IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

FEDERAL TRADE COMMISSION, Plaintiff, v. **PEABODY ENERGY CORPORATION** and **ARCH COAL, INC.**, Defendants.	Civil Action No. 4:20-cv-00317

PLAINTIFF FEDERAL TRADE COMMISSION'S SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANTS' REQUEST TO MODIFY THE PROTECTIVE ORDER

In-house access to highly confidential information in merger cases is the exception, not the rule. In four of the five most recent FTC merger challenges, defendants' in-house counsel and executives were granted *no* access to confidential information.[1] Likewise, courts evaluating motions to modify protective orders in recent merger challenges brought by the U.S. Department of Justice have rejected arguments that are nearly identical to the arguments made by Defendants here. *See United States v. Aetna, Inc.*, 2016 WL 8738420, at *5-6, 10-11 (D.D.C. Sept. 5, 2016) (denying in-house counsel access to confidential information following non-party objections in part because "once learned, [confidential information] is impossible to forget"); *United States v. Deere & Co., et al.*, No. 16-cv-08515, ECF No. 286, slip op. at 1-2 (N.D. Ill. Apr. 26, 2017) (giving concerns expressed by competitors "serious weight" and denying in-house counsel access to confidential information because "there would be no way to purge [in-house counsel's] knowledge of non-party confidential information going forward"). Contrary to Defendants' claim that "fairness" requires their employees to scrutinize their competitors' and customers' most highly confidential information, this settled practice of federal courts in antitrust merger cases is well known to Defendants, as an absolute bar on in-house access to confidential information governed in both the 2004 *FTC v. Arch Coal* case and in *FTC v. Ardagh* (in which Peabody's lead counsel, Mr. Hassi, participated on behalf of the FTC).[2]

Notwithstanding courts' practice of forbidding or strictly limiting any in-house access to confidential information, Defendants seek a modification of the Protective Order that would grant *six* executives—including business personnel with no legal responsibilities—unlimited

[1] *See* Ex. 1 ¶ 7 (no in-house access to confidential information); Ex. 2 ¶ 7 (same); Ex. 3 ¶ 7 (same); *FTC v. Advocate Health Care Network, et al.*, 162 F. Supp. 3d 666, 673-74 (N.D. Ill. 2016) (access to highly confidential information denied to all proposed executives and in-house counsel). In the fifth, *FTC v. Wilh. Wilhelmsen Holding ASA, et al.*, discussed further *infra*, the only access to any confidential information consisted of tightly limited access to *redacted* non-party declarations; it did not include any access to rivals' confidential documents. *See* Ex. 4 ¶¶ 7-9.
[2] *See* Ex. 5 ¶ 7; Ex. 6 ¶ 7.

access to competitively sensitive information from non-party customers and competitors. Non-party intervenors have raised objections grounded in precedent and based on well-justified concerns that any disclosure of their confidential information to Defendants' employees would severely and irreparably harm intervenors' business interests. Further, Defendants have failed to establish why the broad access they request is necessary to vigorously defend the proposed joint venture. The FTC therefore respectfully requests that the Court deny Defendants' request to provide any access to confidential information to Ms. Tharenos and Messrs. Jones, Jarboe, and Cochran. In the event that the Court determines that Ms. Li and Ms. Klein can access confidential information, despite the concerns of intervenors, the FTC requests that the Court direct the parties to reach agreement on a two-tiered protective order whereby (1) no Defendant employee (including in-house counsel) may access any material designated as highly confidential and (2) only Ms. Li and Ms. Klein may access to material designated as confidential.

I. Defendants Have Failed to Establish Good Cause for the Requested Modification

Merger challenges frequently require an examination of the strategies and operations of not only the merging parties themselves but also of the merging parties' competitors and customers. In light of the highly sensitive non-party information required, courts are extremely hesitant to grant defendants' executives and employees access to confidential information—such as the negotiating strategies, price setting, and expansion plans that are present here—of their own customers and competitors, particularly where, as here, non-parties object to such access. *See, e.g.*, *Aetna*, 2016 WL 8738420, at *5; *Deere*, No. 16-cv-08515, ECF No. 286, slip op. at 2; *Advocate*, 162 F. Supp. 3d at 670, 674 (denying access to in-house attorneys following objection from non-parties because "once an expert—or a lawyer for that matter—learns the confidential information that is being sought, that individual cannot rid himself of the knowledge he has

gained"). Courts routinely deny in-house counsel access to non-parties' confidential information, and Defendants fail to establish good cause for why an exception should apply here.

First, Defendants contend that absent in-house access to confidential information, they cannot share with their clients the identities of potential witnesses.[3] This is simply not true. The FTC provided its preliminary fact witness list to Defendants on March 16, 2020, on a non-confidential basis, and outside counsel can freely share the names of all 25 individuals who appear on that list with whomever they choose.[4] Likewise, the FTC provided a non-confidential version of its FRCP Rule 26(a)(1)(A)(i) disclosures on March 24, 2020, and included an unredacted list of more than *90* non-party individuals who are likely to have discoverable information that may support the FTC's claims or defenses.[5] Defendants complain that they cannot reveal the identities of declarants to their client, but to the extent any such disclosure is necessary it should be addressed through a separate and strictly controlled process, such as that employed in the recent *FTC v. Wilhelmsen* case referenced by Defendants during the March 24 telephonic conference.[6] In *Wilhelmsen*, two specific employees were given access to *redacted* declarations that removed highly confidential information, access was tightly controlled, and the employees were specifically ordered not to "retaliate against, threaten, or otherwise intimidate any potential witness in this litigation."[7]

Second, Defendants claim that access is necessary to enable in-house counsel to participate in the preliminary injunction hearing.[8] However, the Protective Order already in place provides that all materials relevant to the preliminary injunction hearing "shall be part of

[3] Defendants incorrectly claimed on March 24, 2020, that they were unable to provide their client with the names of the witnesses who would appear at the hearing. See *FTC v. Peabody, et al.*, Mar. 24, 2020 Tr., at 29:20-23, 40:20-23.
[4] *See* Ex. 7 (FTC's Preliminary Fact Witness List). The FTC's final witness list will also be non-confidential.
[5] *See* Ex. 8 (FTC's Non-Confidential Initial Disclosures).
[6] *FTC v. Peabody, et al.*, Mar. 24, 2020 Tr., at 42:21-43:5.
[7] *See* Ex. 4 ¶¶ 8-9.
[8] *FTC v. Peabody, et al.*, Mar. 24, 2020 Tr., at 35:16-36:22.

the public record," unless non-parties file specific motions justifying *in camera* treatment.[9] This replicates the exact process, endorsed by Arch's counsel during the recent telephonic conference, that will be employed during the administrative proceeding on the merits.[10]

Third, Defendants have hired experienced antitrust counsel who are knowledgeable about the industry and have had ample time to understand the complexities of the markets at issue. Many of the same counsel representing Defendants in this proceeding represented the merging parties throughout the entirety of the FTC's eight-month investigation, and indeed, Defendants' outside antitrust litigation counsel has been involved in the planning of this proposed transaction over a period of years.[11] Given outside counsel's significant involvement already, Defendants fail to establish "what additional significant benefit the in-house counsel will bring to the defense of the action." *See Deere*, No. 16-cv-08515, ECF No. 286, slip op. at 2.

Fourth, Defendants' reliance on *Process Controls International v. Emerson Process Management*, 2011 WL 1791714 (E.D. Mo. May 10, 2011) is misguided. The defendant in *Process Controls* sought a Protective Order modification permitting it to access the *plaintiff's* confidential information and not, like here, the confidential information of unwilling non-parties to the action. *Id.* at *6. Further, *Process Controls* implemented a two-tiered protective order designed to protect certain categories of confidential information from any disclosure to the parties' in-house counsel, not the unfettered access that Defendants seek here. *Id.* at *8.

II. If Any In-House Counsel Are Granted Access to Confidential Information, the Court Should Implement a Two-Tiered Structure That Bars All Access to "Highly Confidential" Information and Restricts Access to "Confidential Information" to Just Ms. Li and Ms. Klein

[9] *See* Protective Order, ECF No. 47, ¶ 10.
[10] *See FTC v. Peabody, et al.*, Mar. 24, 2020 Tr., at 31; Ex. 9 ¶ 10.
[11] For example, a partial privilege log that Defendant Peabody submitted during the FTC investigation indicates the involvement of Peabody's outside counsel at Akin Gump Strauss Hauer & Feld LLP in withheld materials related to "seeking regulatory approval" of iterations of the proposed transaction in 2018 and even 2017.

If the Court concludes it is appropriate to provide some Defendant employees with limited access to confidential information, the Court should establish a two-tiered protective order that protects any "highly confidential" information from disclosure while limiting the disclosure of less-sensitive "confidential" materials to just Ms. Li and Ms. Klein.[12]

Unlike Ms. Li and Ms. Klein, the rest of Defendants' proposed in-house executives and employees fail to meet any standard cited by Defendants for granting access to competitors' and customers' confidential information. Ms. Tharenos and Mr. Cochran are business people, not attorneys, and Defendants cite no support (and indeed, FTC counsel is unaware of any support) that suggests business people should be permitted to review any confidential information under any circumstances. Indeed, the risk of serious harm to non-parties is greatest if business executives are granted access to confidential materials. As for Mr. Jones and Mr. Jarboe, both attend meetings where high-level information on sales commitments and production forecasts are discussed. As a result, the risk of inadvertent disclosure is high, as production forecasts and decisions are competitive decisions that are "made in light of similar or corresponding information about a competitor," which is the standard for "competitive decision making" under the authority cited by Defendants. *See Process Controls,* 2011 WL 1791714, at *7. Further, as noted above, Defendants fail to establish that Mr. Jones and Mr. Jarboe would bring any additional significant benefit to the defense of the action, particularly if both Ms. Li and Ms. Klein are granted access to confidential information.

[12] If the Court adopts a two-tier Protective Order precluding any in-house access to "highly confidential" information and limited access to "confidential" information, the FTC proposes conferring with Defendants and non-party intervenors and submitting proposed language within two business days' of the Court's Order defining specific categories of information, such as pricing lists and future plans for expansion, that could be designated as "highly confidential" and "confidential."

Dated: March 26, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of March, 2020, I served the foregoing on all counsel of record via the Court's ECF filing system.

/s/ Daniel Matheson
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