

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,)	
)	
Plaintiff,)	
)	Case No. 1:04CV00534 (JDB)
v.)	
)	
ARCH COAL, INC., et al.,)	
)	
Defendants.)	

**RESPONSE OF *AMICUS CURIAE* PETER KIEWIT SONS', INC. TO
MOTION IN LIMINE BY PLAINTIFF FEDERAL TRADE COMMISSION
TO EXCLUDE ALL EVIDENCE AND ARGUMENT ON THE ISSUE OF REMEDY**

As *Amicus Curiae*, Peter Kiewit Sons', Inc. ("Kiewit") respectfully offers the Court its response to the Motion In Limine by Plaintiff Federal Trade Commission to Exclude All Evidence and Argument on the Issue of Remedy ("Motion"). The specific proposed remedy addressed by Plaintiff's Motion is the asset purchase agreement ("Arch-Kiewit Agreement") between Kiewit and Defendant Arch Coal, Inc. ("Arch"). Plaintiff asserts that the Arch-Kiewit Agreement may never be consummated in the absence of a preliminary injunction. Kiewit hereby responds to Plaintiff's Motion in order to make clear to the Court, as only Kiewit is in a position to do, the resolve and intention of Kiewit to hold Arch to its obligation to consummate the Arch-Kiewit Agreement.

Plaintiff contends that, because Arch and Kiewit could voluntarily renegotiate or modify their agreement after Arch acquires Triton Coal Company, LLC ("Triton"), divestiture of the Buckskin Mine to Kiewit is not guaranteed to take place. Kiewit's president and chief operating officer is scheduled to appear as a witness at the hearing in part to address, as he did in his recent

deposition, Kiewit's intention to achieve consummation of the purchase of Buckskin from Arch without alteration of the Arch-Kiewit Agreement.

Kiewit is contractually committed to Arch to purchase, and Arch is contractually committed to Kiewit to sell, the Buckskin Mine. Plaintiff suggests that the Arch-Kiewit Agreement contains provisions that allow one or both parties to walk away from their obligations. Plaintiff refers to the provision that either party can terminate if the closing of the acquisition of the Buckskin Mine has not occurred by an expiration date of May 17, 2004. Contrary to Plaintiff's assertion, the applicable expiration date automatically extends through August 17, 2004 to coincide with the expiration date of Arch's purchase agreement with Vulcan and Triton.

There should be no doubt that Kiewit's interest in completing the acquisition of the Buckskin Mine from Arch is strong. If, as Plaintiff's Memorandum in support of its Motion suggests, Arch attempted to avoid its contractual obligation to convey the ownership of the Buckskin Mine to Kiewit, Kiewit would sue Arch to compel consummation of the Arch-Kiewit Agreement.

Finally, Plaintiff contends that Kiewit's incentive and resolve to consummate its agreed-upon purchase of the Buckskin Mine from Arch is "irrelevant." Respectfully, that is for the Court to determine upon a full understanding of the implications of Kiewit's acquisition intentions. The views and positions of Kiewit's president and chief operating officer, scheduled as a witness to address Kiewit's interest in acquiring the Buckskin Mine from Arch and Kiewit's intentions with respect to Buckskin once it acquires the mine, should be of value to the Court in making that determination.

DATED: June 9, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 9, 2004, a copy of the foregoing Response of *Amicus Curiae* Peter Kiewit Sons', Inc. To Motion In Limine By Plaintiff Federal Trade Commission To Exclude All Evidence And Argument On The Issue Of Remedy, was served via facsimile and United States mail upon:

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