
case. And the fact that discovery is over and the case is on the threshold of trial is a reason to proceed—not suddenly stop.

Respondents' second "recent development"—their "ongoing" discussions with the European Commission—also provides no support for direct settlement discussions with Commissioners in contravention of Commission rules¹¹. As an initial matter, contrary to any suggestion in the motion, the EC's investigation is not set to be resolved by May 16, 2018.

violation of established rules—because of ~~and~~ of one or more Commissioners undermines the proceeding's role as ~~liber~~ative, bipartisan, and expert agency function.

B. There is No “Substantial Harm” from Proceeding with the Part III Litigation

Respondents' disregard of the Commission's ~~rules~~ is more than enough reason to deny their request. But it is worth noting that Respondents' claims of “substantial harm”—i.e., that continuing with the litigation will entail “needless cost and ~~enormous~~ waste,” and that there is “no likely prospect” of a Commission decision by March 2019—are baseless.¹⁶ This motion is just the latest example of Respondents' repeated efforts to avoid or delay a trial on the merits while ignoring applicable rules and law.

To start, Complaint Counsel disputes the contention that a final Commission decision by March 2019 is unlikely. But if that were truly Respondents' concern, the logical course would be to request that the Commission (or the ALJ as appropriate) expedite, rather than stay, proceedings. Yet Respondents have never asked the Commission or the ALJ to expedite or advance any of the pre-hearing or post-hearing deadlines.¹⁷ Instead, Respondents' request for a stay would more likely cause the very delay they say they want to avoid.

Respondents' complaints also cannot be squared with their professed interest in demonstrating “in any forum, at any time” that their transaction is procompetitive.¹⁸ This echoes statements Respondents have made previously, professing only to “wait on the merits.”¹⁹

¹⁶ Mot. at 3-5.

¹⁷ Nor have Respondents ever asked Complaint Counsel to file such a motion to shorten any deadlines, which is contemplated by the Commission's rules. See Rule 3.1 (“The Commission, at any time, or the Administrative Law Judge at any time prior to the filing of his or her initial decision, may, with consent of the parties, shorten any time limit prescribed by these Rules of Practice.”).

¹⁸ Mot. at 2.

¹⁹ ALJ Sch. Conf. Tr. at 11 (Dec. 20, 2017) (Counsel for Tronox: “[W]e would like to just get to the trial on the merits, whether it's in front of Your Honor -- and I understand the schedule there -- or in front of a [federal court] judge.”).

The hearing beginning next week—far from a waste—is the trial on the merits

Respondents say they seek. This no reason to delay it.

Finally, Respondents' current complaints should be understood in the context of their efforts from the outset of this litigation to stall delay. For example, at the start of this case, Tronox, rather than moving promptly to defend this case on the merits, wasted weeks in pursuing a frivolous and procedurally baseless collateral federal action against the Commission.²⁰ Respondents also served almost no discovery for the first three weeks of the Part III discovery period, later put depositions on hold for three weeks, and, even before this motion, asked Complaint Counsel to agree to a two-month stay. Respondents did not even seek expedited treatment of this motion, despite the looming trial date.²¹ Given this pattern, Respondents' claims of substantial harm stemming from purported timing exigency carry no weight.

II. Respondents' "Alternative" Requested Relief is Also Procedurally Improper and Misunderstands the Nature of Part III and Preliminary Injunction Proceedings

In the "alternative" to a stay and removal of the Part III case, Respondents request that the Commission "reconsider" whether to file a preliminary injunction action in federal court.²² This request is also untethered from the Commission's rules.

The Part III rules provide a specific process for seeking Commission review of defined aspects of the litigation. Specifically, the rules provide for interlocutory appeals of certain rulings of the ALJ, see Rule 3.23, and for motions to the Commission for summary judgment on

²⁰ Complaint, Tronox Limited v. FTC Civ. Action No. 1:18cv10-SA-RP (N.D. Miss. Jan. 23, 2018). Tronox did not file the federal complaint until three weeks after its attorneys expedited applications to appear in the federal court. And Tronox then did not properly serve the complaint for another three weeks. That fact, along with the fact that Tronox provided "no authority to support its request for an expedited hearing," prompted the federal court to twice deny Tronox's motions for an expedited schedule. *Tronox Limited v. FTC Civ. Action No. 1:18cv10-SA-RP* (N.D. Miss. Jan. 25, 2018); *Order, Tronox Limited v. FTC Civ. Action No. 1:18cv10-SA-RP* (N.D. Miss. Feb. 2, 2018). Tronox eventually voluntarily dismissed the federal action.

²¹ As a result, Complaint Counsel's response to this motion is not due until May 17, 2018. Understandably, with the hearing looming, the ALJ has asked about the impact of the pending motion. Complaint Counsel files this response early to aid the Commission if it wants to address the motion in an expedited fashion.

²² Mot. at 2, 5.

issues being adjudicated. See Rule 3.24. The rules nowhere provide for Respondents to move the Commission to weigh in on Complaint Counsel's approach to litigating the case, including when or whether to file a preliminary injunction case in federal court.

In this matter, the Commission has already authorized staff to seek a preliminary injunction in federal court, if necessary. No other Commission action is required with respect to that issue, and FTC staff is prepared to effect that authorization if the need arises. To date, and consistent with past practice,²³ FTC staff has not done so because the EC proceedings prevent Respondents from closing until at least, as noted above. FTC staff has thus avoided the expense of a duplicative or overlapping proceeding that may never be necessary.

While the foregoing procedural deficiencies are dispositive, it is worth noting that Respondents' request fundamentally misunderstands the nature of a federal preliminary injunction action and a Part III proceeding. In particular, Respondents assert that the preliminary injunction action will "fully resolve this matter."²⁴ While many merger challenges brought by the FTC require expedited temporary relief in the form of a federal preliminary injunction, that relief is merely designed to protect the status quo while the administrative proceeding on the merits takes place. See, e.g., *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 726-27 (D.C. Cir. 2001) (Congress enacted the FTC preliminary injunction provision to "preserve [the] status quo" until the administrative proceeding). Federal preliminary injunction proceedings are not themselves trials on the merits. See, e.g., *FTC v. Sysco Corp.*, 13 F. Supp. 3d 1, 21-22 (D.D.C. 2015) (preliminary injunction prevents the merger pending "adjudication of the merger's legality" in the administrative proceeding). The Respondents' request for a federal preliminary

²³ When there was no imminent threat that a merger could close, and a preliminary proceeding on the

injunction action to “resolve this matter” makes no sense. The function of such a federal court action is merely to preserve the status quo pending the administrative trial; it is not the “trial on the merits.”

Moreover, Respondents never articulate why they think a federal court preliminary injunction decision is capable of being dispositive, an administrative trial on the merits is not. This disrespectful attitude toward the ALJ’s initial decision on the merits, which Respondents apparently believe is not a “fair day in court,”²⁵ lacks any merit, as does their disregard for the Commission’s role.

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Dated: May 11, 2018

Respectfully submitted,

/s/ Dominic Vote

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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2018, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

May 11, 2018

By: /s/Blake Risenmay
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