IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF FEDERAL TRADE COMMISSION'S MEMORANDUM IN REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION *IN LIMINE*

The Federal Trade Commission's motion *in limine* in this matter puts squarely before this Court the question whether, in a preliminary injunction proceeding under section 13(b) of the FTC Act, if the FTC otherwise establishes that a preliminary injunction is legally warranted, the District Court can consider as possible grounds for denying preliminary relief the defendants' self-help remedy proposal. Perhaps fearing the answer to this question, defendants seek to persuade this Court, through a tortured characterization of the facts, that Arch's agreement to sell post-merger certain Triton assets to Peter Kiewit Sons, Inc. ("Arch-Kiewit Agreement") is not intended as a "remedy" at all, but rather is "an intrinsic part of the overall [Arch-Triton]

transaction."[1] Neither the facts nor the law support defendants' arguments, and nothing in defendants' opposition overcomes the fundamental concerns expressed in the FTC's motion *in limine* to exclude evidence and argument on the issue of permanent remedy.[2] Indeed, any decision *not* to impose preliminary injunctive relief in this case that is based on consideration of the Arch-Kiewit Agreement would inhibit the Commission's ability to conduct the very administrative proceedings envisioned by Congress under the FTC Act and the Clayton Act, and would irreparably prejudice the Commission's effective enforcement of the antitrust laws in this case.

I. Defendants' Mischaracterization Of The Facts Does Not Alter The Remedial Nature Of Arch's Proposed Sale Of The Buckskin Mine.

Defendants' principal argument in opposition hinges on their assertion that the Arch-Kiewit Agreement is somehow not being proffered as a remedy for the competitive effects of the proposed Arch-Triton merger.[3] This argument is contradicted by the defendants' own actions and statements and the facts in this case. Indeed, according to the defendants themselves:

> Upon learning of the [FTC] staff's reservations regarding Arch's acquisition of both of Triton's mines (*i.e.*, North Rochelle and Buckskin), Arch secured Kiewit as a purchaser of the Buckskin mine, and, together with Kiewit, submitted to the FTC the divestiture package *as an answer to those stated concerns*.

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[1] Defendants' Memorandum in Opposition to Plaintiffs' Motion in Limine Regarding Kiewit's Purchase of the Buckskin Mine, filed June 10, 2004 ("Defs.' Opp'n"), at 5.

[2] *See* Memorandum in Support of Plaintiff Federal Trade Commission's Motion *In Limine*, filed June 3, 2004 ("FTC motion *in limine* on remedy").

[3] *Amicus curiae* Kiewit, however, does not appear to dispute that the Arch-Kiewit Agreement is being offered to this Court as a "specific proposed remedy." *See* 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, filed June 9, 2004 ("Kiewit Response"), at 1.

Defs.' Opp'n at 3- 4 (emphasis added).[4] Defendants thus clearly admit that they offered the sale of the Buckskin mine as a remedy to the Commission. Moreover, defendants' assertion to this Court that "[t]he Buckskin divestiture has been agreed to by the merging parties not for remedial purposes," Defs.' Opp'n at 5, is belied most tellingly by their concession that, "[t]he Buckskin divestiture . . . is proposed . . . to insure, once [the underlying acquisition is] consummated, that no violation is likely to occur." *Id.*[5] Inherent in this argument is the concession that the underlying Arch-Triton merger, if consummated, would violate section 7 of the Clayton Act. If defendants are conceding that the FTC would be able to demonstrate a likelihood of success on the merits at the preliminary injunction hearing, then entry of the presumptive full-stop preliminary injunction would be the appropriate outcome under section 13(b), not permitting the defendants to acquire all of Triton and dismantle its operations through the sale of Buckskin to Kiewit. *See FTC v. H.J. Heinz*, 246 F.3d 708, 714-15, 726 (D.C. Cir. 2001); *FTC v. PPG Industries, Inc.*, 798 F.2d 1500, 1506 (D.C. Cir. 1986).

The defendants further admit the remedial nature of their "divestiture" proposal in arguing

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[4] Defendants quibble with the FTC's characterization of Kiewit's initial interest in acquiring all of Triton as an earlier "unsuccessful bid." Defs.' Opp'n at 4 n.1. More accurately, Kiewit's initial interest in acquiring all of Triton took the form of its submission of a nonbinding offer that Kiewit elected not to pursue further. *See* Ex. 1, Grewcock Dep. Tr. at 30:22-40:19. To the extent Kiewit may have a continuing interest in acquiring all of Triton, that is obviously constrained by the existence of Arch's merger agreement with Triton. *See* Ex. 2, Grewcock Dep. Tr. at 48:1-66:14, Dep. Ex. 1 (PX 3637) and Dep. Ex 2 (PX 3638).

[5] Defendants' recognition of the remedial nature of the proposed sale of Buckskin is reinforced by their reference to the transaction as a "merger/divestiture proposal," and their contention that "[w]hether the divestiture will in fact introduce a vigorous competitor into the market . . . is an obvious question for the trier of fact." Defs.' Opp'n at 2, 10.

that it represents a "good faith attempt to address the concerns expressed by the FTC staff."[6] Although they endeavor, by argument alone, to shoehorn the Arch-Kiewit Agreement into the confines of *FTC v. Libbey*[7] by urging that the sale of Buckskin was designed to address these stated concerns, defendants acknowledge that when the Commission authorized a preliminary injunction complaint, it "determined that the competitive concerns posed by Arch's acquisition of Triton were not remedied by Arch's offer to sell the Buckskin mine to Kiewit." Defs.' Opp'n at 4 (quoting FTC motion *in limine* on remedy, at 4). Indeed, defendants recognize that the FTC's reservations about the underlying transaction relate to "Arch's acquisition of *both* of Triton's mines (i.e., North Rochelle *and* Buckskin)," but that "Arch secured Kiewit as a purchaser of [only] the Buckskin mine."[8] Thus, the proposed "divestiture" does not even ostensibly address the FTC's stated concerns.

II. Defendants Cite No Controlling Law For Their Arguments In Opposition.

Defendants claim that the FTC's argument has been rejected by every court to have considered it, but other than *FTC v. Libbey, Inc.*, cite exclusively to cases brought by the

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[6] *See* Defs.' Opp'n at 3-4. Defendants suggest that, because "the FTC has itself put the issue of the Buckskin divestiture before the Court on its request for a preliminary injunction by alleging that 'the transfer [of Buckskin to Kiewit] could not constrain [an] anticompetitive price increase by the three major competitors . . . [d]efendants are entitled to give an evidentiary response to that unsubstantiated claim." Defs.' Opp'n at 5. The Commission's determination that the proposed sale of Buckskin to Kiewit was inadequate relief for the competitive concerns arising from the proposed Arch-Triton merger underscores, and does not alter, the fact that this is being offered as permanent relief and is not properly part of the preliminary injunction hearing. *See* FTC motion *in limine* on remedy, at 5-8.

[7] 211 F.Supp.2d 34 (D.D.C. 2002). As discussed further below, *Libbey* is inapplicable to the facts of this case.

[8] Defs.' Opp'n at 3-4 (emphasis added).

Department of Justice ("DOJ") Antitrust Division as support for this assertion. *See* Defs' Opp'n at 2. Unlike the FTC, which acts as ultimate trier of fact on the merits of the Clayton Act challenges it pursues administratively under section 11 of the Clayton Act, 15 U.S.C. §21, the DOJ can only secure preliminary and permanent injunctive relief through a district court, which acts as the ultimate trier of fact on the merits under section 15 of the Act, 15 U.S.C. § 25, as in the cited cases. *See U. S. v. Franklin Electric Co., Inc.,* 130 F.Supp. 2d 1025 (W.D. Wisc. 2000) (DOJ action seeking permanent injunction pursuant to §15 Clayton Act of acquisition challenged under §7 Clayton Act); *see also U.S. v. Atlantic Richfield Co.*, 297 F. Supp. 1061 (S.D.N.Y. 1969), *aff'd. sub nom., Bartlett v. U.S.*, 401 U.S. 986 (1981) (DOJ action seeking to enjoin merger under §15 Clayton Act); *U.S. v. Connecticut National Bank*, 362 F. Supp. 240, 283 (D. Conn. 1973), *vacated, U.S. v. Connecticut National Bank*, 418 U.S. 656 (unsuccessful DOJ action to enjoin bank merger under §15 Clayton Act). None of these cases involved an action for preliminary relief under §13(b) of the FTC Act, in which the District Court's role is limited.

Moreover, *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34 (D. D.C. 2002), the sole §13(b) case cited by the defendants, which they assert is "the precedent most directly on point," Defs.' Opp'n at 2, was based on substantially different facts than are present in this matter. Unlike in *Libbey*, where the Court found the parties in that case had abandoned their original merger agreement and entered into a new agreement,[9] defendants here have *not* amended their original May 29, 2003,

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[9] As the defendants quote:

> . . . parties to a merger agreement that is being challenged by the government *can abandon that agreement and propose a new one* in an effort to address the government's concerns. *And when they do so under circumstances as occurred in this case, it becomes the new agreement that the Court must evaluate* in deciding whether an injunction should be issued.

Merger and Purchase Agreement pursuant to which Arch proposes to acquire all of Triton.[10] Defendants' suggestion that "Arch amended its initial Triton acquisition" is simply not true.[11] As a matter of contract law and in fact, Arch's contract with Kiewit is separate and distinct from, and has not been made part of, the May 29 Arch-Triton merger agreement.[12] The Court in *Libbey* also found that the amended agreement ostensibly addressed the FTC's concerns about the original agreement's potential anticompetitive effects in the relevant market in that case.[13] That is emphatically not the case here: Arch is still proposing to purchase all of Triton, and its proposal to sell Buckskin to Kiewit post-merger on its face addresses only part of the FTC's stated concern. And while the Court in *Libbey* had jurisdiction over all of the parties to the amended merger agreement, Kiewit is not subject to the jurisdiction of this Court. Moreover, although Kiewit is also not a respondent in the FTC's ongoing administrative proceeding, it could, by consummating the Arch-Kiewit Agreement, thwart the FTC's ability to order complete and effective relief if the Arch-Triton merger is found illegal in the administrative proceeding.

Although the FTC believes that the Court's decision in *Libbey* to evaluate the parties' last-minute amended merger agreement rather than their original merger agreement was incorrect, the agency did not appeal the ruling because the requested preliminary injunction was

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Libbey, 211 F. Supp. 2d at 46. (emphasis added).

[10] *See* FTC motion *in limine* on remedy, at 3.

[11] *See* Defs.' Opp'n at 3.

[12] FTC motion *in limine* on remedy, at 4.

[13] The Court in *Libbey* found that the amended merger agreement ostensibly addressed the FTC's competitive concerns regarding the food service glassware market because "it eliminated the purchase of Anchor's food service business." 211 F.Supp. 2d at 38, 41.

granted. *Libbey*, 211 F. Supp. 2d at 55. Regardless, in asking "that this Court evaluate the Buckskin divestiture along with the other features of the entire transaction,"[14] the defendants seek to expand *Libbey* far beyond its holding, and to have this Court make an unprecedented decision in an FTC preliminary injunction action pursuant to section 13(b) of the FTC Act: to deny the FTC's requested preliminary injunction based on a private side deal between defendant Arch and non-party Kiewit that would permanently alter the competitive structure of the market and prejudice the Commission's ability to order appropriate ultimate relief.

Defendants conclude their opposition by asserting that "[w]hether the divestiture will in fact introduce a vigorous competitor into the market . . . is an obvious question for the trier of fact based on the evidentiary record compiled at the hearing."[15] Where the FTC seeks only preliminary injunctive relief from the Court pursuant to section 13(b) of the FTC Act in aid of its ongoing administrative trial on the merits, the question whether the proposed sale of the Buckskin mine to Kiewit "will in fact introduce a vigorous competitor into the market" is reserved, by statute and under controlling law, for determination by the Commission as trier of fact on the merits.[16]

III. Consideration Of The Arch-Kiewit Agreement As A Basis For Denying Preliminary Relief Would Preempt The Commission's Jurisdiction Under The FTC Act And The Clayton Act.

The issue of remedy only becomes relevant in the FTC's § 13(b) action for preliminary relief if the Court first determines that the proposed Arch-Triton merger raises serious and

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14 Defs.' Opp'n at 5.

15 *Id.* at 10-11.

16 *See* FTC motion *in limine* on remedy, at 5-8.

substantial questions. But denial of the preliminary injunction based on consideration of the defendants' proposal would result in one of two possible outcomes, either of which would irreparably prejudice *the Commission's* ability to obtain an effective remedy at the conclusion of the administrative proceeding on the merits : (1) the defendants' proposed "remedy" may not occur in its present form because Arch and Kiewit could renegotiate, or even abandon, their transaction, but Arch would have acquired all of Triton; or (2) the proposed remedy would occur, and Triton's operations as they presently exist would be torn asunder. If Arch is permitted to acquire Triton and to dismantle its operations through sale of the Buckskin mine to Kiewit, the Commission would be unable to order that Triton's current operations be reconstituted in the hands of a single new competitor that would be able to supply the market with both 8400 Btu and 8800 Btu SPRB coal, just as Triton does now, thereby fully restoring Triton's pre-merger competitive presence in the market.[17] Arch's proposed self-help remedy, as embodied in the Arch-Kiewit Agreement, would thus irreparably prejudice the Commission's ability to fashion a complete and effective permanent remedy if it were to find the Acquisition illegal at the end of administrative proceedings.[18]

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[17] *See* FTC motion *in limine* on remedy, at 8-9.

[18] *See* FTC motion *in limine* on remedy, at 1-2. Defendants' assertion that they and not the FTC and the public interest are at risk if the Court denies the requested preliminary injunction and they are later subject to a permanent injunction issued administratively by the FTC, Defs.' Opp'n at 6-7, ignores the Congressional determination embodied in section 13(b) that divestiture is an inadequate and unsatisfactory remedy in a merger case because, "if the merger were ultimately found to violate the Clayton Act, it would be impossible to recreate pre-merger competition." *See Heinz*, 246 F.3d at 726.

Conclusion

Having failed to persuade the Commission that the Arch-Kiewit Agreement was adequate relief for the FTC's competitive concerns with Arch's acquisition of Triton, defendants are understandably eager to try to persuade this Court to override the agency's determination and preempt the pending administrative proceeding on the merits. Defendants state that they do not seek an affirmative Court order approving the Buckskin sale, "but ask only that this Court evaluate the Buckskin divestiture along with the other features of the entire transaction,"[19] presumably as the basis for denial of the FTC's requested preliminary injunction. But if the Court allows the Acquisition to proceed without an injunction based on Arch's proposed self-help remedy, this would effectively deprive the Commission of its ability to restore competition to the pre-merger *status quo* because it would permit Arch to dismantle Triton permanently, thereby prejudicing the FTC's ability to enforce the antitrust laws effectively. For this precise reason, the good faith intentions of Kiewit and Arch to consummate the proposed Arch-Kiewit Agreement are among the concerns underlying the FTC's motion *in limine*.[20]

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[19] Defs.' Opp'n at 5.

[20] The FTC does not question *amicus curiae* Kiewit's resolve or intention to hold Arch to its obligations under the Arch-Kiewit Agreement. *See* Kiewit Response. Rather, among the FTC's concerns is that the parties *will* consummate the Arch-Kiewit Agreement. *See* FTC motion *in limine* on remedy, at 11-12.

For the foregoing reasons, the FTC respectfully reiterates its request that the Court grant the FTC's motion *in limine* on remedy and issue an order excluding evidence and argument concerning permanent relief, particularly Arch's proposed sale of Triton's Buckskin mine to Kiewit, from the consolidated preliminary injunction hearing.

Respectfully submitted,

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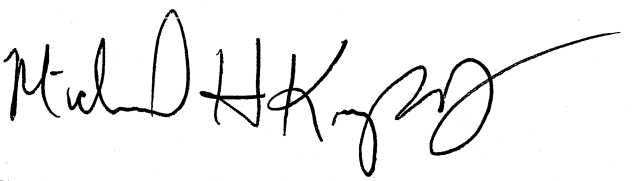
By: 

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