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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

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COMMISSIONERS: **Joseph J. Simons, Chairman**
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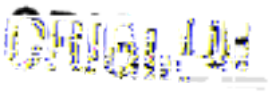

In the Matter of

Tronox Limited
a corporation,

National Industrialization Company (TASNEE)
a corporation,

The National Titanium Dioxide Company Limited (Cristal)
a corporation, And

Cristal USA Inc.
a corporation.

PUBLIC

Docket No. 9377

RESPONDENTS' APPEAL OF THE INITIAL DECISION

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RESPONDENTS' APPEAL OF THE INITIAL DECISION

Respondents Tronox Limited ("Tronox") and the National Titanium Dioxide Company Limited ("Cristal") respectfully request that the Commission narrow the geographic scope of the Proposed Order issued by Chief Administrative Law Judge Michael D. Chappell, which enjoins further discussions between Respondents in the six countries outside of North America where Cristal is seeking to divest titanium dioxide ("TiO2") production facilities.

The global geographic scope of the Proposed Order is not necessary under the record in this matter. The Complaint, the evidence at trial, and Chief Judge Chappell's findings were focused on the combination of Tronox's and Cristal's U.S. assets in North America, and the impact of that combination on the North American relevant market. The evidence and findings of fact do not imply that combining Tronox's and Cristal's ex-U.S. assets would have adverse effects on the North American market. In fact, Complaint Counsel argued and Chief Judge Chappell found that the competitive effects from combining Respondents' ex-U.S. assets was irrelevant for their competitive analysis.

As a result, the global injunction in the Proposed Order is not required to meet the Commission's enforcement goals. A global injunction harms the parties unnecessarily—the proposed transaction also includes an Australian company (Tronox) acquiring various foreign assets from a Saudi Arabian company (Cristal), including mines and smelting facilities on other continents. Complaint Counsel argued and Chief Judge Chappell found that the combination of those foreign assets is irrelevant to competition in North America, and eight foreign competition authorities whose jurisdictions are impacted by the combination of those foreign assets—and the procompetitive and output-enhancing impact of that combination in those foreign countries—have each cleared the transaction. The Commission should therefore amend the overbroad Proposed

Order, and limit that order to the scope of assets that were the focus of the evidence and findings in this case.

The geographic over breadth of Chief Judge Chappell's order coupled with its requirement that Tronox immediately return all Cristal confidential information will likely produce two unnecessary negative consequences:

- The Proposed Order would require Respondents to cease discussions with Complaint Counsel regarding a proposed remedy whereby Tronox would resolve any alleged competitive concerns through a "clean sweep" of all of Cristal's TiO2 manufacturing assets in North America plus all associated assets to a single purchaser, INEOS Enterprises ("INEOS"). The proposed remedy will result in absolutely no increase in concentration in the North American market.

- The Proposed Order would require Respondents to cease discussions about the acquisition of certain under- or non-performing production facilities outside the United States where Tronox intends to increase production (the Yanbu TiO2 production facility) or commence production (the Jazan smelter). If Tronox is successful in these endeavors, global customers will benefit through the increase of overall TiO2 supply.

Based on the foregoing, Respondents respectfully request that the Commission enter an order enjoining only the North American aspects of their proposed global transaction.

STATEMENT OF THE CASE

A. Summary of Proceedings

On February 21, 2017, Respondents entered an agreement by which Tronox, an Australian corporation, would acquire Crists-f T ъ ı

(meaning the United States and Canada). Though Respondents disagree with Chief Judge Chappell's findings, they have elected not to appeal those findings on their merits. Instead, Respondents merely request that the Commission modify the order Chief Judge Chappell has proposed so that it does not enjoin the worldwide transaction, but only the components of the transaction that would take place in the North American market found by Chief Judge Chappell.

Prior to the issuance of Chief Judge Chappell's decision on Dec

The entry of a narrowed order would also be entirely consistent with Chief Judge Chappell's findings that anticompetitive effects from the propo

of those jurisdictions, including competition authorities in Australia, China, New Zealand, Saudi Arabia, South Korea, Turkey, Columbia, and Europe (the European Commission). The European Commission, after thoroughly assessing the risks that the transaction would lead to coordinated

to competitive effects resulting from increased concentration in the alleged North American market.

For example, the Complaint alleges that "anticompetitive conscious parallelism" occurs among North American TiO2 producers "in the North American chloride TiO2 market, resulting in higher chloride TiO2 prices for customers." Complaint ¶¶47-49 (emphasis added). It also alleges that there is a "tight link between North American chloride TiO2 prices and North American production," and that "Tronox has a history of seeking to support North American chloride TiO2 prices by curtailing output in North America." Complaint ¶¶50-51 (emphasis added). Finally, the Complaint alleged that countervailing factors, such as TiO2 imports into North America from producers in other regions, would not mitigate the alleged anticompetitive effects: "TiO2 imports into North America, mostly sulfate TiO2, manufactured by smaller TiO2 companies, primarily from China, are limited and unlikely to provide a meaningful competitive restraint in the near future." Complaint ¶57.

Following issuance of the Complaint, the Commission assigned the case to Chief Administrative Law Judge D. Michael Chappell.

On May 18, 2018, Chief Judge Chappell heard opening statements from both sides and began hearing witness testimony. Testimony continued over the course of the next month for a total of sixteen days. Chief Judge Chappell heard closing arguments on September 14, 2018.

On July 4, 2018 and in the midst of the Part 3 proceedings, Respondents secured the final foreign regulatory approval required to consummate the transaction from the EC. The EC granted its approval pending Tronox's successful divestiture of its paper laminate business to a willing

purchaser with chloride-production capacity in Europe.[3] On July 16, 2018, Tronox announced that Venator Materials PLC ("Venator") had agreed to purchase its paper laminate business and that Venator had separately entered an agreement with Tronox in which Tronox could require Venator to purchase Cristal's two TiO2 plants in Ashtabula, Ohio in the event an injunction were to be issued against the proposed transaction. On August 20, 2018, the European Commission announced that it had issued its final approval to the proposed transaction, given that the divestiture of Tronox's paper laminate business to Venator was both adequate and complete.

Once the EC issued its final approval, the parties would have been free to consummate the proposed transaction because there was no federal court injunction in place. Hence, in the midst of the Part 3 proceedings, on July 10, 2018, Complaint Counsel sought a preliminary injunction in federal district court. The district court held an abbreviated hearing—just 8 hours of total presentation per side, including each side's three witnesses and opening and closing arguments. On September 5, 2018, the district court granted the FTC a preliminary injunction pending the final resolution of the Part 3 adjudication and appeals.

After the ruling by the district court, Respondents commenced remedy discussions with Complaint Counsel, wherein they offered to divest the entirety of Cristal's TiO2 manufacturing assets in North America plus all associated assets. As noted above, on July 16, 2018, Tronox announced that Venator had agreed to purchase Cristal's North American business operations in the event an injunction were to] A ɔ MJn t 2 dy " ɔ˜ φ ɔ n } m p. ڈ

currently has TiO2 production operations in North America. Acc

Cristal's North American facilities, resulting in increased output and intensified competition in the relevant market. Moreover, Respondents understand that a number of customers have expressed their support for the proposed divestiture remedy to Staff, further supporting the competitive virtues of this proposed remedy. Respondents and INEOS have endeavored to be open and transparent to enable Staff to undertake a thorough review of the proposed remedy to ensure it would not have anticompetitive effects.

As of the date of this Appeal, Respondents and INEOS continue to work cooperatively with Complaint Counsel to resolve any outstanding issues relating to the proposed divestiture. On December 4, 2018, Tronox announced that it had asked Chief Judge Chappell to certify to the Commission the proposed remedy transaction with INEOS. Tronox acknowledged that Staff was unwilling at that time to support or recommend the proposed remedy transaction. On December 7, 2018, Chief Judge Chappell denied Tronox's motion to certify to the Commission its proposed remedy transaction with INEOS, stating that the proposed remedy at that time was "not comprehensive" and was presented too close in time to the issuance of his Initial Decision.

into North America, and in fact, "[i]mports account for only 3% of North American chloride TiO2 sales." ID 28.

Chief Judge Chappell further found that Complaint Counsel had established that the proposed transaction would result in market share statistics in the North American chloride market that establish "a presumption that the effect of the Acquisition may be to substantially lessen competition." ID 32. That presumption was strengthened because the North American chloride market is vulnerable to coordinated conduct among competitors, and Chief Judge Chappell found that the proposed transaction would increase this vulnerability. ID 32-43.[4]

Chief Judge Chappell then reject

Jazan slagger." ID 56, F. 373 ("Tronox's February 21, 2017 agreement for the acquisition of Cristal does not include any provisions regarding a purchase of the Jazan slagger.").[5]

Similar points may be made about Tronox's proposed acquisition of the other ex-U.S. assets of Cristal. For example, there was no showing at trial that Tronox's acquisition of Cristal's mines in Brazil or Australia or production facilities in Saudi Arabia, Australia, Brazil, France, and the UK, will have any plausible anticompetitive effects on the North American chloride TiO2 market.

Accordingly, the Commission should amend the Proposed Order to clarify that (1) it applies only to the proposed transaction in North America and not to other agreements or transactions between Respondents; and (2) Respondents may retain each other's confidential information related to North America solely for the purpose of facilitating settlement discussion with Complaint Counsel concerning the proposed "clean sweep" divestiture to INEOS. At the very least, the Commission should clarify that nothing about the order applies to the Jazan Smelter, or other assets that are not part of the relevant market.

[5] [illegible]

in local or regional markets outside North America"). Nor can TiO2 customers, according to the Complaint, seek supply from outside of North America and import it themselves. "Import duties, shipping and handling costs, and other logistical challenges would render such efforts both uneconomical and impractical." Complaint ¶35.

Given the alleged immateriality of TiO2 imports into the North American market, the Complaint focused solely on North American producers in North America as the source of likely anticompetitive effects:

> Given relatively inelastic demand for chloride TiO2, the major North American TiO2 producers recognize that by limiting the supply of chloride TiO2 available in North America they are better able to stabilize or increase North American TiO2 prices. Several of these companies have curtailed or restricted their North American chloride TiO2 output over the past several years to prop up prices … by temporarily idling production lines, lowering production rates, or permanently closing plants. They have also allowed chloride TiO2 inventory to build up, exported North American production, and slowed or delayed production increases in an effort to increase or maintain higher prices.

Complaint ¶23; see also ¶¶52-53.[6] This alleged ability to affect price by controlling North American output occurs independently from any actions any TiO2 producer might take elsewhere in the world, because as shown, the Complaint alleged that imports into North America are negligible and thus immaterial to the competitive balance of North American supply.

The Complaint further claimed that this alleged North American output reduction would be more likely to occur as a result of further concentration among North American producers—

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[6] The Complaint's examples of output reduction allegedly aimed at increasing North American prices demonstrate the point. The Complaint, for instance, alleged that recently, "Tronox and Chemours have been particularly disciplined about their North American sales and production of TiO2. In 2015, Tronox reduced production at its Hamilton, Mississippi facility by temporarily shutting down a line, and Chemours closed its Edge Moor plant in Delaware and shut down a production line at its New Johnsonville, Tennessee plant." Complaint ¶24.

not the combination of any of Tronox's and Cristal's foreign assets. According to the Complaint's coordination theory, the proposed transaction would "consolidate[ ] the overwhelming majority of North American chloride TiO2 sales and production capacity in the hands of two large and disciplined TiO2 companies, [New] Tronox and Chemours" and would "enhance[ ] market transparency among the competitors that remain," thus increasing the "likelihood of coordination" among competing TiO2 producers in the North American market. Complaint ¶3. According to the Complaint's unilateral output reduction theory, "by doubling the size of Tronox's North American chloride TiO2 business, the Acquisition would increase the incentive and ability of Tronox … to discipline its output to influence North American chloride TiO2 supply and increase prices." Complaint ¶3. Both theories depend on an increase in concentration levels in North

In short, by the Complaint's own terms: only the North American chloride TiO2 market is relevant to the alleged anticompetitive effects here; imports into that market are negligible; competitive conditions in other markets are irrelevant; and the only theories of anticompetitive harm alleged (coordinated and unilateral output reduction) depend solely on the actions of North American producers in North America, not anywhere else in the world. Thus, the worldwide injunction proposed here finds no support in the original allegations in the Complaint that gave rise to this case.

B. The Evidence Complaint Counsel Presented At Trial Does Not Support A Worldwide Injunction.

Throughout trial, the evidence Complaint Counsel presented was consistent with the allegations of the Complaint and limited to the likelihood of anticompetitive effects in the North American chloride market as a result of increased concentration within that market. Complaint Counsel did not present evidence suggesting that other aspects of the proposed transaction would increase the likelihood of anticompetitive effects in North America. In fact, quite the opposite—in their effort to brush aside the procompetitive benefits of the transaction in other markets, Complaint Counsel argued strenuously that competitive effects from the transaction in markets outside North America are irrelevant

Based on this reasoning, Complaint Counsel explicitly argued that the efficiencies Respondents claimed could not be an adequate defense because those efficiencies "would not materially benefit the North American chloride TiO2 market"—"[i]ndeed, efficiencies outside of the relevant market are not cognizable." CC Post-Trial Br. at 79. Even though Respondents sought to show that output expansion outside of North America would inure to the benefit of North American customers, Complaint Counsel explicitly rejected that argument based on the fact that the alleged output expansion was outside North America.

Finally, Complaint Counsel's post-trial brief indicated that the Proposed Order should be narrowed from the language Complaint Counsel proposed and that Chief Judge Chappell accepted. Complaint Counsel argued that "the proper remedy [in this case] is an Order prohibiting any transaction between Tronox and Cristal that combines their businesses, except as may be approved by the Commission." CC Post-Trial Br. at 81 (emphasis added). Yet the Proposed Order contains no language authorizing Respondents to seek approval of any other combination of their businesses. CC Post-Trial Br. at Ex. A; ID 123-24.

All of the foregoing shows that the evidence Complaint Counsel presented at trial and the arguments on which Complaint Counsel relied demonstrated (at most) only a likelihood of anticompetitive effects arising from the North American components of the proposed transaction. There was neither evidence nor argument to suggest any anticompetitive effects in the relevant market from the combination of Respondents' foreign assets. Accordingly, none of the evidence suggests that the worldwide scope of the injunction contained in the Proposed Order bears a reasonable relation to the substantial likelihood of anticompetitive effects in North America that Complaint Counsel sought to prove at trial.

C. The Initial Decision Makes No Findings That Would Support A Worldwide Injunction.

Chief Judge Chappell's Initial Decision accepts most of the allegations in the Complaint

effects from combining Tronox's and Cristal's ex-U.S. assets. Nor did he reference any effect that non-North American production would have on coordinated conduct in the North American market.

other logistical and supply issues deter North American customers from importing chloride TiO2." ID 55.

To summarize, like the Complaint's allegations and Complaint Counsel's trial evidence, Chief Judge Chappell's Initial Decision provides no factual findings or other support for a worldwide injunction here. The only anticompetitive effects Chief Judge Chappell found to be likely as a result of the proposed transaction are limited to the market of chloride TiO2 sales in North America and result from the combination of Respondents assets in the United States. Chief Judge Chappell's only finding relating to the combination of the parties' ex-U.S. assets was that the competitive effects of combining those assets are irrelevant to the analysis of the North American market.

II. THE COMMISSION THEREFORE SHOULD AMEND THE PROPOSED ORDER.

The evidence does not support a worldwide injunction. Respondents therefore respectfully request that the Commission amend the Proposed Order so that it does not prevent the possibility of a transaction outside of North America that has been reviewed and approved by eight non-U.S. competition authorities and holds the real possibility of increased production of both feedstock and TiO2 pigment and hence, in Respondents' view, would be strongly procompetitive.

A. The Commission Should Enter An Injunction Limited To North American Assets Rather Than The Proposed Order.

As the foregoing analysis shows, at no point during these Part 3 proceedings did Complaint Counsel allege, nor did Chief Judge Chappell find, that a worldwide injunction of Tronox's proposed acquisition of Cristal was warranted. Yet, the Proposed Order would enjoin Tronox's entire acquisition of Cristal around the world, including non-North American components for which there is no evidence to support the likelihood of anticompetitive effects in North America.

That Proposed Order exceeds the Commission's admittedly broad authority to fashion an appropriate remedy. Blocking the entire worldwide transaction goes far beyond what is necessary to ensure competition within the relevant market.

Respondents propose instead an appropriately narrowed order that would enjoin only the North American aspects of the proposed transaction, while also requiring Respondents to take no action anywhere in the world that would impair the competitive viability of Cristal's North American assets (primarily the two TiO2 plants in Ashtabula, Ohio and the research and development facility near Baltimore, Maryland). Unlike the Proposed Order, Respondents' Proposed Order is reasonably related to the anticompetitive effects that Chief Judge Chappell found would likely result from the proposed transaction. Those effects are limited to the actions of North American producers acting within the North American market.

B. The Proposed Order's Requirement That Tronox Return All Cristal Confidential Information Would Inhibit Ongoing Settlement Discussions.

Settlement discussions between Respondents and staff have continued with substantial progress. Respondents have presented a credible structural remedy based on a "clean sweep" divestiture to a well-capitalized, seasoned chemical industry participant with a proven track record in other FTC remedy transactions. Complaint Counsel is investigating to ensure that the proposed remedy addresses the competitive concerns in the relevant market. This process takes time and resources, and Respondents have invested ample amounts of both in order to respond to the staff's information requests. In the midst of this effort, a prolonged government shutdown occurred which also delayed the process.

Despite those challenges, Respondents and Complaint Counsel are moving closer to ironing out all of the details required to fashion a satisfactory structural remedy. This measured

progress gives Respondents optimism that they will eventually reach a mutually-acceptable resolution with Complaint Counsel. But that process takes time. The Proposed Order, however, places another impediment in the path towards cooperative resolution.

C. The Commission Should Clarify That No Part Of The Order Applies To Respondents' Separate Agreement Regarding The Jazan Smelter.

At the very least, the Commission should clarify in its final order that no injunction applies to Respondents' separate agreement regarding the rehabilitation and future ownership of Cristal's smelter in Jazan, Saudi Arabia. Complaint Counsel was very clear in post-trial briefing that Respondents' option agreement and technical services agreement are "not even part of this proposed transaction," and therefore are beyond the scope of this case, which provided "an independent reason [Respondents'] Jazan claim should be rejected." CC Post-Trial Br. at 77-78. Chief Judge Chappell agreed with Complaint Counsel and made a specific factual finding that "Tronox's February 21, 2017 agreement for the acquisition of Cristal does not include any provisions regarding a purchase of the Jazan slagger." ID 112, F.373; see alsoID 56 ("Respondents' assertions as to the Jazan slagger are particularly speculative, given that the Acquisition at issue in this proceeding does not even include an acquisition of the Jazan slagger.").

Yet the Proposed Order restricts only Section A of the injunction to the "Proposed Acquisition Agreement" of February 21, 2017. ID 123. The remainder of the order requires Respondents to cease and desist from any combination of their businesses and requires Respondents to "return all confidential information received, directly or indirectly, from one another," without being restricted to the "Proposed Acquisition Agreement." ID 124. Thus, Sections B, C, and D as currently drafted would plausibly restrict Respondents from continuing to perform under the separate agreements related to the Jazan smelter. Such restrictions bear no

reasonable relation to the likely anticompetitive effects that Complaint Counsel urged or that Chief Judge Chappell found in this case. Alternatively, if it is the Commission's position that the Proposed Order as written does not apply to Respondents' separate agreements regarding the Jazan smelter, then the Proposed Order is unclear and imprecise and must be modified.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Commission enter the Proposed Order attached as Exhibit A as the Final Order resolving this Part 3 proceeding.

January 28, 2019

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

Michael F. Williams, P.C.
Matthew J. Reilly, P.C.
Karen M. DeSantis
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
matt.reilly@kirkland.com

ATTORNEYS FOR TRONOX LIMITED

CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2019 I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580
ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I also certify that I caused the foregoing document to be served via email to:

Chuck Loughlin
Dominic Vote
Federal Trade Commission
600 Pennsylvania Ave. NW
Washington, DC 20580
cloughlin@ftc.gov

James L. Cooper
Seth Wiener
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Ave, NW
Washington DC 20001
james.cooper@arnoldporter.comDo

CERTIFICATE FOR ELECTRONIC FILING

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EXHIBIT A

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Michael Becker
Kirkland & Ellis LLP
mbecker@kirkland.com
Respondent

Karen McCartan DeSantis
Kirkland & Ellis LLP
kdesantis@kirkland.com
Respondent

Megan Wold
Kirkland & Ellis LLP
megan.wold@kirkland.com
Respondent

Michael DeRita
Kirkland & Ellis LLP
michael.derita@kirkland.com
Respondent

Charles Loughlin
Attorney
Federal Trade Commission
cloughlin@ftc.gov
Complaint

Cem Akleman
Attorney
Federal Trade Commission
cakleman@ftc.gov
Complaint

Thomas Brock
Attorney
Federal Trade Commission
TBrock@ftc.gov
Complaint

Krisha Cerilli
Attorney
Federal Trade Commission
kcerilli@ftc.gov
Complaint

Steven Dahm
Attorney
Federal Trade Commission
sdahm@ftc.gov
Complaint

E. Eric Elmore
Attorney
Federal Trade Commission
eelmore@ftc.gov
Complaint

Sean Hughto
Attorney
Federal Trade Commission

shughto@ftc.gov
Complaint

Joonsuk Lee
Attorney
Federal Trade Commission
jlee4@ftc.gov
Complaint

Meredith Levert
Attorney
Federal Trade Commission
mlevert@ftc.gov
Complaint

Jon Nathan
Attorney
Federal Trade Commission
jnathan@ftc.gov
Complaint

James Rhilinger
Attorney
Federal Trade Commission
jrhilinger@ftc.gov
Complaint

Blake Risenmay
Attorney
Federal Trade Commission
brisenmay@ftc.gov
Complaint

Kristian Rogers
Attorney
Federal Trade Commission
krogers@ftc.gov
Complaint

Z. Lily Rudy
Attorney
Federal Trade Commission
zrudy@ftc.gov
Complaint

Robert Tovsky
Attorney
Federal Trade Commission
rtovsky@ftc.gov
Complaint

Dominic Vote
Attorney
Federal Trade Commission
dvote@ftc.gov
Complaint

Cecelia Waldeck
Attorney

jkim3@ftc.gov
Complaint

Andrew Pruitt
Attorney