

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

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

COMPLAINT COUNSEL'S PRE-TRIAL BRIEF

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 6

 A. Background 8

 B. The Proposed Acquisition Is Presumptively Unlawful in a Market for Sales of Chloride TiO₂ to North American Customers..... 9

 1. The Relevant Product Market is Chloride TiO₂ 10

 2. The Relevant Geographic Market is North America 17

 3. The Proposed Acquisition Is Presumptively Unlawful Because It Would Substantially Increase Concentration In The Relevant Market 23

 4. ~~B.4 North Am4Relt f09r#0~~ 10

TABLE OF AUTHORITIES

Cases

Brown Shoe Co. v. United States 370 U.S. 294 (1962)passim
California v. Am. Stores 495 U.S. 271 (1990).....7.....
Chicago Bridge & Iron Co. v. FTC 534 F.3d 410 (5th Cir. 2008).....7..
FTC v. Arch Coal 329 F. Supp. 2d 109 (D.D.C. 2004).....10..
FTC v. CCC Holdings Inc 605 F. Supp. 2d 26 (D.D.C. 2009).....passim
FTC v. Elders Grain, Inc., 868 F.2d 901 (7th Cir. 1989).....passim
FTC v. H.J. Heinz 246 F.3d 708 (D.C. Cir. 2001)passim

FTC

are no substitutes for TiO₂. And North American customers cannot meaningfully substitute TiO₂ manufactured through the sulfate process ("sulfate TiO₂") for chloride TiO₂. Chloride TiO₂ provides superior opacity, durability, and whiteness compared to sulfate TiO₂ and constitutes more than [REDACTED] % of North American TiO₂ purchases. Moreover, the evidence shows that North American customers have not and will not switch to sulfate TiO₂ to any meaningful degree, even in the face of dramatic price increases for chloride TiO₂.

{ }

[REDACTED]

[REDACTED]

[REDACTED]

their rivals' competitive behavior—including detailed information on competitors' pricing, operating costs, available capacity, and inventories. Cristal is the only major producer of TiO₂ that is not a public company and thus does not publicly announce its TiO₂ revenue, pricing changes, and inventory levels on a quarterly basis. After the merger, such information will become available to the industry through Tronox's detailed earnings statements.

By further facilitating coordination, the Acquisition will benefit not only Tronox, but also will benefit Tronox's competitors. Indeed, the day after Respondents publicly announced the Acquisition, Peter Huntsman, the chairman of former parent company of Venator, one of Tronox's direct competitors, emailed Tronox Chairman Tom Casey to congratulate him on the acquisition. Tom Casey responded that the Acquisition would be good not only for Tronox, but for competitors Huntsman, Chemours and Kronos as well "very happy that we were able to put [the acquisition] together since I think it will be very good for [Tronox's] shareholders – and if today's market reaction is an indication, yours, and Chemours' and Kronos' too." PX1045 at 1 (Tronox). An acquisition that is good for Tronox's competitors, though, is assuredly not likely to benefit customers or consumers.

In addition to increasing the likelihood of coordination, the Acquisition will also increase Tronox's incentive and ability to unilaterally withhold output in order to drive up industry prices. For years, Tronox has consistently and openly pursued a strategy of output management by shuttering plants and curtailing production:

And then the question is when will [prices] turn? We're addressing that by managing our production so that inventories get reduced to normal or below normal levels. And when that happens, prices will rise.

We -- from what we see with Chemours and Huntsman and presumably the others as well, they're doing the same thing. We see them acting in the same way." PX9005 at 10 (Tronox Q3 2015 Earnings Call).

[REDACTED]

the relevant market is primed for coordination, that the Acquisition makes coordination more likely, and that the Acquisition also increases Tenox's incentives to suppress output on its own—bolsters that presumption.

Section 7 of the Clayton Act prohibits mergers or acquisitions “the effect of [which] may be substantially to lessen competition, or to create a monopoly” in any line of commerce or . . . activity affecting commerce in any part of the country.” 15 U.S.C. § 18. “As the statutory language suggests, Congress enacted Section 7 to curtail anticompetitive harm in its incipiency.” Polypore, 150 FTC at *8 (citing Chicago Bridge & Iron Co. v. F.T.C., 534 F.3d 410, 423 (5th Cir. 2008)). “Congress used the words ‘may be substantially to lessen competition’ . . . to indicate that its concern was with probabilities, not certainties.” Heinz, 246 F.3d at 713 (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962)). Staples 2016, 190 F. Supp. 3d at 115; see California v. Am. Stores, 495 U.S. 271, 284 (1990). Section 7 itself creates a relatively expansive definition of antitrust liability: To show that a merger is unlawful, a plaintiff need only prove that its effect ‘may be substantially to lessen competition.’”). As a result, “certainty, even a high probability, need not be shown.”

TiO₂ in North America from

over \$4,000 a ton, it is true now.” PX9012 at 8 (Tronox Q4 2013 Earnings Call).²¹

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Likewise, { [REDACTED] } also recognize the important differences between chloride and sulfate TiO₂, and recognize that customers in North America do not

Consistent with the record described above, Complaint Counsel's economic expert, Dr. Nicholas Hill, conducted an empirical analysis and found [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } Dr. Hill will more fully describe his economic analysis of the relevant product market during trial.

2. The Relevant Geographic Market is North America.

"The boundaries of the relevant geographic market, like the boundaries of the relevant product market, depend on reasonable interchangability and cross-elasticity of demand." Polypore, 150 FTC at *16 (citing Brown Shoe, 370 U.S. at 336). "Where suppliers can set prices based on customer location, and customers cannot avoid targeted price increases through arbitrage, suppliers may be able to exercise market power over customers located in a particular geographic region, even if a price increase to customers located in other geographic regions would be unprofitable." Polypore, 150 FTC at *16 (citing Merger Guidelines § 4.2.2).

Here, the relevant geographic market is centered around the locations of chloride TiO₂ customers in North America.²² See Merger Guidelines § 4.2.2. This geographic market includes all sales of chloride TiO₂ in North America—including imports by foreign suppliers—even

²² North America is defined as the United States and Canada. See supra note 1.

though imports are limited{ [REDACTED]

[REDACTED] } As the evidence indicates, TiO2 producers price regionally, on a delivered basis, a hypothetical monopolist controlling all sales of chloride TiO2 to North American customers would not be defeated by those customers turning outside of North America to purchase chloride TiO2. As such, the geographic market is properly defined around North American customers. See Polypore, 150 FTC at *16; Merger Guidelines § 4.2.2.

Notably, TiO2 producers price on a delivered basis, and North American customers obtain nearly all of the TiO2 they consume through deliveries by suppliers to the customers' North American locations{ [REDACTED]

[REDACTED]

[REDACTED] }

{ [REDACTED] } And

prices in North America than in other regions{ [REDACTED]

[REDACTED] }

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

x

x

[REDACTED]

x

[REDACTED]

x

}

Customers also recognize the regional nature of their chloride TiO₂ purchases. *See* PX8003 (Young (Sherwin-Williams) Decl.) ¶ 27 (“North American TiO₂ prices are traditionally higher than other regions due to supply and demand conditions. . . . In other regions, customers use primarily sulfate TiO₂, which has more supply options, such as sulfate TiO₂ from China or Eastern Europe. TiO₂ prices tend to fluctuate more in other regions than in North America, and can be higher than North American prices when supply is tight.”); { [REDACTED] }; PX8000 (Malichky (PPG) Decl.) ¶ 7 (“Even as a global purchaser, though, pricing and volume for TiO₂ purchase[s] are negotiated and determined regionally. Between 2011 and 2016, PPG's price for TiO₂ in the United State[s] tended to be more stable, and higher, on average, than in other parts of the world.”).

Unsurprisingly in light of the foregoing, over at least a four-year period, Respondents recognized that prices for customers in North America were higher, by large amounts, than anywhere else in the world:

- x { [REDACTED] }
- x In March 2013: “Markets in North America are still under pressure to decline since they are so much higher than other regions of the world, however, we are trying to hold on to the current price levels.” PX2030 at 3 (Cristal);
- x { [REDACTED] }
- x [REDACTED]

X

[REDACTED]

X

[REDACTED]

Consistent with Respondents' ordinary course documents, Dr. Hill analyzed pricing data

{ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] }

Moreover, customers have been unable to use arbitrage to defeat the higher prices in North America. { [REDACTED]
[REDACTED] } Tronox admits the cost of shipping and duties adds at least { [REDACTED] }% to the cost of imported TiO2 in the United States. { [REDACTED] }. These additional costs, which likely exceed { [REDACTED] }, make arbitrage particularly difficult. { [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

²⁸ In the second quarter of 2017, prices in other regions began to exceed North American prices. The higher price levels in other regions coincided with reduced availability of TiO2 in those regions. In

competitive.” *Heinz*, 246 F.3d at 716; *see Staples*, 190 F. Supp. 3d at 128; *Sysco*, 113 F. Supp. 3d at 52.

An acquisition is presumptively anticompetitive if it increases the HHI by more than 200 points and results in a “highly concentrated market” with a post-acquisition HHI exceeding 2,500. *See Staples 2016*, 190 F. Supp. 3d at 128; *Sysco*, 113 F. Supp. 3d at 52-53; *see also Merger Guidelines* § 5.3. This transaction would *triple* the increase that renders an acquisition presumptively unlawful. Post-merger, the combined firm would have a North American market share of {█}% of North American sales of chloride process TiO₂, and that the acquisition would increase the HHI by over 700 points, to a level of over 3000.

These market share statistics demonstrate this Acquisition is presumptively anticompetitive. *See Staples*, 190 F. Supp. 3d at 128; *Sysco*, 113 F. Supp. 3d at 52-53; *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 28 (D.D.C. 2017). “The presumption can only be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.” *Merger Guidelines* §5.3. Courts consistently enjoin transactions with high changes in concentration, like this Acquisition. *E.g.*, *Heinz*, 246 F.3d at 716 (HHI increase of 510 “creates, by a wide margin, a presumption that the merger will lessen competition.”).

4. The Documented History of Coordination in the TiO₂ Industry Strengthens the Presumption.

The reason that Section 7 of the Clayton Act presumes a significant increase in concentration to be unlawful is that merger law “rests upon the theory that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels.” *Heinz*, 246 F.3d at 715 (internal quotation marks omitted). Coordination includes conduct ranging from outright collusion, to tacit coordination, to “parallel accommodating conduct,” which “includes situations in which each rival’s response to competitive moves made by others is individually

rational . . . but nevertheless emboldens price increases and weakens competitive incentives to reduce prices.” *Merger Guidelines*, §7.0.

“Tacit coordination ‘is feared by antitrust policy even more than express collusion, for tacit coordination, even when observed, cannot easily be controlled directly by the antitrust laws. *It is a central object of merger policy to obstruct the creation or reinforcement by merger of such oligopolistic market structures in which tacit coordination can occur.*” *Heinz*, 246 F.3d at 725 (emphasis added) (quoting 4 Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, *Antitrust Law* ¶ 901b2, at 9 (rev. ed. 1998)).

The conclusions that the courts have drawn in the two previous TiO₂ price fixing cases confirm the strong presumption that this merger will increase the likelihood of coordination. In *Valspar*, the U.S. Court of Appeals for the Third Circuit found insufficient evidence of overt price fixing by TiO₂ producers, but highlighted the oligopolistic market conditions that underpin Complaint Counsel’s concern that this Acquisition will result in reduced competition: “There is no dispute that the market was primed for anticompetitive interdependence and that it operated in that manner. *Valspar*’s expert evidence confirming these facts mastered the obvious.” 873 F.3d at 197. In *In re Titanium Dioxide*, the District Court concluded that the plaintiffs had provided enough evidence to support their allegations of a TiO₂ price fixing conspiracy:

Having carefully considered the sheer number of parallel price increase announcements, the structure of the titanium dioxide industry, the industry crisis in the decade before the Class Period, the Defendants’ alleged acts against their self-interest, and the myriad non-economic evidence implying a conspiracy, this Court finds that the Plaintiffs put forward sufficient evidence tending to exclude the possibility of independent action. 959 F. Supp. 2d at 830.

This well-documented history of coordination described by the courts builds on the inferences to be drawn from the market share statistics, and demonstrates that the competitive concerns in this case are particularly strong. Indeed, as the 7th Circuit observed: “The theory of

competition and monopoly that has been used to give concrete meaning to section 7 teaches that an acquisition which reduces the number of significant sellers in a market already highly concentrated and prone to collusion by reason of its history and circumstances is unlawful *in the absence of special circumstances.*” *Elders Grain*, 868 F. 2d. at 906 (emphasis added).

C. Evidence of Likely Harm Bolsters the Presumption.

Instead of the “special circumstances” required by *Elders Grain*, there is extensive evidence that the Acquisition would likely result in harm to competition. Whether in coordination with the remaining competitors—Chemours, Kronos and Venator—or acting unilaterally, the merged firm would likely succeed in curtailing output in order to raise prices or prevent them from falling. This “additional proof that the merger would harm competition” further strengthens the presumption, thus increasing the burden Defendants must shoulder on rebuttal. *Sysco*, 113 F. Supp. 3d at 71-72; *see id.* at 72 (“The more compelling the [FTC’s] *prima facie* case, the more evidence the defendant must present to rebut [the presumption] successfully.”) (*quoting Baker Hughes*, 908 F.2d at 991).

In this case, there is direct evidence that the merger is likely to lead to anticompetitive effects. The Court need not guess whether Tronox intends to raise prices after the merger: Tronox has explicitly stated that it intends to do so. Tronox met with PPG, one of Tronox and Cristal’s largest customers, and explained that it intends to raise PPG’s North American chloride TiO₂ prices after the merger because “Cristal is selling TiO₂ too low in the market; [] they’re undercutting the market.” PX7025 (Malichky (PPG) Dep. at 146). The message from Tronox was clear: “‘We’re going to consolidate the price,’ meaning that the Cristal price is going to go up.” *Id.* That Tronox believes the merger will result in higher prices is further confirmed in its own internal documents. Ian Mouland, a senior Tronox sales executive who participated in the meeting with PPG, { [REDACTED]

[REDACTED]
 [REDACTED] }
 Finally, other TiO₂ suppliers have similarly acknowledged the Acquisition's likely effect on competition, noting that it will contribute to { [REDACTED] }²⁹ and "continued capacity constraints."³⁰ This evidence, as well as the extensive evidence described below, both strengthens the presumption that the Acquisition will lead to anticompetitive effects and serves as direct evidence of likely effects.

1. The Proposed Acquisition Would Increase the Likelihood of Coordination in an Already Vulnerable Market.

"[T]he market for titanium dioxide is an oligopoly. Titanium dioxide is a commodity-like product with no substitutes, the market is dominated by a handful of firms, and there are substantial barriers to entry." *Valspar*, 873 F.3d at 190. Indeed, the Acquisition would leave Tronox and Chemours in control of { [REDACTED] }% of North American sales, and over { [REDACTED] }% of North American capacity. "With only two dominant firms left in the market, the incentives to preserve market shares would be even greater, and the costs of price cutting riskier, as an attempt by either firm to undercut the other may result in a debilitating race to the bottom." *CCC Holdings*, 605 F. Supp. 2d at 67.

Under the *Merger Guidelines*, a market is more vulnerable to coordination where: 1) firms are aware of their mutual interdependence; 2) there are only a small number of competing firms; 3) the products are relatively homogenous; 4) the market is transparent enough for firms to monitor their competitors' behaviors; 5) price elasticity of demand is low; and/or 6) there is a past history of actual or attempted coordination among the firms. *See Merger Guidelines* §7.2. This market is vulnerable to coordination, whether by express collusion, tacit collusion, or

²⁹ [REDACTED]

³⁰ PX3011 at 38 (Kronos).

Additionally, the Acquisition will likely increas

Titanium Dioxide courts have cited. [REDACTED]

[REDACTED]

[REDACTED] { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

will hear about Tronox’s efforts to reduce production in 2015. Tronox has contended that this was an effort to decrease its high levels of inventory and save money. But Tronox could have cut price to sell more product into the market. For example, in 2015, Tronox had the opportunity to gain additional business with { [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] } Far from the “bare-knuckle” competition Tronox’s lawyers are sure to describe, Tronox chose instead to cut production and avoid provoking its competitors, { [REDACTED]
[REDACTED] }

At every turn, Tronox opts not to undercut competitors, even where it has product available to sell to its customers.

- x [REDACTED]
- x [REDACTED]
- x [REDACTED]
- x [REDACTED]

Tronox’s former CEO plainly (and publicly) summarized their approach: “As you saw, we have not gained market share by trying to reduce price. We don't think that's the appropriate strategy going forward” PX9010 at 5 (Tronox Q2 2014 Earnings Call). And Tronox has

publicly recognized coordinated actions taken with its competitors to reduce output and maintain prices:

I can tell you that . . . last year, Huntsman [now Venator], . . . Cristal, Chemours, and we all lowered our plant utilization rates. And we all talked about declining



Removing Cristal as a competitor will eliminate opportunities for it to compete aggressively and to disrupt Tronox's strategy of pricing discipline and avoiding driving down price. Fundamentally, Tronox has adopted a strategy that is consistent with facilitating coordination among its rivals. The Acquisition would place even more capacity under its purview and eliminate a rival that, at times, has refused to cooperate. And it would eliminate a competitor for whom customers "might turn for succor if the other sellers tried to jack prices above the competitive level." *Elders Grain*, 868 F.2d at 907.

2. The Proposed Acquisition Would Increase Tronox's Incentive to Unilaterally Reduce Output.

In addition to increasing the likelihood of coordinated effects, the Proposed Acquisition will increase Tronox's incentive and ability to reduce TiO₂ output.³⁷ Tronox has a history of curtailing production and taking capacity offline in order to support higher chloride TiO₂ pricing. As discussed below, the Proposed Acquisition will increase Tronox's incentive to engage in this unilateral output suppression. The Proposed Acquisition will also increase Tronox's ability to unilaterally suppress output, both by giving Tronox more capacity to manage, and by eliminating an independent com()TSecurity offlinter

After operating at very low rates of capacity utilization during 2012, { [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] }

In 2015, Tronox curtailed TiO₂ production at its Hamilton and Kwinana plants, as well as reduced feedstock production, in order to “balance the market,” even though these curtailments caused it to absorb about \$30 million in fixed costs. PX9003 at 11 (Tronox Q1 2016 Earnings Call). Tronox’s then CEO explained its rationale:

- x “It is our view that an upward move in Pigment selling prices will be predicated on a reduction of supply in the pigm

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } In

a recent investor presentation, Kronos observed that “structural improvements” drove a \$250 million increase in EBITDA and that “baseline TiO2 capacity has been permanently reduced with limited near-term ability to increase capacity.” PX3011 at 15, 38.

The Proposed Acquisition will increase Tronox’s incentives to withhold TiO2 output in North America. Dr. Hill modeled how the Proposed Acquisition will affect Tronox’s incentives regarding production. {

}

D. Respondents Cannot Rebut The Strong Presumption Of Illegality.

With the presumption of illegality firmly established, the burden shifts to Defendants to rebut the presumption by “produc[ing] evidence that ‘shows that the market-share statistics [give] an inaccurate account of the [acquisition’s] probable effects on competition’ in the

42 [REDACTED]

relevant market.” *Heinz*, 246 F.3d at 715 (quoting *United States v. Citizens & S. Nat’l Bank*, 422 U.S. 86, 120 (1975)); *Staples 2016*, 190 F. Supp. 3d at 115; *Sysco*, 113 F. Supp. 3d at 23.⁴³

Here, Defendants carry a heavy burden given the strength of the *prima facie* case. *See Staples 2016*, 190 F. Supp. 3d at 115 (“The more compelling the *prima facie* case, the more evidence the defendants must present to rebut it successfully.”) (quoting *Baker Hughes*, 902 F.2d at 991).

As shown *supra*, significant evidence of competitive harm—in a market pervaded by coordinated conduct—corroborates the presumption. Respondents will be unable to rebut the presumption, as neither the possibility of entry

guarded by Western producers.” PX3011 at 19 (K

Similarly, recent Tronox strategy documents observe that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } In addition, Tronox documents indicate [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The difficulty Chinese producers face in producing chloride TiO2 is illustrated by the experience of China's largest TiO2 producer, Lomon Billions. Although Lomon Billions successfully operates sulfate TiO2 facilities, chloride TiO2 plants are significantly more complex, and Lomon Billions has struggled to its existing chloride TiO2 facility [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Respondents will likely point to Lomon Billions publicly announced plans to build additional chloride capacity over the next few years [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Chinese manufacturers have also been unable to produce chloride TiO2 that meets the quality requirements of North American customers for anything but low-end applications, and it

46 [REDACTED]

[REDACTED] Tronox and Cristal documents refer to the ongoing dispute between Lomon Billions and Ti-Cons based on Lomon Billions' claim that the inadequacy of the Ti-Cote technology is to blame for the "failure" of its chloride plant. PX2072 at 23 (Cristal).

[REDACTED]

Moreover, import duties and the high cost of overseas shipping are also barriers to Chinese exporters expanding their sales in North America [REDACTED]

[REDACTED] }⁴⁸

Finally, given recent reductions in Chinese TiO2 production capacity and increasing demand for TiO2 within China, it is uncertain whether there will be any Chinese TiO2 available for export to North America in the years to come. Over the past several years, many of the older TiO2 plants in China have closed due to high positions, government initiatives to address pollution, and limited availability of feedstocks, and more are projected to close. See PX9001 at 9 (Tronox Q3 2016 Earnings Call) (observing that Chinese production was down in 2015 and would be down again in 2016 and 2017).⁴⁹ At the same time, demand for chloride and sulfate TiO2 within China has continued to increase at a higher rate than in other regions [REDACTED]

⁴⁸

[REDACTED]

[REDACTED]; PX8005 (Maiter (Venator) Decl.) ¶ 22 (“Because of the cost disadvantage of shipping TiO2 into North America, the TiO2 that we do import into North America tends to be specialty or high-performance grades . . . which sell at a price that can partly overcome the additional duty, shipping, and storage costs.”); [REDACTED]

See also PX2072 at 23 (Cristal) (reporting 10-15 plants idled, some expected to remain closed, and others expected to close due to environmental issues); PX8003 (Sherwin-Williams) Decl.) ¶ 24 (“Over the last year or so, a substantial amount of TiO2 capacity in China has closed.”).

2d 36, 89 (D.D.C. 2011) (quoting Merger Guidelines § 10); Staples 19970 F. Supp. at 1089-90; Staples 2016190 F. Supp. 3d at 137-38 n.15. Moreover, “[h]igh market concentration levels,” like those presented by the Proposed Acquisition, require “proof of extraordinary efficiencies.” Heinz, 246 F.3d at 720. No court has ever permitted an otherwise unlawful transaction to proceed as a result of claimed efficiencies. See id at 720-21; Sysco 113 F. Supp. 3d at 82; CC Holdings 605 F. Supp. 2d at 72. The result should differ here, as Respondents have failed to substantiate their efficiencies claims.

Respondents’ primary asserted efficiencies fall into three categories: (1) alleged expansion of TiO₂ feedstock at Cristal’s high-grade feedstock manufacturing facility in Jazan, Saudi Arabia,⁵⁴

That the Jazan facility is not a part of the Proposed Transaction should, by itself, doom these claims. Respondents have failed to identify a case that has credited efficiencies when the purported efficiencies were generated not by the transaction, but by some separate acquisition of assets. To the contrary, courts that have considered an efficiencies defense presume that the claims relate to efficiencies generated by the acquisition in question. See, e.g., Penn State Hershey, 838 F.3d at 347 (efficiencies defense entails a showing by defendants that “the anticompetitive effects of the merger will be offset by extraordinary efficiencies resulting from the merger”) (citation omitted and emphasis added); Alphonse Med. Ctr.–Nampa Inc. v. St. Luke’s Health Sys., 778 F.3d 775, 790 (9th Cir. 2015) (efficiencies defense entails showing by defendants that “the proposed merger will create a more efficient combined entity and thus increase competition”) (emphasis added); University Health, 938 F.2d 1206, 1222-23 (11th Cir. 1991) (efficiencies defense requires a showing that “the intended merger would create significant efficiencies in the relevant market”) (emphasis added). The Merger Guidelines presume the same—considering “efficiencies generated through a merger” in evaluating the effects of the merger in question. Merger Guidelines § 10 (emphasis added). Respondents’ claimed Jazan efficiencies are not generated by the acquisition of assets in the Proposed Transaction. Thus, they are not a cognizable defense in this matter.

Regardless, even accepting that Respondents’ claims should be considered in evaluating this transaction, they fail for lack of merger specificity. First, the Jazan claims are not merger specific because, not being a part of this proposed acquisition, they are not “accomplished with the proposed merger.” Merger Guidelines § 10 (defining a “merger-specific” efficiency as one that is “likely to be accomplished with the proposed merger and

unlikely to be accomplished in the absence of the proposed merger or another means having comparable anticompetitive effects”).

Second, a potential future acquisition of the Jazan facility by Trono is not the only way the Jazan facility will become operational. While Trof [REDACTED]

[REDACTED],⁵⁶ Cristal has every incentive to fix [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁵⁶ [REDACTED]

⁵⁷ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

See also PX2203 (Cristal) (describing ongoing talks with Tiz regarding strategic collaboration on Jazan facility).

Respondents' Jazan claims also fail because they are not verifiable. To start, these claims are rife with uncertainty, and thus are speculative and unverifiable, given that Respondents have yet to even sign the Option

[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] } Therefore, despite its confident pronouncements, it is clear from Tronox's own

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED] } Because Cristal can and is taking steps to reach Yanbu's full output potential on its own, Respondents' alleged efficiencies with respect to Yanbu are not merger specific.

Respondents' Yanbu efficiency claims also are not verifiable [REDACTED]

[REDACTED]

[REDACTED] } Tronox bases the Yanbu efficiencies claims on the assumption [REDACTED]

[REDACTED]

Moreover, Tonox's projections of increased output at Yanbu post-acquisition appear to be based

66 [REDACTED]

[REDACTED]; PX2379 at 4-6 (Cristal) (describing Yanbu organizational changes, including addition of several experts in low-pressure technology).

on little more than managerial business judgment and therefore should be rejected [REDACTED]; see also H&R Block, 833 F. Supp. 2d at 91 (rejecting efficiencies based on managers' judgments rather than data analysis of data).

Third, Respondents further allege a number of cost saving efficiencies relating to optimizing various operations and processes. Court Counsel's efficiencies expert, Dr. Mark E. Zmijewski, has reviewed Respondents' efficiencies submissions with respect to the Jazan facility, the Yanbu facility, and the claimed cost saving efficiencies. Dr. Zmijewski concludes that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Finally, Respondents' efficiencies defenses because any post-acquisition output increases at Jazan or Yanbu (both in Saudi Arabia) and any post-acquisition cost savings, would be unlikely to materially impact the North American TiO₂ market. See University Health, 938 F.2d at 1222-23 (defendant asserting efficiency defense "must demonstrate" that the claimed efficiencies "ultimately would benefit competition and, hence, consumers"); Sysco, 113 F. Supp. 3d at 82 (defendants must "demonstrate that their claimed efficiencies would benefit customers"); CCC Holdings, 605 F. Supp. 2d at 74 (same). Indeed, the bulk of Respondents' claims are outside of the relevant market at issue here. Tronox CEO Jeffrey Quinn appears to concede as much, observing to analysts that "an overwhelming portion of the synergies are ex U.S." PX9101 at 7 (Tronox Q4 2017 Earnings Call). In particular, the Jazan efficiencies concern the production of feedstock—not TiO₂—outside of North America, and Respondents have failed to show how these purported benefits will have any effect inside the relevant market at issue here. Although related to TiO₂ production, the Yanbu efficiencies claims likewise are

Enacted May 22, 2018 7.472 -1.15 Td [()14-72 Director0 Tw 7()Tj -13.915 -14Tf /Fm0 Do Q 2
