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

PEABODY ENERGY CORPORATION'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 Peabody Energy Corporation ("Peabody") submits this supplemental brief in support of Defendants' request to modify the Protective Order. Peabody respectfully submits that the Court should modify the Protective Order to grant access to two Peabody in-house counsel (Carol Li and Scott Jarboe) and Peabody's Vice President Joint Venture Integration (Alice Tharenos), because none participate in competitive decision-making and each is essential for Peabody's defense.

The current Protective Order—which permits access to Confidential Material to outside counsel only and prohibits access to everyone from Peabody—severely impairs Peabody's ability to meaningfully participate in its own defense. Making matters worse, the FTC has taken an extreme view of "Confidential Material" and has marked nearly everything produced to date "Confidential," completely hamstringing Peabody's ability to assist its outside counsel. The FTC claims, for example, that its Rule 26 Initial Disclosures are "Confidential"—meaning that, nearly a month after the FTC filed its lawsuit, no one at Peabody knows the individuals' names or corporate employers 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 Peabody 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." *Process Controls Int'l, Inc. v. Emerson Process Mgmt.*, No. 4:10-cv-645, 2011 WL 1791714, at *7–8 (E.D. Mo. May 10, 2011); *FTC v. Whole Foods Mkt., Inc.*, No. 07-1021, 2007 WL 2059741, at *3 (D.D.C. July 6, 2007); *see 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-makers” are executives directly involved in issues like pricing, marketing, or product design, where information about how a competitor made those decisions could influence their decisions. *Whole Foods*, 2007 WL 2059741, at *2; *see also Process Controls*, 2011 WL 1791714, at *8 (E.D. Mo. May 10, 2011) (denying access to confidential information because “counsel has frequent contact with decisionmakers [has been] squarely rejected;” what matters is “participat[ion] in these types of decisions themselves”). This is particularly true in merger challenges, which typically proceed on an expedited basis. *Intervet, Inc. v. Merial Ltd.*, 241 F.R.D. 55, 57 (D.D.C. 2007). In such cases, courts often permit select party representatives lacking responsibility for competitive decision-making access to confidential information. *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); *FTC v. Sysco Corp.*, No. 1:15-cv-00256-APM, Doc. 87 at 4 (D.D.C. March 13, 2015); *FTC v. Whole Foods Mkt., Inc.*, No. 1:07-cv-01021, Doc. 100 at 8 (D.D.C. July 10, 2007).

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.” *In re Se. Milk Antitrust Litig.*, No. 2:08-md-1000, 2009 WL 3713119, at *2 (E.D. Tenn. Nov. 3, 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[].”). Courts recognize that in-house representatives perform an indispensable role in litigation. *See Se. Milk*

Antitrust Litig., 2009 WL 3713119, at *1–2 (recognizing that parties "have a degree of knowledge and experience in the dairy industry which makes them indispensable to counsel as this case is prepared for trial"). 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 Peabody's Defense

As set forth in their declarations (attached as Exs. A–C), Peabody's three designated individuals are not involved in competitive decision-making, and each is critical to assisting Peabody in this litigation. All easily meet the standard set forth in *Whole Foods.*

1. **Carol Li.** Carol Li, whose addition to the Protective Order the FTC does not oppose,[1] is Director & Associate General Counsel–Litigation & Disputes, U.S. at Peabody and has been with Peabody since 2016. She supervises Peabody's pending and threatened litigation. Ms. Li is not involved in any competitive decision-making. Her interactions with Peabody's strategic decision-makers are limited to discussions of pending and threatened litigation.

Ms. Li is critical to assisting outside counsel in the defense of this case. Ms. Li has day-to-day operational oversight over this litigation. She is the designated point person coordinating Peabody's defense and has been a critical asset to outside counsel trying to defend this case.

2. **Scott Jarboe.** Scott Jarboe is Chief Legal Officer and Corporate Secretary of Peabody, and has been with Peabody since 2010. Mr. Jarboe is not involved in competitive decision-making. Mr. Jarboe does not attend meetings at which Peabody executives discuss and

[1] This is in contrast to some of the Intervenors, who would deny access to all Peabody employees. (*See* Ameren Entities' Mot. to Intervene ¶ 17, ECF No. 68.)

make pricing decisions. To the extent Mr. Jarboe receives information regarding Peabody's participation in competitive bids, it is retrospective information. And while he may see reports and attends meetings where high-level information on sales commitments and production forecasts are discussed, Peabody does not make competitive decisions in these meetings.

Mr. Jarboe is essential to Peabody's defense. He is deeply knowledgeable about Peabody's business and legal history. He was the lead business development lawyer the first time Peabody and Arch Coal, Inc. ("Arch") considered combining their assets, has been involved in and provided legal advice to Peabody since the proposed joint venture's inception, and was the lead lawyer reporting to the now-former Chief Legal Officer during Peabody's bankruptcy in 2016. As Chief Legal Officer, Mr. Jarboe is also the ultimate legal decision maker for Peabody and has ultimate oversight over outside counsel.[2] He needs to be able to review Peabody's unredacted legal submissions and fully participate in determining litigation strategy.

3. **Alice Tharenos.** Ms. Tharenos is Vice President Joint Venture Integration of Peabody, and has been with the company since 1999. She has held roles ranging from commercial strategy, financial strategy, operations planning, and business development. Ms. Tharenos is not involved in competitive decision-making. Ms. Tharenos does not attend the meetings at which Peabody executives discuss and make pricing decisions. To the extent Ms. Tharenos receives information regarding Peabody's participation in competitive bids, it is retrospective. And while she may see reports and attends meetings where high-level information on sales commitments and production forecasts are discussed, Peabody does not make competitive decisions in these meetings.

[2] Courts regularly permit in-house counsel access to confidential materials as needed to supervise and make strategic decisions about the lawsuit. *See, e.g.*, *British Telecomms. PLC v. IAC/InterActiveCorp*, 330 F.R.D. 387, 394 (D. Del. 2019); *Boehringer Ingelheim Pharm., Inc. v. Hercon Labs. Corp.*, No. CIV.A. 89-484, 1990 WL 160666, at *2 (D. Del. Oct. 12, 1990); *United States v. AB Electrolux*, 139 F. Supp. 3d 390, 394 (D.D.C. 2015).

Ms. Tharenos is essential to Peabody's defense. She is deeply knowledgeable about not only Peabody's operations, but the industry overall, including the transformative shift from coal to natural gas and other electricity-generating fuels. With her over twenty years of industry experience, she is better positioned than outside counsel to (a) evaluate the merits of third parties' complaints; (b) understand the third parties' documents; and (c) determine which third parties to depose. The same will be true going forward with respect to pleadings, expert reports, testimony, and Confidential Material presented during the preliminary injunction hearing.

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

The cases the FTC cites in opposition to Defendants' proposed modification are easily distinguishable and do not support its position. The FTC relies almost entirely on *FTC v. Advocate Health Care Network*, 162 F. Supp. 3d 666 (N.D. Ill. 2016). There, the magistrate judge relied on in-house counsel's LinkedIn profiles which contained statements, the court emphasized, on "*strategic planning.*" *Id.* at 671 (emphasis in original). In so doing, the court misapplied *U.S. Steel Corp. v. United States*, 730 F.2d 1465 (Fed. Cir. 1984) by conflating "strategic" with "competitive" decision-making. This approach is inconsistent with nearly every other case to apply the "competitive decision-making" standard, including those in this district. *See, e.g.*, *Process Controls*, 2011 WL 1791714, at *7–8. *Every* in-house lawyer is involved in *strategic* decision-making; the critical distinction recognized by the weight of the case law is whether the representative is involved in *competitive* decision-making. This factor distinguishes cases like *Sysco*, in which the general counsel participated and was directly involved in weekly executive meetings discussing pricing decisions. 83 F. Supp. 3d at 4. Even in that case (on which the FTC also relies), the court allowed others access because they met the *Whole Foods* standard. *Id.*

Dated: March 23, 2020

Respectfully submitted,

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