IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, Plaintiff, v. ARCH COAL, INC., *et al.*, Defendants.	Civ. No. 1:04CV00534 (JDB)
STATE OF MISSOURI, et al., Plaintiff, v. ARCH COAL, INC., *et al.*, Defendants.	

PLAINTIFF FEDERAL TRADE COMMISSION'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS SEEKING CONSOLIDATION OF PRELIMINARY AND PERMANENT INJUNCTIONS

Immediately after agreeing with the Federal Trade Commission ("FTC" or "Commission") and the States on a Stipulated Scheduling Order for a consolidated preliminary injunction hearing,[1] and without any prior notice to plaintiffs, defendants have effectively moved a second time to consolidate preliminary and permanent relief into one hearing – a motion that

[1] We emphasize again, as we did at the scheduling conference, that the expedited schedule to which we have agreed is applicable *only* to a truncated preliminary injunction hearing. A full hearing on the merits of the Commission's Section 7 case would be far more expansive.

this Court expressly denied a week ago at its April 14, 2004 Scheduling Conference.[2] Although defendants essentially seek reconsideration of the same motion that the Court recently rejected, they allege no new law and no new facts in support of their position. Rather, defendants simply rehash their prior arguments – arguments that this Court has previously rejected. In a conclusion that is as apt today as it was a week ago, this Court reasoned as follows:

> Even though it's a case involving plaintiffs beyond the FTC, the states and the FTC, can I decide the merits of the FTC's claims? I don't think I can. I can only decide a preliminary injunction with respect to the FTC's claims. Whatever I can do with respect to the states, I can't resolve the merits of the FTC's claim.
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> I'm just addressing the hearing that [Mr. Reynolds is] talking about, because [Mr. Reynolds was] talking about compressing and making it a merits hearing. But I don't think I can resolve the FTC's antitrust claims.

April 14 Transcript 19:23-20:11.[3] As this Court correctly observed, Congress, through Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §53(b), places the adjudication of the FTC's case on the merits outside the scope of this Court's jurisdiction. Nothing defendants have asserted – either in their current papers or in their previous motion – alters this essential conclusion.

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[2] This Court explicitly directed defendants to file a new motion – styled as a motion for reconsideration – if they sought to pursue this issue. Scheduling Conf. (4-14) Tr. 38. Instead, defendants have filed a document entitled "Supplemental Memorandum."

[3] Plaintiff FTC has filed a Complaint for Preliminary Injunction only. As this Court and the D.C. Circuit Court have recognized, in the context of Section 5(b) of the Clayton Act, 15 U.S.C. § 16, the district court should not expand its antitrust review beyond the case presented in the complaint. *United States v. Microsoft Corp.*, 56 F.3d 1448, 1459 (D.C. Cir. 1995) ("Congress surely did not contemplate that the district judge would, by reformulating the issues, effectively redraft the complaint himself.") *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) ("the court is not to review allegations and issues that were not contained in the government's complaint").

I. This Court's Authority Over the FTC's Case Is Limited to Consideration of a Preliminary Injunction

Defendants recognize that the Court has no statutory authority to require a full hearing on the merits in the FTC's case, or to transform the Commission's complaint for preliminary relief into one for permanent relief. Def. Supp. Mem. at 6 n.4. Yet, they request that the Court do so anyway arguing, essentially, that the Court's discretion to consolidate preliminary and final hearings in the same matter for the purpose of judicial economy under FED. R. CIV. P. 65 overrides the FTC Act.

Section 13 (b) of the FTC Act provides in relevant part that the Commission may seek from a federal district court the issuance of a temporary restraining order or preliminary injunction:

> [w]henever the Commission has reason to believe . . . that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by [the Commission], and . . . that the enjoining thereof pending the issuance of a [administrative] complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the [Court of Appeals] on review, or until the order of the Commission made thereon has become final, would be in the interest of the public.

15 U.S.C. § 53(b); *see, e.g., FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001). Courts have uniformly recognized that the role of the district court in such 13(b) proceedings is limited: "The district court is not authorized to determine whether the antitrust laws have been or are about to be violated. That adjudicatory function is vested in the FTC in the first instance." *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1342 (4th Cir. 1976); *accord Heinz*, 246 F.3d. 708, 714 (quoting *Food Town Stores).* Thus, the law is crystal clear and undisputed: Congress has expressly provided that when the Commission seeks only a preliminary injunction in aid of its

administrative proceeding, only the Commission – and not the Court – has the authority to conduct a full hearing on the merits and to consider permanent relief in the FTC's case.[4]

Notably, the defendants concede this point, acknowledging in their memorandum that: "the Court clearly would have ... no authority to hear a claim for permanent relief," in a 13(b) preliminary injunction action filed by the FTC. Def. Supp. Mem. at 6 n.4. Defendants insist, however, that Fed. R. Civ. P. 65 trumps Section 13(b) in this case because the court also has before it the States' action, in which the Court has authority to issue permanent injunctive relief. The defendants cite no case or authority in support of this conclusion. Rather, they merely assume it to be true, despite this Circuit's rejection of the proposition that the Federal Rules of Civil Procedure on consolidation can be used to abrogate substantive rights. *See Cablevision Systems Development Company v. Motion Picture Association of America, Inc.*, 808 F.2d 133, 135 (D.C. Cir. 1987) (stating that consolidation must not change the rights the parties would have if the cases advanced separately); *Mylan Pharmaceuticals Inc. v. Henney*, 94 F. Supp. 2d 36, 43 (D.D.C. 2000) (stating the rights of the parties must not change when actions consolidated).

Rule 65(a)(2) merely allows the Court in appropriate instances to consolidate the preliminary and permanent relief applications arising within a single case in order to avoid "repetition of evidence" and to "expedite the final disposition of the action." *Advisory*

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[4] Defendants erroneously argue that the jurisdiction of this Court and the Commission is concurrent, citing to §16 of the Clayton Act. Def. Supp. Mem. at 5. However, the FTC brings its action for permanent relief under §5 of the FTC Act, 15 U.S.C. §45, and §11 of the Clayton Act, 15 U.S.C. § 21, which expressly provide for the FTC's administrative proceeding. Only the FTC, and not the States, has the authority to enforce §5 of the FTC Act, and only the FTC, and not the States, is authorized to enforce the Clayton Act administratively under § 11 of the Clayton Act. Accordingly, the Court's jurisdiction to hear the States' cause of action is not concurrent with the FTC's jurisdiction.

Committee Notes (1966 Amendment). Defendants inexplicably conclude that this authority also encompasses the ability to consolidate multiple cases and to force the FTC into a final hearing on the merits in a manner wholly inconsistent with the statutory constructs of the FTC Act and the Clayton Act. But as this Court noted in *Mylan Pharmaceuticals Inc. v. Henney*, 94 F. Supp. 2d 36, 43 (D.D.C. 2000), "[c]onsolidation of cases is 'permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties to another.'" (citing *Johnson v. Manhattan R. Co.*, 289 U.S. 479, 496-97 (1993)); *See Cablevision Systems Development Company v. Motion Picture Association of America, Inc.*, 808 F.2d 133, 135 (D.C. Cir. 1987) (stating that "[f]ollowing *Johnson*, courts have repeatedly held that consolidation must not operate to abridge, enlarge or modify the substantive rights the parties would have if the cases proceeded separately").[5] Needless to say, Rule 65(a)(2) does not, and cannot, provide a vehicle for depriving the Commission of its statutory rights and authority.

II. Consolidation Is Only Appropriate with Regard to Preliminary Injunction Portions of the Two Actions

The Court's consolidation of the actions for preliminary relief pursuant to FED. R. CIV. P. 42(a) is the appropriate mechanism for achieving judicial economy. Under Rule 42(a), "[w]hen actions involving a common question of law or fact are pending before the court," it may

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[5] While these cases address consolidation pursuant to Rule 42(a), the same principle of preserving the rights of the parties holds true in consolidation pursuant to Rule 65(a). *See e.g., Anderson v. Davila*, 125 F. 3d 148,158 (3d Cir. 1997) (vacating decision where consolidation prejudiced the defendant because the district court caused defendant to believe that the hearing was for preliminary relief only); *City of Rye, New York v. Schuler*, 355 F. Supp. 17, 19-20 (S.D.N.Y. 1973) (allowing consolidation that facilitated judicial economy "without prejudicing the rights of anyone").

consolidate the actions to "avoid unnecessary costs or delay." The FTC and the Plaintiff States both seek preliminary relief before this Court, despite the fact that they seek final relief in different tribunals. In their actions for preliminary relief, the FTC and States will proffer identical facts, overlapping testimony, and will present similar questions of fact and of law for preliminary relief. Hence, consolidation pursuant to Rule 42(a) is appropriate to achieve "convenience and economy in administration" by consolidating the two similar actions for preliminary relief and leaving the dissimilar portions to be tried in disparate tribunals. *Mylan Pharmaceuticals Inc. v. Henney*, 94 F. Supp. 2d 36, 43 (D.D.C. 2000) (citing *Johnson v. Manhattan R. Co.*, 289 U.S. 479, 496-97 (1993)). Accordingly, the Court properly consolidated the two actions for the limited purpose of the preliminary injunction hearings on April 21, 2004. Any further consolidation would result in a loss of judicial economy and an abridgement of the FTC's substantive rights.

Properly read, Fed. R. Civ. P. 65(a)(2) could have, at most, permitted this Court, *in its discretion*, to combine instead the States' preliminary injunction hearing with their case on the merits. The FTC has no parallel case on the merits before this Court and its request for preliminary injunction is inherently different from the States' request for permanent relief in nature, scope, statutory basis and burdens of proof. In light of these inherent differences, the defendants cannot misuse Rule 65(a) to submerge the FTC's limited request for preliminary relief under an entirely different standard into the States' request for permanent relief. Such misuse of Rule 65(a) would improperly allow defendants to circumvent the FTC's case on the merits in an administrative tribunal. Since the Court granted the States' motion to consolidate cases for preliminary relief pursuant to Rule 42(a) on April 21, 2004, further consolidation

pursuant to Rule 65(a) would cause the FTC's case to inappropriately merge into, and be consumed by, the States' case on the merits, despite the inherent differences between the two cases. Such consolidation would abridge the statutory rights of the FTC to bring its case on the merits in an administrative tribunal and would produce judicial *dis*-economies. Consolidation pursuant to 65(a) would complicate the hearing and require the Court to duplicate adjudication that the administrative tribunal will later undertake.

III. Defendants Are Not Prejudiced By Consolidation of the Preliminary Injunction Only

Defendants argue that there will be "*no meaningful Clayton 7 review whatsoever*" because the additional delay of an administrative hearing will "insure defeat of the transaction by default." Def. Supp. Mem. at 3. Accordingly, they urge the Court to "short circuit[ ] the FTC's administrative process." *Id.* at 5. These arguments, however, amount to little more than thinly disguised forum shopping.[6] Indeed, Defendants have indicated that their true intention in seeking consolidation is to have this Court render a full decision on the merits after a truncated hearing, and then to seek to use that ruling (if it is in Defendants' favor) as the basis for collateral estoppel arguments in the FTC's administrative proceeding. Reynolds April 14 Transcript 20: 1-6; Def. Supp. Mem. at 6. Plaintiff FTC carries the burden of proof in its antitrust case and is entitled to present its case in a full proceeding on the merits in the appropriate forum. To the extent

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[6] Defendants imply that the FTC is being disingenuous in opposing Rule 65(a)(2) consolidation because "[t]he FTC knows . . . full well" that the "promise of an administrative hearing is . . . wholly illusory, with more than enough . . . additional expense, delay, and uncertainty to insure defeat of the transaction by default, without ever having a proper adjudication on the merits." Def. Supp. Mem. at 4. Yet, as the Commission' s counsel has noted to the Court, prior to the April 14 scheduling conference defendant Arch's position to the agency had been that it intended to litigate fully any administrative complaint issued by the Commission. Orlans April 14 Transcript 28:22-25.

defendants are unhappy with the prospect of an administrative trial following a grant of preliminary injunction issued under Section 13(b)'s lesser standard for relief, however, their dissatisfaction is merely with the statutory scheme established by Congress with the enactment of Section 13(b) and should more properly be addressed to Congress.

Moreover, the defendants' concerns about delay are both overstated and largely of their own making. With regard to the timing of the administrative proceeding, defendants are simply wrong in asserting that "*commencement* of the FTC hearing process *must await* a ruling by the Court in this action." Def. Supp. Mem. at 3 (emphasis in original). Indeed, the administrative proceeding *already* has commenced.[7] The rule and "triggering event" cited by defendants pertain only to election of fast-track procedures under Section 3.11A of the FTC's Rules of Practice for Adjudicative Proceedings ("FTC Rules"). 16 C.F.R. § 3.11A. Irrespective of whether fast-track procedures are elected, the FTC Rules provide for expedited hearing. Section 3.1 of the FTC Rules provides that: "It is the policy of the Commission that, to the extent practicable and consistent with requirements of law, such proceedings shall be conducted expeditiously." 16 C.F.R. § 3.1. The FTC Rules further provide that "counsel for all parties shall make every effort at each [stage] of a proceeding to avoid delay." *Id.*[8] Nothing prevents plaintiff and defendants

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[7] The administrative proceeding has been assigned to Administrative Law Judge D. Michael Chappell. Order Designating Administrative Law Judge, FTC Docket No. 9316 (April 15, 2004).

[8] The FTC Rules were amended in 1996 expressly "to reduce the cost, complexity, and length of FTC adjudicatory proceedings by clarifying and streamlining the agency procedures governing such proceedings." 61 Fed. Reg. 50640 (1996). Among the reasons noted for the amendments was the Commission's concern that "[t]he length of time taken in FTC proceedings may also be a factor that some courts consider in deciding whether to grant a preliminary injunction pending the outcome of the Commission's administrative proceeding." *Id.* The amendments alleviate this concern.

from working, in good faith, to expedite, insofar as possible, the administrative hearing. To this end, counsel for plaintiff has committed both to defendants' counsel and to this Court to take all actions necessary to bring the administrative proceeding to trial on an expedited basis. Orlans April 14 Transcript 30:20-31:1.

While representing to this Court that they cannot abide the time required to conduct the administrative proceeding brought by the FTC, however, defendants have dragged their feet in the administrative action. Plaintiff filed its Complaint in this preliminary injunction action on April 1, and defendants promptly filed their Answers on April 5. In contrast to their demonstrated speed in answering the charges in the Complaint for preliminary injunction, defendants have still not answered the administrative complaint issued by the FTC on April 6 and served on defendants on April 8, although according to defendants the administrative complaint is "virtually identical in both form and substance" to the Complaint here. Def. Mem. at 6 n.6. Defendants' election to take their time in answering the administrative complaint is significant because filing of defendants' answers to the administrative complaint triggers significant events in the administrative proceeding.[9]

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[9] Defendants must answer the administrative complaint on or before April 28. In accordance with Section 3.31(b) of the FTC Rules the parties are required to exchange initial disclosures within 5 days of receipt of a respondent's answer to the complaint. Moreover, Section 3.21(b) of the FTC Rules requires the administrative law judge to convene a scheduling conference not later than 14 days after the date on which all answers to the administrative complaint have been filed. 16 C.F.R. § 3.21(b). At the first scheduling conference, counsel for the parties are expected to address their factual and legal theories, a schedule of proceedings, possible limitations on discovery, "and other possible agreements or steps that may aid in the orderly and expeditious disposition of the proceeding." 16 C.F.R. § 3.21(b). Further, within two days after the scheduling conference the administrative law judge is required to enter an order establishing a schedule of proceedings, a plan of discovery, dates for the submission and hearing of motions, and the time and place of a final prehearing conference and of the evidentiary hearing. 16 C.F.R. § 3.21©).

The plaintiffs have committed to expedite the preliminary proceedings before this Court insofar as possible, even arguing that the matter be heard "on the papers." Orlans April 14 Transcript 8:24-9:10. However the Defendants have resisted such expedition,[10] as well as plaintiffs' efforts, to date, to move the administrative adjudication along quickly. The administrative adjudication would be further expedited upon Defendants' election of fast-track proceedings, which can occur once this Court has issued a preliminary injunction. 16 C.F.R. § 3.11A(b)(1)(i); *see* Def. Supp. Mem. at 3-4.

Defendants also complain that "the transaction has already been held in limbo for nearly a year while the FTC and Plaintiff States have jointly conducted their internal investigation." Def. Supp. Mem. at 4. Yet approximately three months of delay during this time are attributable to Defendant Arch's failure or refusal to comply with the Hart-Scott-Rodino Act, 15 U.S.C. § 18a, as well as to the defendants' own requests that the Commission postpone its vote authorizing the filing of the complaint in this action.[11] Indeed, at one point the Commission was forced to authorize its staff to file a separate lawsuit for violations of the Hart-Scott-Rodino Act because Arch refused to comply with the Act's requirements. 7A(g)(2) of the Clayton Act, 15 U.S.C. §

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[10] At the April 14 scheduling conference defendants argued against a hearing on paper submissions, representing to the Court that "we have had no discovery in this case whatsoever." Reynolds Transcript 12:21-22; *see id.* at 18:3. However, in their memorandum filed the previous day defendants conceded that "the government entities have thus far produced over fifty (50) boxes of investigative materials obtained from third-parties." Def. Mem. at 5 n.4. Further, defendant Arch has withdrawn its electronic document production relied on by Plaintiffs FTC and the States. *See* Emergency Motion filed this day.

[11] In one instance, defendants insisted on a written assurance that the Commission not vote prior to March 30.

18a(g)(2).[12] Only after the Commission authorized such suit and literally minutes before the suit was to be filed did Arch take steps to come into compliance with the Act. Meanwhile, defendants used that delay in an exhaustive attempt to convince FTC staff, management and, ultimately, the Commission, of the merits of their merger. Thus, defendants bear at least some responsibility for much of the delay.

Defendants' attempt to argue that they will be prejudiced by further delay violates the D.C. Circuit's well-established "chutzpah doctrine," under which a party cannot complain of harm to which it has contributed. *Breneman v. FAA*, 30 Fed. Appx. 7, 2002 WL 449015 (D.C. Cir. 2002); *Caribbean Shippers Ass'n v. Surface Transp.* Bd., 145 F.3d 1362, 1365 n.3 (D.C. Cir. 1998); *Harbor Ins. Co. v. Schnabel Found. Co.*, 946 F.2d 930, 937 n.5 (D.C. Cir. 1991) (citing the "legal definition of chutzpah: chutzpah is a young man, convicted of murdering his parents, who argues for mercy on the ground that he is an orphan").

Moreover, the Court need look no further than the *Heinz* case, the most recent merger decision of the D.C. Circuit Court, to conclude that the defendants' arguments about delay and prejudice must fail. In *Heinz*, the defendants argued that their merger would not survive the issuance of a preliminary injunction. 246 F.3d at 726. The Court of Appeals was unpersuaded:

> If the merger makes economic sense now, the appellees have offered no reason why it would not do so later. Moreover, . . . [n]othing in the record leads us to believe that [the principal assets of value] will not still exist when the FTC completes its work.

Id. at 726-27 (citations omitted). Here, there is no reason to believe that the underlying assets

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[12] Defendant Arch was required to comply with a request for additional information or documentary material pursuant to 15 U.S.C. § 18(a)(e) and 16 C.F.R. § 803.20 and failed to fully comply with such request until March 15, 2004.

will somehow fail to survive an expedited administrative adjudication, or that the parties will somehow vanish. Accordingly, there is no reason to presume that the defendants are prejudiced, or that administrative adjudication on the merits before the agency would provide "*no meaningful Clayton Act review*" so as to warrant the abrogation of the FTC Act and the adjudicative scheme envisioned by Congress and employed by the Commission for over thirty years.[13]

Conclusion

The defendants admit that the Court has no authority under the FTC Act to hear the full merits of the FTC's case. Yet, they argue that the statute can be abrogated solely on the basis that six States also have filed suit to arrest the transaction. While the Court has properly consolidated the preliminary relief portions of the two cases pursuant to Rule 42(a), there is no basis for full consolidation and combination of the preliminary and final hearings as argued for by the defendants. Accordingly, the Court should deny the defendants' motion for consolidation pursuant to Rule 65(a).

Respectfully submitted,

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[13] It is simply not true, as asserted by defendants, that there has never been an administrative proceeding following the entry of a Section 13(b) preliminary injunction. The FTC obtained a preliminary injunction blocking Coca-Cola's purchase of Dr. Pepper, *FTC v. Coca-Cola*, 641 F. Supp. 1128 (D.D.C. 1986), and proceeded to hold a full administrative trial. *In the matter of The Coca-Cola Co.*, D.9207, 117 F.T.C. 795 (1994). The Commission noted that Coca-Cola did not clearly disavow any interest in acquiring Dr. Pepper. 117 F.T.C. at 918. Moreover, after the FTC obtained a preliminary injunction blocking PPG Industries, Inc. from buying Swedlow, Inc., *FTC v. PPG Industries, Inc.*, 798 F.2d 1500 (D.D.C. 1986), several days of administrative hearing took place before the matter settled. *In the Matter of PPG Industries, Inc.*, D.9204, 111 F.T.C. 597 (1989).

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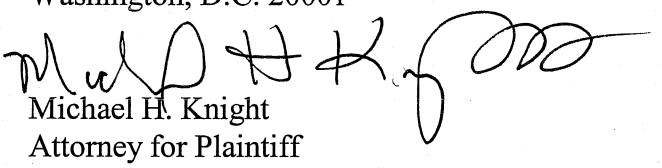
By: 
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