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

ARCH COAL'S SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANTS' REQUEST TO MODIFY THE PROTECTIVE ORDER

Per the Court's March 20, 2020 Order (ECF No. 77), Defendant Arch Coal, Inc. ("Arch") submits this supplemental brief in support of Defendants' request to modify the Protective Order. Arch respectfully submits that the Court should modify the Protective Order to grant access to two in-house counsel from Arch supervising this litigation (Rosemary Klein and Robert Jones), and Arch's senior advisor (Kenneth Cochran), because none participate in competitive decision-making and each is essential for Arch's defense of the proposed Joint Venture.

The current Protective Order—which limits access to Confidential Material to outside counsel only and prohibits anyone from Arch from reviewing any such material—severely impairs Arch's ability to meaningfully participate in its own defense. Making matters worse, the FTC has taken an extreme view of what constitutes "Confidential Material" and has marked everything produced to date "Confidential," completely hamstringing Defendants' ability to assist outside counsel. The FTC claims, for example, that even their Rule 26 Initial Disclosures are "Confidential"—meaning that, nearly a month after the FTC filed its lawsuit, Arch still has not learned the names or corporate employers of the individuals who provided *ex parte* declarations that the FTC intends to rely on to support its case. Modifying the protective order to provide access to a limited set of Arch representatives is critical to a fair proceeding.

ARGUMENT

Courts routinely modify protective orders to allow a party's employees to access confidential information where the individuals are not involved in "competitive decision-making." *See Process Controls Intern, Inc. v. Emerson Process Mgmt.*, 2011 WL 1791714, at *7–8 (E.D. Mo. May 10, 2011); *FTC v. Whole Foods Mkt., Inc.*, 2007 WL 2059741, at *3 (D.D.C. July 6, 2007); *see also FTC v. Sysco Corp.*, 83 F. Supp. 3d 1, 5 (D.D.C. 2015) ("It would be unfair . . . 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)."). Competitive decision-making is a "shorthand for a counsel's activities, association, and relationship with a client that are such as to involve counsel's advice and participation in any or all of the client's decisions (pricing, product design, etc.) made in light of similar or corresponding information about a competitor." *Process Controls*, 2011 WL 1791714, at *7 (citation omitted). As this district has recognized, individuals may not be denied access even if they have "frequent contact with decisionmakers"; rather, it must be shown that these individuals actually "participate in these types of decisions themselves." *Id.* at 8 (noting that the relevant standard is "advice and participation" in "competitive decision-making") (quoting *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 n.3 (Fed.Cir.1984)). Courts therefore often permit a select number of party representatives lacking responsibility for competitive decision-making access to confidential information—particularly in merger litigations. *See, e.g.*, *FTC v. Staples, Inc.*, No. 1:15-cv-02115, Doc. 63 at 4–5 (D.D.C. Jan. 10, 2016); *U.S. v. AB Electrolux*, No. 1:15-cv-01039, Doc. 140 at 9–10 (D.D.C. Sept. 15, 2015); *Sysco*, No. 1:15-cv-00256-APM, Doc. 87 at 4 (D.D.C. March 13, 2015); *Whole Foods*, No. 1:07-cv-01021, Doc. 100 at 8 (D.D.C. July 10, 2007) (attached as Exs. D – G (highlighting added)).

Access to confidential information is especially important where, as here, the defendants have "a degree of knowledge and experience in the . . . industry which makes them indispensable to [outside] counsel as this case is prepared for trial." *In re Se. Milk Antitrust Litig.*, 2009 WL 3713119, at *2 (E.D. Tenn. 2009); *accord United States v. Sungard Data Sys., Inc.*, 173 F. Supp. 2d 20, 21 (D.D.C. 2001) ("To deny outside counsel access to the lawyers most familiar with their clients' business and the industry in which they compete and who will have a much deeper and complete understanding of the documents being produced and of the expert testimony to be derived from it is to make [the client] fight with one hand behind [its] back[]."). This is particularly true

where, as here, there have been blanket confidentiality designations. *Id.* at *2 ("Defendants cannot be allowed, on the one hand, to designate the vast majority of the documents produced during discovery as highly confidential and, on the other hand, to use such designation to interfere with the plaintiffs' ability to prosecute their case.").

I. The Designated Individuals Have No Involvement In "Competitive Decision-Making" and are Essential to Arch's Defense

As set forth in their declarations (attached as Exhs. A – C), none of Arch's three designated individuals are involved in competitive decision-making, and each is critical to assisting Defendants in this litigation. All easily meet the standard in *Process Controls* and *Whole Foods.*

1. **Rosemary Klein.** Rosemary Klein, who the FTC does not oppose adding to the Protective Order, is Associate General Counsel at Arch. Her primary role is to advise the management team and board on legal issues involving, *e.g.*, corporate securities and corporate governance, and supervising material litigations. Ms. Klein is not involved in any competitive decision-making. She is not part of, nor does she consult with, Arch's commercial team that is responsible for making competitive decisions related to pricing, marketing, output, supply, competitors, and customers.

Ms. Klein is, however, critical to assisting outside counsel here. Ms. Klein has been closely involved with facilitating Arch's response to the FTC's investigation. Along with Mr. Jones, she coordinated the information gathering process and has been a critical asset to outside counsel defending this case. Moreover, as a member of the "clean team," Ms. Klein has experience handling highly confidential information without inadvertently disclosing it to others.

2. **Robert Jones.** Robert Jones is Senior Vice President – Law, General Counsel and Secretary of Arch, and has been with the company since 1991. Mr. Jones is not involved in competitive decision-making, including any decisions that establish prices or production levels.

While he sees reports and attends meetings with executives where high-level information on sales commitments and production forecasts are discussed, Arch does not make competitive decisions in these meetings, and Mr. Jones is neither asked for nor does he provide his views on these topics. Mr. Jones is nonetheless *essential* to Arch's defense. He is deeply knowledgeable about not only Arch's operations, but the industry overall, including the evolving regulatory landscape and the transformative shift from coal to natural gas and other electricity-generating fuels. With his over 30 years of experience, including in the FTC's prior investigations involving transactions in the same area, he is in a much better position than outside counsel to evaluate what customers have stated in their *ex parte* declarations. The same will be true going forward with respect to pleadings, expert reports, testimony, and Confidential Material presented during the hearing.

As Arch's General Counsel, Mr. Jones is also the ultimate legal decision maker for Arch in seeing through this joint venture. He needs to be able to review Arch's legal submissions and participate in determining litigation strategy. Mr. Jones is indispensable to defending this litigation.

3. **Kenneth Cochran.** Mr. Cochran is a semi-retired, Senior Advisor at Arch. He previously worked full-time at Arch in various senior operations positions, including President of Thunder Basin Coal Co., President of Western Operations, and Senior VP of Operations. Mr. Cochran transitioned to his current role as Senior Advisor on December 31, 2018. Mr. Cochran has no involvement with any competitive decision-making and no interaction with the competitive decision-makers other than through informal, social interactions. Mr. Cochran would be fully retired but-for his agreement to serve as a member of the "clean team" for the proposed transaction.

Mr. Cochran's assistance will nonetheless be important to outside counsel's defense of this case. Given his deep experience in operations, Mr. Cochran frequently interacted with Arch's

customers prior to his semi-retirement and is in a unique position to evaluate customer statements and documents that the FTC may rely on. Mr. Cochran also has extensive knowledge of how energy markets and market operators work—and, in particular, how they channel all electricity-generating fuels into direct competition with one another. Given that the FTC claims that the market is limited to SPRB coal and intends to rely on customer statements to that effect, Mr. Cochran's input and assessment will be critical for Defendants to mount an effective defense.

II. The FTC's Case Law Is Distinguishable and Does Not Support Its Argument

The out-of-circuit cases cited by the FTC in opposition to Defendants' proposed modification are easily distinguishable and do nothing to support its position. The FTC relies almost entirely on the magistrate judge's opinion in *FTC v. Advocate Health Care Net.*, 162 F. Supp. 3d 666, 668 (N.D. Ill. 2016). There, the judge relied on in-house counsel's LinkedIn profiles which contained statements, as the Court emphasized, on "*strategic planning.*" *Id*. at 671. In so doing, the court misapplied *U.S. Steel*—on which this Court relied in *Process Controls*—by conflating what constitutes "strategic" versus "competitive" decision-making. This approach is inconsistent with nearly every other case to apply the "competitive decision-making" standard. *See, e.g.*, *Process Controls*, 2011 WL 1791714, at *7 – 8; *Whole Foods*, 2007 WL 2059741, at *2. *Every* in-house lawyer is involved in *strategic* or *business* decisions; the critical distinction recognized by this Court and the weight of the case law focuses on whether company representatives actually *participate* in *competitive* decisions. This factor distinguishes cases like *Sysco*, in which the general counsel participated and was directly involved in weekly executive meetings at which actual pricing decisions would be discussed. 83 F. Supp. 3d 1, at *4. Even in that case (on which the FTC also relies), the court allowed other in-house counsel access because they met the *Whole Foods* standard. *Id*.

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Respectfully submitted,

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