IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, Plaintiff, v. ARCH COAL, INC., *et al.*, Defendants.	Case Number 1:04CV00534 (JDB)
STATE OF MISSOURI, et al., Plaintiffs, v. ARCH COAL, INC., *et al.*, Defendants.	Case Number 1:04CV00535 (JDB)

DEFENDANTS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF RULE 65(a)(2) MOTION FOR CONSOLIDATION OF PRELIMINARY AND PERMANENT INJUNCTIONS

At the status conference on April 14, 2004, the Court invited further briefing on Defendants' Rule 65(a)(2) motion to the extent any party wished to address further the Court's authority to grant the relief requested. Defendants Arch Coal, Inc. ("Arch"), Vulcan Coal Holdings LLC, and Triton Coal Company (LLC) ("Triton") file this Supplemental Memorandum in response.

This Court clearly has full authority to consolidate the hearings on the motions for preliminary and permanent injunctive relief filed by the States of Missouri, Kansas, Illinois, Iowa and Texas ("Plaintiff States") (Case No. 1:04CV00535). That is undisputed. Moreover, such a consolidation has in recent years been employed more often than not in merger/acquisition cases brought by the Department of Justice under Clayton 7, particularly when, as here (*see* Pl. Sts. Complaint ¶ 14), the merging parties have agreed to "stand down" and refrain from closing the transactions pending the Court's decision. *See, e.g., United States v. SunGard Data Sys., Inc.*, 172 F. Supp. 2d 172, 179 (D.D.C. 2001); *United States v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121, 125 (E.D.N.Y. 1997).

Hence, the Rule 65(a)(2) question now before the Court is, with all due respect, truly not one concerning this Court's *authority* to consolidate. Rather, the issue concerns only the Court's *discretionary powers* to do so. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *Glacier Park Found. v. Watt*, 663 F. 2d 882 886 (9th Cir. 1981). More precisely, the immediate question is whether the Court should -- not "can," but "should" -- combine into a single hearing the Plaintiff States' requests for preliminary and permanent relief in light of the related action for preliminary relief only (Case No. 1:04CV00534), filed by the Federal Trade Commission ("FTC") under Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b). Defendants submit that, even accounting for the FTC's Section 13(b) suit, a balance of the equities in this instance -- and an exercise of the Court's Rule 65(a)(2) discretion is all about balancing the equities (*City of Rye v. Schuler*, 355 F. Supp. 17, 20 (S.D.N.Y. 1973)) -- offers compelling reasons to order consolidation, and no reason not to do so.

Plaintiffs' argument in opposition centers on the proposition that, under the Federal Trade Commission Act (15 U.S.C. §§ 21(a)-(d), 45(a)-(d)), Congress gave to the FTC "the lead role" to enforce the Clayton Act administratively, with review by the courts of appeals, and that a Rule 65(a)(2) consolidation in the Plaintiff States' related action would effectively deprive the FTC of the administrative review process Congress afforded. *See, e.g.,* FTC Memo in Support of Preliminary Injunction Motion at 42-43 (citing *Hospital Corp. of America v. FTC*, 807 F.2d

1381, 1386 (7th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987)). Yet, the enforcement authority Congress conferred on the FTC was plainly not exclusive; it runs concurrently with the jurisdiction courts have in the first instance to resolve Clayton 7 merger/acquisition questions in suits brought by parties other than the FTC, including the Plaintiff States. *See* Clayton Act, Section 16, 15 U.S.C. § 26 (2002); *and see, e.g., Hawaii v. Standard Oil*, 405 U.S. 251 (1972). Moreover, the administrative proceeding the FTC complains it would be deprived of is an illusion. In the history of merger enforcement, Defendants are unaware of a single instance in which such a proceeding has ever followed the entry of a Section 13(b) preliminary injunction.

In candor, Defendants' worst fear is that there will be *no meaningful Clayton 7 review whatsoever* of the Arch-Triton-Kiewit transactions. Plaintiffs have represented to the Court that the FTC's administrative proceeding is "currently scheduled to begin on July 6, 2004." Pl. Sts. Memo in Support of Rule 42(a) Consolidation, at 5. That date, however, comes from the FTC's Notice accompanying its administrative complaint, which states, "[a] hearing will begin on the sixth day of July, 2004, at 10:00 a.m. in Room 532, *or such other date as determined by the ALJ*." FTC Memo in Support of Preliminary Injunction Motion, App. IV, at 15 (emphasis added).

In point of fact, under the FTC's own Rules of Practice for Adjudicative Proceedings ("FTC Rules"), with the filing of the FTC's Section 13(b) action, *commencement* of the FTC hearing process *must await* a ruling by the Court in this action, identified in the FTC Rules as a "triggering event." *See* 16 C.F.R. § 3.11A(c)(1) (2004). Moreover, even when the administrative proceeding has been put on a so-called "fast track,"[1] the pre-hearing scheduling conference with the ALJ that follows the "triggering event" (16 C.F.R. § 3.11A(c)(2)(i)) is only for the purpose of establishing "a schedule of proceedings, including a plan of discovery, dates

[1] The FTC Rules afford respondents an opportunity to elect to proceed on a "fast track" (16 C.F.R. § 3.11A(b)(1)), in which case "the Commission will issue a final order and opinion within 13 months after the triggering event." (16 C.F.R. § 3.11A(c)(3).) Respondents' election must, however, await this Court's ruling in the instant Section 13(b) action (16 C.F.R. § 3.11A(b)(2)).

for 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(c) (2004).

It is, thus, painfully apparent that no administrative hearing can or will commence in the FTC until, at the earliest, some months after a ruling by this Court, and that Defendants are staring at a deadline for final Commission action likely toward the latter part of August, 2005 -- assuming the Commission does not elect to extend the 13-month deadline imposed by the FTC Rules. *See* 16 C.F.R. § 3.11A(c)(3). Given 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, the prospect of waiting an additional year while the FTC conducts its administrative review sounds the effective "death knell" for the proposed merger. The FTC knows this full well, as do the Plaintiff States and the parties. The promise of an administrative hearing is, in reality, wholly illusory, with more than enough built-in layers of additional expense, delay, and uncertainty to insure defeat of the transactions by default, without ever having a proper adjudication on the merits.[2]

This Court thus provides Defendants their *only prospect* for meaningful Clayton 7 review. Collapsing into a single hearing the Plaintiff States' requests for preliminary and permanent injunctive relief will *alone permit* the Arch-Triton-Kiewit transactions to be properly scrutinized to determine whether they will, indeed, substantially lessen competition, as claimed by the FTC and the Plaintiff States, or will, when consummated, bring more vibrant and lasting

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[2] The Plaintiff States' magnanimous gesture to "abate or stay" their action for a permanent injunction and "abide by" the outcome of the administrative proceedings before the FTC (Pl. Sts. Memo in Support of Rule 42(a) Consolidation, at 5-6) is thus not calculated to insure that a full hearing takes place on the Clayton 7 claims they made, but to put the Defendants' transactions on an administrative "fast track" to nowhere, effectively insuring the transactions will "die" without anyone (neither the FTC nor the Plaintiff States) having to show that the Arch-Triton-Kiewit transactions do in fact, as alleged, raise real antitrust concerns. Defendants have found no law to suggest that, once plenary jurisdiction has been properly invoked (as in Case No. 1:04CV00535), a court must suspend indefinitely an exercise of its Clayton 7 enforcement authority because the FTC subsequently opens a separate administrative review proceeding on the same transaction.

competition to the relevant market on terms that will enhance productivity and lower costs, as maintained by Defendants.

Such an exercise of the Court's Rule 65(a)(2) discretion can hardly be faulted on the ground that it short circuits the FTC's administrative process when, as explained, that process is so protracted that no merging parties have nor can realistically afford to avail themselves of it. Moreover, unlike the Rule 42(a) consolidation urged by the Plaintiff States and the FTC (which, as explained, effectively denies Defendants all opportunity for a full hearing on the merits), Defendants' Rule 65(a)(2) consolidation deprives no one of the opportunity to be heard fully on the merits. The FTC obviously will be a participant before the Court and fully capable of putting in its entire case-in-chief.[3] Similarly, the Plaintiff States, instead of deferring wholly to the FTC as they had proposed, have the chance to be fully engaged. As pointed out in our motion papers, both have plainly had complete discovery, and, not surprisingly, stand ready to proceed on an accelerated schedule. *See* Defendants' Memo in Support of Rule 65(a)(2) Consolidation, at 4-5.

Proceeding in this fashion in no way undermines the Federal Trade Commission's antitrust enforcement authority. In assigning to the FTC concurrent jurisdiction to enforce the Clayton Act, Congress gave to the agency responsibility to examine closely proposed mergers and acquisitions so as to insure that, if consummated, they would cause no substantial lessening of competition. *See, e.g., A Guide to the Federal Trade Commission*, at 16-18; *and see generally, Von Kolinowski,* Antitrust Laws & Trade Reg. (2nd Ed.) § 3.02[4]. A Rule 65(a)(2)

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[3] The FTC's position here is, indeed, curious. On the one hand, it argues in support of the Plaintiff States' consolidation motion that the FTC *should not be deprived of* the opportunity to present its case-in-chief, albeit to an ALJ (knowing full well, if that argument prevails, it never will be put to its proof). On the other hand, it argues in opposition to Defendants' consolidation motion that the FTC *should not be required* to present its evidence-in-chief, albeit in this Court (knowing full well that if not put to its proof here, it will be put to its proof nowhere). It is, however, the FTC and Plaintiff States, after some 8 months of a joint investigation, which openly challenged the Arch-Triton-Kiewit transactions under Clayton 7. To require that the challenging parties step forward and show their proof -- making clear they cannot win by default through a simple manipulation of hearing schedules -- hardly seems an abuse of discretion. There is in this regard little doubt the FTC could have invoked this Court's jurisdiction to seek a permanent injunction. *See* 15 U.S.C.§ 53(b)(2). Its election not to do so, but to orchestrate with the Plaintiff States a request for a limited consolidation only under Rule 42(a), appears quite clearly calculated to avoid a hearing on the merits altogether rather than to reserve the merits' inquiry for administrative review.

consolidation in this case takes from the FTC neither its ability to investigate the Arch-Triton-Kiewit transactions (it has admittedly already performed that task over the last 8 months), nor the ability to marshal and present whatever evidence it may have to support its conclusions. Accordingly, there can be no credible claim of prejudice. *And see*, Defendants' Memorandum in Support of Rule 65(a)(2) Consolidation, at 9.

Certainly, if Defendants prevail, and this Court determines that the Arch-Triton-Kiewit transactions should not be enjoined, further administrative hearings to examine the same evidence may be superfluous. But that, at least, would obviate administrative review for substantive reasons (and after hearing fully from the FTC), not because of procedural formalities. Conversely, should this Court determine an injunction should issue (again, after hearing fully from the FTC), further FTC review also becomes unnecessary, but, again, because the Clayton Act requires that result, not because indecision forces it. In either event, or both, this Court will have acted well within its authority through consolidation of the claims for preliminary and permanent relief in the Plaintiff States' case. And, with the offer of a following administrative review in the FTC's Section 13(b) action holding out no better promise than a decision too far down the road for the proposed transactions to survive another 13 months of indecision, the exercise of that authority in the present circumstances suggests no abuse of judicial discretion.[4]

To be sure, this Court's consolidated trial on the merits contemplates a shortened hearing, but that circumstance weighs no more heavily on the Plaintiffs than on the Defendants. Indeed, precisely because this will be Defendants only chance to be heard, the undersigned counsel advised the Court that a 5-day hearing appears a bit too tight, even recognizing that the Court is

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[4] As Defendants acknowledged in their initial Memorandum, if the only action filed had been the FTC's Section 13(b) suit for preliminary injunction, this Court clearly would have had no authority to hear a claim for permanent relief, and thus Defendants could not have properly raised the issue presented on the instant motion regarding an exercise of the Court's discretionary power under Rule 65(a)(2). *See* Defendants' Memorandum in Support of Rule 65(a)(2) Consolidation, at 6-8. But, the FTC and the Plaintiff States chose to come to this Court together and file companion actions as related cases. Because the Plaintiffs put the issue of a permanent injunction squarely before the Court, it is well within this Court's authority to hear and determine that issue in the manner urged by Defendants, and a perfectly proper exercise of its Rule 65(a)(2) discretion to decide to do so. Indeed, Defendants know of no precedent to the contrary.

prepared to receive both written and oral testimony. Even so, setting aside five days to hear the merits is far better than the stingy offer from the Plaintiff States and the FTC – *i.e.,* a quick pass "on the papers" with no hearing on the merits whatsoever. Defendants can find nothing in that suggestion that serves the public interest. *And see* Defendants Memorandum in Support of Rule 65(a)(2) Consolidation, at 5-9.

CONCLUSION

For the foregoing reasons, as well as those set forth in Defendants' initial motion papers, Defendants submit that this Court has full authority to consolidate the requests for preliminary and permanent relief in the Plaintiff/States' action (Case No. 1:04CV00535), and that to do so would in the present circumstances be a proper exercise of the Court's discretionary powers

under Rule 65(a)(2). Accordingly, Defendants urge that such an order of consolidation be entered – if not immediately, then sometime before the matter is scheduled to be heard by the Court.

Respectfully submitted,

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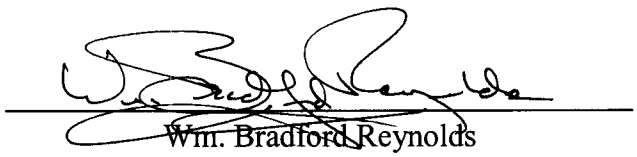
Dated: April 19, 2004

CERTIFICATE OF SERVICE

I hereby certify that a copy of Defendants' Supplemental Memorandum Supporting Rule 65(a)(2) Motion for Consolidation of Preliminary and Permanent Injunction was served electronically and by first-class mail to all counsel of record this 19th day of April, 2004.



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