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Hon. Sarah E. Pitlyk
United States District Court
Eastern District of Missouri
111 South 10th Street
St. Louis, MO 63102

March 17, 2020

Re: *FTC v. Peabody, et al., CA No. 4:20-cv-00317* – Joint Request for a Teleconference

Dear Judge Pitlyk:

Defendant Arch Coal, Inc. ("Arch") submits this letter pursuant to Paragraph 19 of the Case Management Order (ECF No. 49) on behalf of all Parties to jointly request a telephone conference to address a dispute regarding Defendants' intent to request a further modification of the Protective Order (ECF No. 47), as previewed for the Court in the Unopposed Motion to Modify the Protective Order filed on March 12, 2020 (ECF No. 52, at 2 n.2).

Summary of Dispute:

Defendants request that the Court modify the Protective Order to allow two additional individuals per Defendant access to Confidential Materials under the Protective Order (these two individuals would be in addition to the one per Defendant that already is unopposed by Plaintiff). Plaintiff objects to the additional individuals for the reasons described below.[1] The Parties met and conferred several times but could not reach an agreement.

Defendants' Position:

On March 12, 2020, Defendants filed an Unopposed Motion to Modify the Protective Order to add two in-house lawyers from Defendants who do not have any responsibilities for competitive decision-making, and therefore clearly satisfy the settled standard established in *FTC v. Whole Foods Mkt., Inc.*, 2007 WL 2059741 (D.D.C. 2007) (attached as Ex. A), which governs when parties may be permitted access to Confidential Material under a Protective Order. *See* ECF No. 47. As noted in Defendants' Unopposed Motion, however, Plaintiff refused to consent to four additional individuals who likewise have no competitive decision-making responsibilities.[2] Their participation in this litigation is essential to allow Defendants a fair opportunity to help prepare their defense to the FTC's challenge to the JV. The four individuals are: for Peabody, Scott Jarboe, Chief Legal Officer and Corporate Secretary; and Alice Tharenos, VP – JV Integration; and for Arch, Robert Jones, SVP –

[1] Two third parties filed objections to the Unopposed Motion to Modify. *See* Notice of WFA's Objection to Defendants' Motion to Modify the Protective Order (ECF No. 59), March 13, 2020; NTEC's Motion to Intervene (ECF No. 63).

[2] The two third parties that filed objections failed to specify any basis to deny the Unopposed Motion. And of the 20+ third-party customers that have been subpoenaed in this case, only a single customer has attempted to condition its non-opposition to ECF No. 47 on a written assurance of outside-counsel-only protection for its Confidential information. Defendants have not agreed to this condition.

Law, General Counsel and Secretary; and Kenneth Cochran, Senior Advisor. *Id.* at 1–2, n.2. Plaintiff objects to the inclusion of Messrs. Jarboe and Jones because, despite being in purely legal roles, they attend board meetings where sensitive material may be discussed by others. Plaintiff objects to Ms. Tharenos and Mr. Cochran because they either have (or used to have) business roles at the companies.

Courts routinely modify protective orders to allow a defendant company's employees to access confidential information where the designated individuals are not "involved in competitive decision-making." *Whole Foods*, 2007 WL 2059741, at *3; *accord FTC v. Sysco Corp.*, 83 F. Supp. 3d 1, 3 (D.D.C. 2015) ("for example, pricing, marketing, or design issues when that party granted access has seen how a competitor has made those decisions."). This is particularly true in merger challenges brought by the government. *See id.* at 5 ("It would be unfair, in the court's view, for the government to attempt to prevent a private business transaction based, even in part, on evidence that is withheld from the actual Defendants (as distinct from their outside counsel).").

Plaintiff has designated anything produced by customers during the investigation and even the identity of those customers as "Confidential Material." Thus plaintiff's refusal to allow these additional individuals access to Confidential Material prevents Defendants' counsel from sharing with their clients even the ***names of the relatively few companies that submitted ex parte affidavits to the FTC or even any company identified in the FTC's Rule 26(a)(1) initial disclosures*** (which the FTC marked as "Confidential"). Plaintiff's position flies in the face of the case law governing this issue. None of the designated individuals plays any role in either Defendants' competitive decision-making and all easily satisfy the *Whole Foods* standard. *See* Exs. B – E. Messrs. Jarboe and Jones serve as Chief Legal Officer and General Counsel for Peabody and Arch, respectively, and, as such, are responsible solely for the provision of legal services. While they both attend board meetings, both individuals' roles are limited to rendering legal advice. The complete lack of competitive decision-making is also true of Ms. Tharenos and Mr. Cochran. Ms. Tharenos's responsibilities are limited to integration planning and transition relating to acquisitions and joint ventures. Mr. Cochran is a semi-retired Arch employee with "business responsibilities" consisting only of membership on Arch's "clean team." Moreover, all have confirmed in sworn affidavits that they will strictly adhere to the confidentiality obligations and will use Confidential Material solely to assist in the defense of this action. *See Whole Foods*, 2007 WL 2059741, at *2.

There is no argument that this narrowly-tailored group of individuals will exploit or otherwise attempt to use Confidential Material for competitive gain. *See, e.g.*, *Trading Technologies, Int'l. Inc. v. BCG Partners, Inc.*, 2011 WL 1547769, at *2-3 (N.D. Ill. 2011). The FTC's refusal to grant these individuals access to "Confidential" material (particularly under the FTC's overly broad definition) is hampering Defendants' ability to meaningfully participate in their own defense.

Plaintiff's Position:

The Court should reject Defendants' attempt to reveal their competitors' and customers' most highly sensitive information to business personnel who have no involvement in litigation or legal matters (Mr. Cochran and Ms. Tharenos), and to in-house attorneys who participate in strategic and competitive discussions (Messrs. Jones and Jarboe).

Courts zealously protect the commercial secrets of third parties who disclose information in connection with the FTC's merger challenges. *See FTC v. Advocate Health Care Network*, 162 F.Supp.3d 666, 671-672 (N.D. Ill. 2016) ("we are not talking about an exchange of documents between

two sides in a lawsuit. We are talking about a number of third parties, not targets of any FTC action, who had to give up exceedingly confidential information in response to a government subpoena."). Defendants provide no support for their assertion that non-lawyer business personnel (Mr. Cochran and Ms. Tharenos) must scrutinize their competitors' and customers' most confidential information in order to provide outside counsel with assistance; they identify no prior case in which such access has been granted to non-legal personnel, and Plaintiff's counsel is not aware of any such case in any of the dozens of merger litigations that the FTC has brought in the past several decades. A boilerplate assertion that business persons' input would be helpful or "essential" cannot outweigh the harm that rivals and customers would suffer from disclosure of their competitive strategies, pricing, costs, and trade secrets. *See id.* at 674.

Indeed, even the parties' in-house legal personnel can be granted access to confidential information only if it is "essential" to mounting a defense. *Advocate*, 162 F.Supp.3d at 671 (rejecting defendants' effort to modify a protective order to provide two in-house counsel with information because "it is unclear why it would be essential for either of these gentlemen to pour over the Intervenors' Highly Confidential information"). Where litigants have – like Defendants here – retained experienced outside counsel to represent their interests, courts closely scrutinize vague assertions that particular employees' access is "essential." *See id.* at 672 ("the critical question is: why is it "essential," as the defendants put it, that in-house counsel, as opposed to outside counsel" be granted access to confidential information). And where – as here – a litigation-focused in-house attorney for each Defendant may have appropriate access, assertions that additional counsel are essential should be examined particularly closely. *See FTC v. Sysco Corp.*, 83 F. Supp. 3d 1, 4 (Chief Legal Officer who attended weekly executive team meetings could not access confidential information where one in-house counsel already had access).

Here, just as in *Sysco*, Messrs. Jones and Jarboe regularly attend "executive committee and board meetings," at which business executives discuss strategic plans and competitive strategies. Their participation in such meetings "creates an unacceptable risk of, or opportunity for, '***inadvertent*** disclosure'" of competitors' and customers' secrets. *Advocate*, 162 F.Supp.3d at 668 (emphasis added). *See also FTC v. Sysco*, 83 F. Supp 3d 1, at *3 (D.D.C. Mar. 12, 2015) ("the primary concern . . . is not that the lawyers involved in such activities will intentionally misuse confidential information; rather, it is the risk that such information will be used or disclosed inadvertently because of the lawyer's role in the client's business."). The risk of inadvertent disclosure is not eliminated by Defendants' representations that Messrs. Jones and Jarboe will refrain from intentionally misusing confidential information. Nor is the risk of inadvertent disclosure addressed by the assertion that their input during business meetings is currently limited to legal matters.

The serious harm that third parties may suffer is apparent, as several have objected to revealing their confidential information even to Defendants' litigation-focused in-house counsel, Ms. Li and Ms. Klein. *See* ECF No. 52. In addition to the two third parties who have apprised the Court of their objections (ECF No. 59, 63), a significant SPRB coal customer has informed the parties that it will not oppose Ms. Li and Ms. Klein (ECF No. 47) only on the condition that Defendants provide a written assurance of outside-counsel-only protection for appropriately designated information, seriously undermining Defendants' claims that they cannot mount a defense unless in-house counsel and other employees are able to review all customers' information. If Defendants file a motion to further modify the protective order to provide four additional employees access to third party's information, third parties are sure to object and seek outside-counsel-only protective order provisions such as the one requested by NTEC, as is common in the FTC's merger cases. *See* ECF No. 63 at 9.

Sincerely,

/s/ William C. Lavery
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Counsel for Defendant Arch Coal, Inc.

cc: Counsel of Record (Via E-Mail)