC has been trying for more than a year to prevent the acquisition through a lengthy administrative process that, by its own admission, will not conclude before the proposed transaction expires on March 31, 2019, over two years after the deal was first announced.

The situation is unprecedented. For nearly eight months, the FTC chose to pursue an administrative process in its own building instead of injunction proceedings in a federal courthouse, even though it knew that the administrative proceeding would not end before the deal expired. Indeed, the FTC’s own Chief Administrative Law Judge acknowledged the unprecedented character of Plaintiff’s tactics, openly stating before the start of the administrative trial: “[T]his is the first case I’m aware of, in a nonconsummated merger, where we’re in this position, going to trial, where the Government has not moved for a preliminary injunction. It’s never happened as far as I know.” 05/16/2018, Pretrial Conf. Tr. 11:25-12:4 (Ex. A); *see also* 12/20/2017 Sched. Conf. Tr. 8:13-21 (Ex. B) (“I have never seen a merger case go to trial, when it’s nonconsummated, once we get a ruling on an injunction, and what that means is it’s a

tremendous waste of resources for the taxpayers of America and for Respondents, for attorneys' fees, to try to get this case to completion").

Now that the European Commission has conditionally approved Tronox's acquisition of Cristal—in addition to the seven other countries that have approved the transaction—the FTC asks the Court to delay the closing further. Although the FTC purports to seek a “preliminary” injunction, it is no secret that granting that requested “preliminary” relief will run out the clock on this deal. The purchase agreement expires in March 2019, and the FTC's administrative process still will have not reached a final decision on the merits. Hence, if the FTC receives the relief it seeks here, the parties' transaction will fail on the basis of an unfinished administrative proceeding. In other words, if the FTC has its way, Tronox will never receive a fair determination of the lawfulness of its acquisition of Cristal. The stakes could not be higher for Tronox and Cristal.

The FTC now asks the Court to enter a temporary restraining order on an expedited timeline to prevent the parties from closing their transaction. But the supposed crisis that warrants this extraordinary relief is of the FTC's own making. Over seven months ago, the FTC—composed of only two Commissioners at the time—authorized the filing of a complaint for injunctive relief in federal court to oppose this transaction. *See* FTC Press Release, *FTC Challenges Proposed Merger of Major Titanium Dioxide Companies*, Dec. 5, 2017, available at <https://bit.ly/2La7Of1>. Yet since then, counsel for the FTC has departed from its own ordinary practice and refused to file a complaint in federal court, choosing instead to drag the parties through administrative proceedings the FTC knew would not conclude in time.

The FTC's efforts to avoid this day in court are instructive. As the evidence will demonstrate, the FTC cannot meet the standard for obtaining a temporary restraining order or a

preliminary injunction. In the context of an unconsummated merger, courts consider the same factors when deciding whether to grant a temporary restraining order as they do when considering whether to grant a preliminary injunction. The FTC in either circumstance bears the burden of making a “proper showing that, 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). This “public interest” standard “demands rigorous proof to block a proposed merger or acquisition.” *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 23 (D.D.C. 2015). “Given the stakes, the FTC’s burden is not insubstantial, and “[a] showing of a fair or tenable chance of success on the merits will not suffice for injunctive relief.” *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 115 (D.D.C. 2004). In short, the FTC must *prove* its case like any other litigant, and the courts will not hesitate to deny relief when the Commission fails to carry its burden.

Tronox and Cristal are prepared to show the Court that the FTC cannot carry its burden here. As Defendants demonstrated in the administrative proceeding, the FTC’s case is artificial, largely academic, and ignores real-world business reality. The FTC’s market definition comes from a results-driven academic model that the FTC’s own ALJ questioned as “front-running.” 06/01/2018 Trial Tr. 1783:23-24 (Ex. C). The FTC’s theory of competitive harm consists largely of “random statements from defendants’ ‘ordinary course’ business documents, including employees’ email and internal slide decks,” taken out of context—precisely the sort of showing rejected recently by another Judge of this Court. *See United States v. AT&T Inc., et al.*, No. 17-2511-RJL (June 12, 2018), Slip op. at 86; *see also id.* (“However, as became clear at trial, when live witnesses take the stand a trial by slide deck leaves much to be desired!”). The FTC also ignores that the entire purpose of the transaction is to increase the combined company’s

production and sale of TiO₂ at a lower cost in the global market, an objective that is necessarily pro-consumer and pro-competitive.

While the Court determines the appropriate schedule for resolving the FTC's claims, Defendants oppose the entry of a temporary restraining order. The FTC is not likely to succeed on the merits of its challenge of Tronox's acquisition of Cristal, and the equities weigh resoundingly against awarding the FTC equitable relief. By any measure, allowing the FTC to play procedural games to run out the clock cannot be reconciled with the public interest.

BACKGROUND

This is an unusual antitrust case because there has already been an administrative trial in the FTC. Thus, the Court can refer to actual *evidence*, rather than just the FTC's self-serving *assertions*. And the evidence here is clear: this proposed transaction should not be enjoined.

A. The Parties.

Defendant Tronox Limited ("Tronox") is a publicly-traded company with its principal corporate offices in Stamford, Connecticut and an operations and research center in Oklahoma City, Oklahoma. Tronox was part of the Kerr-McGee Chemical Corporation before it spun off from its parent in 2005. Tronox filed for Chapter 11 bankruptcy in January 2009, and it successfully emerged from Chapter 11 as a restructured company in February 2011. In 2012, Tronox acquired the mineral sands operations of Exxaro Resources Limited (a South African-based mining company) that produces the main feedstock for Tronox's TiO₂ pigment production facilities, and incorporated the combined entity as a holding corporation under the laws of Australia. As a result of the acquisition, Tronox became a leading vertically-integrated producer of TiO₂.

Tronox has global TiO₂ mining and manufacturing operations. Its largest TiO₂ production facility, which it has owned and operated since the 1960s, is located in Hamilton,

Mississippi. The Hamilton facility alone manufactures almost half of Tronox's worldwide TiO₂ production. It employs approximately 420 workers, with tens of millions of dollars in total payroll. Tronox also has production facilities in Botlek, the Netherlands, and Kwinana, Australia. It owns and operates mines and processing plants in South Africa and Australia to provide feedstock for its TiO₂ manufacturing business. In 2016, Tronox's TiO₂ business generated sales of approximately \$1.3 billion globally, with approximately 46% of its product sold in North America.

The National Titanium Dioxide Company Ltd. ("Cristal"), headquartered in Jeddah, Saudi Arabia, is a privately held company. It is owned 79% by The National Industrialization Company ("TASNEE"), a Saudi joint-stock company, 20% by Gulf Investment Corporation, and 1% by a private investor. Cristal mines titanium ore and other minerals and manufactures and sells TiO₂ pigment. In 2016, Cristal's TiO₂ sales were \$1.7 billion globally. Cristal produces TiO₂ in Ashtabula, Ohio, and in the United Kingdom, Australia, Saudi Arabia, Brazil, China, and France. Cristal also owns and operates titanium feedstock facilities in Australia, Brazil and Saudi Arabia. Cristal is a named party to the acquisition agreement with Tronox. Cristal USA Inc. is an indirectly owned subsidiary of Cristal, which operates the manufacturing facilities in Ashtabula, Ohio and an administrative and research center in Glen Burnie, Maryland.

B. The TiO₂ Market and Tronox's Acquisition of Cristal

TiO₂ is an inorganic white pigment used to whiten a variety of products and found in an array of end-uses, including coatings and plastics, which account for more than 80% of global consumption. The market for TiO₂ operates globally, with mining and production facilities around the world supplying purchasers who are also located around the world. Stern, Tr. 3814:21-3815:6; Shehadeh, Tr. 3204:11-3205:1. By way of illustration, in 2015 the United

States exported 55% of its domestic production and imported 29% of its domestic consumption of TiO₂.

This global market for TiO₂ is highly competitive. Quinn, Tr. 2318:23-2319:8. Tronox emerged from bankruptcy in 2011 and found itself competing in a cyclical industry, which swings between boom and bust, with significant challenges for producers, including sustained periods of falling prices, negative profit margins, and increased competition from Chinese suppliers. Arndt, Tr. 1398:4-8; Stern, Tr. 3731:6-24

Tronox's strategy for addressing the challenges in the TiO₂ market includes the \$2.4 billion acquisition of Cristal, a global producer of TiO₂ based in Saudi Arabia. Stern, Tr. 3790:15-24. The combined company would operate eleven TiO₂ pigment plants in eight countries with a total capacity of 1.3 million metric tons per annum and would have titanium feedstock operations (the key raw material input of TiO₂ production) in three countries with a total capacity of 1.5 million metric tons per annum. This proposed transaction is uniquely valuable to both companies because it will result in a highly vertically integrated combined entity, which is Tronox's key competitive advantage in the global marketplace. Turgeon, Tr. 2601:22-2602:15; Quinn, Tr. 2363:20-2364:6.

Specifically, Tronox is currently long on feedstock, resulting in a stockpile of raw material for which the company has no profitable use. Turgeon, Tr. 2603:14-15; Van Niekerk, Tr. 8741:8-8742:4. Cristal, however, is short on feedstock, and is forced to purchase feedstock on the open market, incurring an additional layer of costs. Turgeon, Tr. 2604:1-25. For this reason, the transaction with Cristal is "a perfect fit because Tronox will be able to use [its] excess feedstock" to feed Cristal's pigment plants. *Id.* "[T]he acquisition of Cristal provides a better balance between feedstock availability and feedstock requirements to make TiO₂," and due in

part to this vertical integration, New Tronox will move “towards the lower cost end of the curve,” “enable[ing] the merged entity to more effectively compete against” low-cost competitors in the market. Stern, Tr. 3851:1-3852:3; 3790:15-24.

Additionally, the proposed transaction presents a unique opportunity to enhance TiO₂ output by improving Cristal’s TiO₂ plant in Yanbu, Saudi Arabia. Yanbu’s current performance is “[e]xtremely subpar,” producing TiO₂ at levels well below its nameplate capacity. Dean, Tr. 2979-2980. Cristal has attempted to bring in outside expertise to improve the Yanbu facility, but these attempts have not resulted in sustainable improvements. Dean, Tr. 2984:4-2985:8; 2980:18-2981:13. The Yanbu plant is particularly challenging for Cristal to operate because that plant runs on Kerr McGee low pressure technology while Cristal’s other plants operate using Millenium technology, which requires different expertise. Dean, Tr. 2984:4-2985:8. Tronox, however, is the legacy company of Kerr McGee. Tronox is the best operator of Kerr McGee technology in the world and has a “unique skill-set to be able to bring to [Yanbu] that no other company in the world possesses.” Quinn, Tr. 2355:25-2356:12. The proposed transaction will enhance TiO₂ output by lending Tronox’s particular Kerr McGee expertise to the Yanbu plant, increasing that facility’s production beyond its “nameplate” capacity and succeeding where Cristal’s many attempts at output enhancement have failed.

ARGUMENT

I. THE FTC CANNOT SHOW THAT IT IS LIKELY TO SUCCEED ON THE MERITS OF ITS CHALLENGE TO THE PROPOSED TRANSACTION.

The objections to the proposed acquisition set forth in the FTC’s complaint are fundamentally flawed and legally unsustainable, and the FTC has failed to prove them in the Part 3 proceeding. The FTC’s market definition is wrong both as a matter of relevant geographic

market and as a matter of relevant product market. Moreover, the FTC cannot articulate a theory as to how this output-enhancing transaction will harm competition.

A. The FTC has failed to prove its proposed geographic and product market.

Merger challenge cases begin by determining the relevant product and geographic markets. *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1110 (N.D. Cal. 2004); *see* 15 U.S.C. §18 (“in any line of commerce ... in any section of the country”). This is an essential first step because “only examination of the particular market—its structure, history, and probable future—can provide the appropriate setting for judging the probable anticompetitive effects of the merger.” *United States v. General Dynamics, Corp.*, 415 U.S. 486, 498 (1974). In keeping with the FTC’s overall burden of proof, “Complaint Counsel bears the burden of proving [the] relevant market within which” the transaction is likely to have “anticompetitive effects.” *In the Matter of Polypore Int’l, Inc.*, No. 9327, 2010 WL 9434806, *165 (FTC Mar. 1, 2000), *adopted as modified by* 2010 WL 5132519 (FTC Dec. 12, 2010) (internal citation omitted). The FTC’s market definition is simply wrong.

First, with respect to the geographic market, the FTC has sought to limit the scope of the TiO₂ market only to North America, which it defines as only the United States and Canada, even though TiO₂ is a globally traded commodity. Hill, Tr. 1782:20-1783:5; 1900:14-16. This gerrymandered geographic market is completely unsupportable. The United States itself exports more than half of its TiO₂ production and imports almost a third of its consumption. Stern, Tr. 3817:2-12. Mexican production provides an example of the type of significant trade flows that the FTC’s proposed geographic market unjustifiably excludes. Specifically, one of the world’s largest TiO₂ plants is located in Altamira, Mexico and is owned by the top North American producer, Chemours. Chemours ships TiO₂ from its Altamira plant into the United States, and incurs no duty for such shipments. Stern, Tr. 3780:4-6, 7-9; *see also id.* 3778:11-14; 3779:9-

3780:4 (explaining that excluding Mexico from the North American market is unreasonable). Nonetheless, for purposes of defining the relevant market, the FTC's economic expert assumed *none* of the substantial quantities of TiO₂ currently produced in North America and exported would ever be repatriated to North America even if prices increased in North America by 5 percent to "as high as 61 percent." Shehadeh, Tr. 3343:2-6; Hill, Tr. 1992:3-7. That is unsupportable as a matter of basic economics and directly contrary to the sealed testimony of one major titanium dioxide producer who testified that if North American price rose by 5 to 10%, it would increase its North American business, including by repatriating exports. Accordingly, the FTC's has failed to prove its alleged "North American" geographic market because its market definition depends on a flawed economic model that is inconsistent with the real world. Shehadeh, Tr. 3344:21-3445:6.

Furthermore, no "regional price" exists for TiO₂, as the FTC asserts. Romano, Tr. 2233:13-18. Tronox establishes prices for TiO₂ by negotiating every price *individually* with every customer around the world. Mouland, Tr. 1247:16-25. The evidence confirms that when Tronox uses the term "regional pricing," it is simply referring to an average of all customers' prices within a geographic area that Tronox deems to be a region for organizational reasons. Mouland, Tr. 1252:21-1253:12. Even still, economic analysis (using techniques published by the FTC's own economists) demonstrates that TiO₂ prices averaged by geographic region move together in a way that is "statistically and economically significant" and "demonstrate that the relevant market is broader than North America," and is instead global. Shehadeh, Tr. 3229:17-3231:24. In support of its contrary position, the FTC supplies only the testimony of its economic expert, who applied a model that "restricts the substitution and the scope of ... arbitrage relative to what is properly considered" and relies on data that the expert himself describes as unreliable.

Shehadeh, Tr. 3260:7-24, 3263:2-24. As a result, the FTC's economic expert constructs a "statistical world" where events are "strikingly different" from "what's happening in the real world." Shehadeh, Tr. 3267:20-3268:8. The FTC's claimed "North American" geographic market is contrary to the evidence and wrong as a matter of economics. This failure to define a relevant geographic market shows the FTC has no likelihood of success on the merits.

Second, the FTC has failed to prove its alleged chloride-process-only product market. With respect to the relevant product market, the FTC has sought to distinguish two different processes for producing TiO₂ that are in fact readily interchangeable and that overwhelmingly comprise part of the same product market. TiO₂ can be manufactured using either a "chloride process" or a "sulfate process." The FTC contends that the TiO₂ generated from the two different manufacturing processes should be considered different products. Yet, TiO₂ customers can substitute sulfate and chloride TiO₂ in the vast majority of applications. At least 80% of applications using TiO₂ manufactured in the chloride process can also use TiO₂ manufactured in the sulfate process. Stern Tr. 3835:11-17; Turgeon, Tr. 2622:8-2623:2. In fact, a properly executed sulfate process produces TiO₂ with the same whiteness and hue as a properly executed chloride process. Turgeon Tr. 2612:14-18. Customers can and do switch between sulfate- and chloride-process TiO₂ and companies that sell TiO₂ manufactured in the chloride process compete directly for sales with companies that manufacture TiO₂ using the sulfate process. Moulard, Tr. 1224:17-1225:10; Shehadeh, Tr. 3312:25-3313:7. Both sulfate- and chloride-process TiO₂ can be used in most end-use applications, including architectural coatings, house paints, decorative coatings, industrial coatings, plastic for packaging (polyolefins), plastic for construction (PVC), and laminate paper. Kronos, Tr. 893:13-896:14. Reports from industry analysts and disinterested outsiders confirm that sulfate- and chloride-produced TiO₂ compete

directly. Shehadeh, Tr. 3309:6-3312:5, 3838:2-7. Even the FTC's *own* economic expert admitted—with considerable understatement—that it would be possible for some customers who buy chloride today to switch to use sulfate TiO₂ instead. Hill, Tr. 1679:19-1680:3.

In fact, the evidence *confirms* that sulfate- and chloride-process TiO₂ constitute a single product market. Econometric and statistical methods developed by FTC economists demonstrate that “[t]here is a long-term relationship between sulfate and chloride titanium dioxide prices” characterized by “statistically and economically significant” co-movement of prices. Shehadeh, Tr. 3288:23-3289:12. The shift over time in the product mix of imports (for example, the increased proportion of sulfate TiO₂ imported into North America) further shows “the incentive and ability of customers to substitute to sulfate-produced titanium dioxide.” Shehadeh, Tr. 3308:3-7. As countervailing evidence, the FTC's economic expert relied on statistical modeling premised on raw data that the expert himself characterized as unreliable. Hill, Tr. 2016:2-8; Shehadeh Tr. 3295:24-3296:15; *see also* Shehadeh Tr. 3293:12-3294:5 (FTC expert's analysis was flawed for the additional reason that it relied on chloride-process TiO₂ price levels rather than relative price levels as compared between chloride-process and sulfate-process TiO₂). The evidence in this case shows that chloride-process and sulfate-process TiO₂ compete in a single market, and the FTC's counter-evidence is unreliable. The FTC has entirely failed its burden to prove that its chosen chloride-process-only TiO₂ market is a relevant product market, and for this reason too, the FTC has no likelihood of success on the merits.

Finally, regarding both the geographic and product elements of the FTC's proposed market, the FTC's own expert relied on a natural experiment that confirms that the only relevant market in this case is the global market for TiO₂ whether produced through the chloride or sulfate process. In January 2017, a fire at a competitor's sulfate-process TiO₂ plant in Pori,

Finland, caused that plant to cease producing TiO₂, withdrawing about 100,000 tons of production from the global market. Hill, Tr. 1826:7-1827:11. The FTC's expert admitted that following this withdrawal of *sulfate* production from a plant in *Europe*, prices for TiO₂ in North America rose, including Tronox's prices even though Tronox produces only chloride-process titanium dioxide. Hill, Tr. 1872:20-25.

At the end of the day, the FTC's allegations about the relevant product market are flatly inconsistent with the real-world evidence that Tronox presented at trial in the administrative proceeding. Tronox is prepared to demonstrate to this Court, through witnesses and evidence, that the FTC is unlikely to carry its burden in the administrative proceeding.

B. The FTC cannot show a presumption of anticompetitive effects for any market other than its proposed North American, chloride-only market.

Having failed to establish either its proposed geographic or its proposed product market, the FTC is left without any evidence entitling it to a presumption that the proposed transaction will be anticompetitive. The FTC's economic expert limited his own analysis to the gerrymandered market he selected: he did "not analyze[] the likelihood of anticompetitive coordinated effects in any markets other than for sales of chloride TiO₂ in North America and sales of rutile [meaning chloride and sulfate TiO₂] in North America." Hill, Tr. 1945:11-15. The transacting parties, by contrast, have shown that post-merger market concentrations would be "unlikely to raise the prospect of anticompetitive effects" according to the Merger Guidelines. Shehadeh, Tr. 3325:12-19. Because the FTC has failed to show a presumption of anticompetitive effects for any market besides the alleged market it proposed and failed to prove, the FTC has not shown that it is likely to succeed on the merits of its claims.

C. The FTC has not shown that unilateral output reduction or coordinated effects are likely as a result of the proposed transaction.

Separate and apart from the FTC's flawed market definition, the FTC has no valid basis for claiming Tronox's acquisition of Cristal will harm competition. The TiO₂ industry is highly competitive by any standard. Since emerging from bankruptcy in 2011, Tronox (and its competitors) have experienced periods of as much as dozens of consecutive months of falling prices, significant inventory accumulations, and negative profit margins. During challenging economic conditions, some TiO₂ manufacturers, including Tronox, were forced to reduce output to remain viable. Contrary to the FTC's allegations, the manufacturers were not curtailing production with the intent to drive up price, but rather were making entirely appropriate (and commercially-necessary) business decisions to reduce inventory during historically challenging demand cycles. Although the FTC now claims that is part of their case against the acquisition, in response to questioning by the ALJ, counsel for the FTC conceded that Tronox had not done anything inappropriate:

JUDGE CHAPPELL: Those three bullets at the top, plant closures, shutdowns, are you saying those are not things that any business may do to make a profit?

MR. VOTE: There is nothing in appropriate -- we are not alleging that the -- that the Respondents have done anything inappropriate, Your Honor. We are simply acknowledging that there's a strong incentive to reduce output in order to press prices higher, and that can be a completely legitimate reason for a Section 7 theory.

12/20/2017 Sched. Conf. Tr. at 31:7-16 (Ex. B). The evidence shows that the ALJ's question was entirely correct, as Tronox had never reduced production to support prices.

In 2015, TiO₂ producers faced one such severe market downturn. At that time, market prices for TiO₂ were at their lowest point in at least the preceding 28 years. Turgeon, Tr. 2638:1-7. Tronox had high inventory levels due to low demand, and it was selling TiO₂ below the cost of production, which was unsustainable for the business. Turgeon, Tr. 2637:15-25;

2649:12-19. In order to stave off insolvency and stop the build-up of inventory, Tronox idled two of six production lines in Hamilton, Mississippi, one of three production lines in Kwinana, Australia, one furnace at the Namakwa Sands feedstock facility, and one furnace at the KZN Sands feedstock facility. Turgeon, Tr. 2648:19-25; 2649:1-9.

While these facilities were idled, Tronox continued selling TiO₂ at stable levels, resulting in the necessary inventory reduction and cash generation. Tronox then brought its idled facilities back up to full production by the second quarter of 2016 (TiO₂ plants) and by the beginning of 2017 (smelting facilities), respectively. Turgeon, Tr. 2652:6-17. Tronox restarted production at this time because inventory had fallen to normal levels even though global TiO₂ prices were still falling. Turgeon, Tr. 2652:21-2653:3. Tronox's sales did not diminish during this period of reduced output because existing inventory was capable of serving all customer demand. Stern, Tr. 3747:15-22. At no time did Tronox reduce output to influence price, and indeed, no economic evidence exists to suggest that Tronox's rational, revenue-generating behavior during dire financial circumstances had such an effect. Romano, Tr. 2652:21-2653:3; Stern, Tr. 3768:10-13. Indeed, even with idled production, Tronox did not increase its profits and continued to experience operating losses during four straight quarters. Stern, Tr. 3768:10-13.

The FTC's claim that Tronox's acquisition of Cristal will substantially reduce competition is flawed because it rests on the counter-factual premise that Tronox will *reduce* output after the transaction closes. In fact, the entire predicate of the transaction from Tronox's perspective is to *expand* output. Indeed, Tronox's acquisition of Cristal would make no financial sense for Tronox if it were planning to reduce output. Chemical facilities are high fixed-cost assets and the only way to generate reasonable returns in a high fixed-cost business is to produce as much product as possible. In addition, shutting down or mothballing chemical facilities is

extremely expensive. Tronox has repeatedly declared in public and in contemporaneous, ordinary-course, internal correspondence that enhancing production is the leading rationale for the transaction. Turgeon, Tr. 2654:8-2655:6. Furthermore, the only industry expert to testify in this case stated that he was not aware of the business logic that would support reducing production at the Ashtabula and Hamilton plants, particularly given that the industry is currently in an upswing and because these plants represent the lowest-cost production facilities for Cristal and Tronox. Stern, Tr. 3853:6-19.

The FTC relies on two economic models to show that the combined entity is likely to reduce production unilaterally, but both models are fundamentally flawed and inconsistent with real world evidence. The first, called the “capacity closure model” “does not reflect competition in the real world” and is “not reliable for evaluating the likely competitive effects of the proposed acquisition.” Shehadeh, Tr. 3386:9-3387:2. For example, the model fails a crucial validity test because it predicts that market-leader Chemours is presently incentivized to operate its facilities beneath capacity, when in fact, it operates them full-out. As a result, “Chemours’ behavior predicted by the model is inconsistent with the behavior of Chemours as reflected in the” real world, and thus the model is not “attuned to industry reality.” Shehadeh, Tr. 3331:3-7, 3338:9-17. The price increase predicted by the model put forward by the FTC can be defeated by a very small increase in overall TiO₂ supply in the market, which is a likely response of rivals. Shehadeh, Tr. 3371:10-18, 3382:19-3383:1, 3416:7-16.

The FTC’s second model, called the Cournot model, also fails essential validity tests because it (1) predicts a price increase even in an “unconcentrated market” under the Merger Guidelines; (2) predicts “the merger will be unprofitable” and therefore is “inconsistent with real-world actions, namely, undertaking this transaction;” and (3) because “it assigns too much

market power” to suppliers with large shares, and thereby “implies that those large suppliers have unrealistically low costs.” **Shehadeh, Tr. 3394:23-3395;19;** 3399:17-3340:13; 3390:14-22. The FTC has no real answer for this analysis, and that may be why it seeks to avoid having the experts testify before the Court in this case. In this case, the FTC’s theories of competitive harm not only fail to comport with real-world, practical reality, but also fail as a matter of economic theory.

The FTC’s purported evidence of coordinated anti-competitive effects post-merger fares no better. Here again, the FTC relies on the capacity closure model, which remains fundamentally flawed for reasons that the FTC itself already knows. Rivals could defeat an theoretical anti-competitive price increase by the post-acquisition, combined entity by increasing the supply of available TiO₂ by only a small amount that is “virtually certain to occur.” **Shehadeh, Tr. 3416:7-16.** Furthermore, the capacity closure model ignores the likely real-world responses of rivals because it “imposes” limits on competitive responses that are “inconsistent with real-world competitive behavior.” **Shehadeh, Tr. 3414:21-3415:2.**

All of the FTC’s claims of alleged unilateral and coordinated anticompetitive effects following Tronox’s proposed acquisition of Cristal are inconsistent with real-world evidence about the TiO₂ industry and are premised on flawed economic modeling. In reality, the evidence shows that competition in the TiO₂ industry is fierce, that producers run their facilities at full production and intend to continue doing so, and that past isolated examples of output reduction were the result of commercially-sound, and entirely-lawful, business decisions in the face of dire market conditions. The FTC’s claims of anti-competitive effects are unsupported, which further demonstrates that the FTC is unlikely to succeed on the merits of its case.

D. The proposed transaction's synergies are real and well-documented.

The proposed acquisition is pro-competitive because it will expand output and make the parties' TiO₂ plants more competitive in the world marketplace. Among other things, Tronox has more TiO₂ feedstock production than its TiO₂ pigment plants can consume, while Cristal has more TiO₂ production than feedstock production. Turgeon, Tr. 2593:17-2595:6. Combining the two companies' assets will achieve synergies through vertical integration, which in economic terms will lead to lower costs, expanded output, and lower pricing. Shehadeh, Tr. 3444:8-17; Stern, Tr. 3851:1-3852:3. For example, Cristal has facilities that are underperforming or not producing at all. One underperforming facility is the Cristal TiO₂ pigment plant in Yanbu, Saudi Arabia that uses the same licensed Kerr McGee technology that Tronox's own plants use. Romano, Tr. 2222:22-2223:11. Tronox, being a proven expert in its own technology, will be able to fix these underperforming and nonperforming assets, expanding output in both TiO₂ feedstock and TiO₂ production. Quinn, Tr. 2355:3-2356:12; Dean, Tr. 2980:2-2981:13; 2984:4-2985:8. The result again will be lower costs and pricing across the industry. Stern, Tr. 3790:15-24; 3851:1-3852:3; Shehadeh, Tr. 3444. These synergies will not occur without the proposed transaction.

These and other synergies to be obtained by the proposed transaction have been well documented as part of the transacting parties' due diligence. Tronox performed due diligence work related to the transaction in stages. First, the Tronox mergers-and-acquisitions team made judgments about the attractiveness of the Cristal acquisition. Second, once an agreement in principle had been reached and a strong non-disclosure agreement was in place, the parties exchanged information, including site visits, to make more detailed assessments of the assets at issue and the likely synergies to be obtained through the deal. During this phase of the process, Tronox engaged the expertise of a third-party accounting firm to analyze the proposed synergies

and ensure that supportable synergy predictions were presented for the board of directors' consideration. Quinn, Tr. 2343:11-24; Mancini, Tr. 2801:1-2804:14. Indeed, the financial institutions who extended loans to Tronox for the transaction insisted on, and relied on, the third party's assessment of the proposed synergies before making a financial commitment to the transaction. Third, after the definitive agreement was announced to the public, Tronox has continued conducting confirmatory due diligence, to verify the anticipated synergies. Tronox's lengthy and thorough due diligence process has amply demonstrated that the proposed transaction will generate significant synergies from various sources, including vertical integration and output enhancement, but also other cost reductions and efficiencies.

The FTC has failed to refute the extensive evidence of output-enhancing synergies and cost-reducing efficiencies that Tronox will generate as a result of the acquisition. The FTC's synergies expert admitted that he is not an expert in the operations of the TiO₂ industry, the TiO₂ manufacturing process, or the operation of continuous process chemical manufacturing plants, Zmijewski, Tr. 1493:1-1494:16.

In short, Tronox will demonstrate the pro-competitive synergies that will result from its acquisition of Cristal and can validate those synergies with the practical experience of fact witnesses with expertise and experts in the chemical industry. The FTC's only purported counter-argument to this evidence comes from an expert who fully admits that he lacks the technical expertise to examine the foundations of these synergies. The FTC's arguments are inadequate to cast doubt on the parties' validated synergies calculations—calculations upon which Tronox's management, board of directors, and shareholders are relying as a premise for this transaction. These synergies support the deal's pro-competitive and output-enhancing nature, and further demonstrate that the FTC is unlikely to succeed on the merits of its case.

E. Competition in the TiO₂ industry is fierce.

The evidence submitted during the administrative trial also confirms that the TiO₂ industry is highly competitive. Quinn, Tr. 2318:22-2319:9. Chemours is Tronox's largest competitor. Chemours is about three times the size of Tronox and is differentiated from other competitors because Chemours' proprietary technology results in a low cost position. Quinn, Tr. 2344:19-2346:11; Mouland, Tr. 1207:9-13. Additionally, Chinese producers—and one such producer in particular, Lomon Billions—have low labor costs and low capital costs. Quinn, Tr. 2347:11-24. Lomon Billions has publicly stated its intent to dominate the TiO₂ industry within the next few years, Quinn, Tr. 2347:11-24; Mouland, Tr. 1209:14-21. Some Lomon Billions products are already as good as or better than Tronox products and are capable of competing directly with them. Romano, Tr. 2238:18-2239:21. Also, Venator and Kronos are large-scale, global competitors, and the parties also currently compete with a series of producers with strong positions in different regions. Mouland, Tr. 1208:2-22, 1209:24-1210:6. The proposed transaction will allow the combined entity to compete with lower costs, low enough to rival famously low-cost producers like Chemours and Lomon Billions. Stern, Tr. 3790:15-24.

The TiO₂ industry is also highly competitive because of the size and power of its customers. Tronox's customers "are much bigger" than Tronox, "especially in the coatings industry, [where] the paint companies are multiple times" Tronox's size. Quinn, Tr. 2345:24-2346:11. These large coatings customers have been consolidating in recent years, and "in order to be able to continue to support the growth of ... large customers that continue to consolidate, [Tronox] need[s] to get bigger, bigger not only in volume but in [its] ability to serve globally." Romano, Tr. 2216:6-2217:6. Improving its ability to serve global customers globally is a key "objective of [the transaction]," "to be able to service our customers better." Romano, Tr. 2216:6-2217:6.

Contrary to the FTC's assertions, the evidence shows that competition in the TiO₂ industry is fierce and that the ongoing threat of low-cost production from rivals like Chemours and Lomon Billions threatens both Tronox and Cristal in the absence of this transaction. If the transaction proceeds, however, TiO₂ customers will benefit from more TiO₂ produced at lower costs, which is inherently pro-competitive and pro-consumer. For this reason, too, the FTC cannot show that it is likely to succeed on the merits of its case.

II. THE FTC CANNOT DEMONSTRATE THAT A TEMPORARY RESTRAINING ORDER IS IN THE PUBLIC INTEREST.

Because the FTC cannot prove a likelihood of success on the merits, the Court need not consider the equities and determine whether a temporary restraining order is in the public interest. *See, e.g., Arch Coal*, 329 F. Supp. 2d at 116 (citing *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1508 (D.C. Cir. 1986) (“absent a likelihood of success on the merits, equities alone will not justify an injunction”). Yet the equities here, should the Court consider them, clearly do not demonstrate that a temporary restraining order is in the public interest. In the antitrust context, “the primary public interests to be considered include (i) the public interest in effectively enforcing antitrust laws and (ii) the public interest in ensuring that the FTC has the ability to order effective relief if it succeeds at the merits trial.” *Sysco Corp.*, 113 F. Supp. 3d at 86.

As shown, the public interest in effectively enforcing the antitrust laws favors allowing this transaction to proceed because it is a necessarily output-enhancing, pro-competitive, pro-consumer transaction. The whole point of this transaction is to lower costs through vertical integration and enhance output through the application of Tronox's unique technical expertise to underperforming Cristal assets. Greater output produced at a lower cost is good for consumers and will permit the combined entity to compete more aggressively in the global marketplace, including against the threat of low-cost production from Chemours and Chinese producers.

Furthermore, the FTC cannot show that denying a temporary restraining order will prevent the FTC from ordering effective relief if it succeeds on the merits of its Part 3 proceeding. In its brief in support of its motion for a temporary restraining order and injunction, the FTC argues that it “would likely be impossible for the Commission to fully restore competition after Defendants integrate their businesses.” Br. at 44. But the FTC provides no convincing support for that contention. The TiO₂ industry runs on physical assets (TiO₂ plants), which can be *divested* in the event that the the parties consummate their transaction and the FTC later prevails in its administrative proceedings. According to the FTC’s own economic evidence presented in the Part 3 proceeding, unilateral output reduction and coordinated effects are likely only when the same producer owns both the Hamilton facility and the two Ashtabula facilities. Hill Tr., 1784:25-1785:7; 1826:7-1828:18. Thus, divesting one of these facilities would necessarily resolve the only objections to this transaction that the FTC has ever sought to prove. The FTC’s reference to information sharing, Br. at 44, is irrelevant because the FTC has never sought to prove that information about plants, costs, and customers would be sufficient to coordinate anticompetitive actions in the absence of actual ownership or control of relevant assets.

It is also unfair and inaccurate for the FTC to suggest that divestiture is a universally inadequate remedy for consummated, anticompetitive transactions. Br. at 43. Not only has the FTC itself argued for and prevailed in post-consummation divestiture in cases the FTC initially brought pre-transaction, but the FTC’s own 2017 study of the efficacy of divestiture remedies demonstrates that “[d]ivestitures of ongoing businesses are particularly successful” as “remedies [to] protect or restore competition.” FTC Press Release, Feb. 3, 2017, *FTC Releases Staff Study Examining Commission Merger Remedies Between 2006 and 2012*, quoting Maureen Ohlhausen,

Acting Chairman of the FTC, available at <https://bit.ly/2k9wvwT>. In the study, FTC staff “considered a merger remedy to be successful only if it cleared a high bar—maintaining or restoring competition in the relevant market.” FTC Report, *The FTC’s Merger Remedies 2006-2012*, at 1, available at <https://bit.ly/2yXOGhC>. Using that standard to evaluate 50 divestiture orders, “*all of the divestitures involving an ongoing business succeeded.*” *Id.* Even if the FTC could prevail in the administrative proceeding—and Tronox will demonstrate why that it not likely—a request for the remedy of divestiture still could provide a complete remedy in the context of this transaction.

Finally, the FTC has delayed its request to this Court for the extraordinary remedy of a temporary restraining order or preliminary injunction. The FTC’s ALJ admonished counsel for the FTC as long ago as December about the potential for waste and unfairness that would arise from waiting too long to file a request for an injunction in federal court. *See, e.g.*, 12/20/2017 Sched. Conf. Tr. at 20:22-25 (“I just -- it would just be an absurd waste to get to a point where we’re in the middle of a trial here and an injunction is granted. We will have to see what happens.”) (Ex. B); *see id.* at 17:7-12 (“But a skeptic could ask, then why the heck are we in here right now if that’s the Government’s position? Why do I have a complaint to deal with if you that’s your position? I’m just looking for some consistency.”) (Ex. B).

In the end, the FTC has not shown that equitable considerations justify a temporary restraining order, nor that a temporary restraining order is in the public interest. Accordingly, the FTC’s request for extraordinary relief should be denied.

In the alternative, the FTC has provided no compelling argument as to why a hearing on its motion for a temporary restraining order could not be combined with the hearing on the

FTC's motion for a preliminary injunction. Defendants have no objection to combining the hearings into a single proceeding at the Court's earliest available trial date.

* * *

Because the FTC has failed to demonstrate that it is likely to succeed on the merits of its challenge and because a temporary restraining order is not in the public interest, the FTC's motion for a temporary restraining order should be denied.

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Submitted By:

/s/ Michael F. Williams, P.C.
Michael F. Williams, P.C. (D.C. Bar No. 486190)
Karen McCartan DeSantis (D.C. Bar No. 420443)
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 879-5000
(202) 879-5200 (facsimile)
michael.williams@kirkland.com
karen.desantis@kirkland.com

ATTORNEYS FOR TRONOX LIMITED

James L. Cooper (D.C. Bar No. 442475)
Peter J. Levitas (D.C. Bar No. 441696)
Ryan Z. Watts (D.C. Bar No. 478395)
Katherine E. Clemons (D.C. Bar No. 1014137)
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Avenue, NW
Washington, D.C. 20001-3743
(202) 942-5000
(202) 942-5999 (facsimile)
james.cooper@arnoldporter.com
peter.levitas@arnoldporter.com
ryan.watts@arnoldporter.com
katherine.clemons@arnoldporter.com

**ATTORNEYS FOR NATIONAL
INDUSTRIALIZATION COMPANY
(TASNEE), THE NATIONAL TITANIUM**

**DIOXIDE COMPANY LIMITED (CRISTAL),
AND CRISTAL USA INC.**