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.*, Plaintiffs, v. ARCH COAL, INC., *et al.*, Defendants.	1:04CV00535 (JDB)

MOTION *IN LIMINE* BY PLAINTIFF FEDERAL TRADE COMMISSION TO EXCLUDE ALL EVIDENCE AND ARGUMENT ON THE ISSUE OF REMEDY

Plaintiff Federal Trade Commission ("FTC" or "Commission") respectfully moves that evidence and argument on the issue of remedy and permanent relief be excluded from the consolidated hearing on the FTC's action for preliminary injunction pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). In particular, the FTC moves for exclusion of all evidence and argument on defendant Arch's executory agreement with Peter Kiewit Sons', Inc. ("Kiewit") to sell Triton's Buckskin mine to Kiewit, contingent on its acquisition of Triton, which defendants present as permanent relief for the FTC's antitrust claims concerning the Acquisition. *See* Defs.' Pretrial Brief in Opposition to Plaintiffs' Motions for Preliminary Injunction (May 24, 2004)

("Defs' Pretrial Brief in Opposition"); *see also* Defs.' Mem. Supporting Rule 65(a)(2) Mtn.; Defs.' Answers.

The FTC submits the accompanying memorandum in support of this motion *in limine*.

The Plaintiff States have authorized the FTC to represent to the Court that the Plaintiff States support this motion. The FTC has conferred with counsel for Defendants, who have advised us that this motion will be opposed.

Respectfully submitted,

FEDERAL TRADE COMMISSION

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Dated: June 3, 2004

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MEMORANDUM IN SUPPORT OF PLAINTIFF FEDERAL TRADE COMMISSION'S MOTION *IN LIMINE*

Plaintiff Federal Trade Commission ("FTC" or "Commission") files this motion *in limine* to exclude, for purposes of the preliminary injunction proceeding, all evidence and argument on the issue of remedy, including, in particular, defendant Arch Coal, Inc.'s ("Arch") proposed self-help remedy as embodied in its executory agreement to sell defendant Triton Coal Co.'s ("Triton") Buckskin mine to Peter Kiewit Sons, Inc. ("Kiewit"), post-merger.

The Commission's pending administrative proceeding will entail a full hearing on the merits of whether Arch's proposed acquisition of Triton (the "Acquisition") may substantially lessen competition in violation of section 7 of the Clayton Act, 15 U.S.C. §18, and section 5 of the FTC Act, 15 U.S.C. §45. If the Commission concludes that the Acquisition is illegal, it will

then determine what remedy is necessary and appropriate to preserve the competitive *status quo*.

Consideration by this Court of what remedy would be necessary and appropriate would preempt the Commission's ability to carry out its responsibilities under the Acts and, should the Commission find the Acquisition to be illegal, order the necessary and appropriate relief. There is no scenario in which addressing the issue of permanent remedy in a preliminary injunction proceeding under section 13(b) of the FTC Act, 15 U.S.C § 53(b), would not prejudice the Commission. If the Court concludes that the Commission has raised serious and substantial questions about the legality of the Acquisition under section 13(b),[1] but allows the Acquisition to proceed subject to an order incorporating Arch's proposed remedy, such an order would preempt the Commission's administrative proceeding on the merits and compromise its ability to impose an appropriate remedy were it ultimately to find the Acquisition to be illegal. Alternatively, if the Court allows the Acquisition to proceed without an order based on Arch's proposed remedy, this would also effectively deprive the Commission of the ability to restore competition to the pre-merger *status quo* because it would permit Arch irreparably to dismantle Triton. Finally, Arch's proposed "remedy" may never occur because the agreement to sell Buckskin is a separate agreement, contingent on the Acquisition and other conditions precedent, and nothing precludes the parties from voluntarily agreeing to renegotiate or modify the agreement after the Acquisition is consummated. Thus, there is no means by which this Court could ensure that any remedy proposed by Arch actually occurs without essentially granting ultimate, permanent relief, thereby preempting and materially prejudicing the Commission's administrative process.

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[1] If the Court concludes that the Acquisition does not merit a preliminary injunction pursuant to section 13(b), then consideration of Arch's proposed remedy would not change this conclusion.

We therefore respectfully move this Court to order that evidence and argument on permanent relief be excluded from consideration in the preliminary injunction hearing.

I. The Only Relevant Transaction For Purposes Of The Preliminary Injunction Is Arch's Acquisition of Triton, Not Arch's Proposed "Remedy."

On May 29, 2003, Arch entered into its Merger and Purchase Agreement to acquire all of Triton. On July 11, 2003, Arch and Triton filed premerger notification forms with the Department of Justice and the FTC under the HSR Act, 15 U.S.C. § 18a, referencing the May 29 merger agreement pursuant to which Arch proposes to acquire all of Triton. In August 2003, Arch and Triton received Requests for Additional Information (referred to as "Second Requests") from the Commission in aid of the FTC's investigation of the Acquisition. Defs' Pretrial Brief in Opposition at 7.

Arch, aware of the FTC's concerns with its proposed merger and knowing that Kiewit wanted to acquire the Buckskin mine,[2] agreed to sell that property to Kiewit, contingent on its ability to acquire all of Triton,[3] as a self-help permanent remedy. In early December 2003, Arch informed the Commission that it was "contemplating the sale of the Buckskin Mine to Kiewit Mining, and . . . subsequently notified [the Commission] in late January 2004 that an agreement had been signed."[4] In authorizing the filing of an action for preliminary injunction, the

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[2] Contrary to defendants' assertion that there are no alternatives to the Acquisition, *see* Defs' Pretrial Brief in Opposition at 16-18, Arch's deal with Triton preempted pending negotiations between Triton and Kiewit, which had previously made an unsuccessful bid to acquire all of Triton, and was in the process of negotiating with Triton to purchase the Buckskin mine. *See* FTC Complaint ¶ 38 ("Kiewit [] a competing bidder for Triton and for Triton's Tier 3 Buckskin assets").

[3] Arch Coal, Inc., SEC Form 8-K (March 8, 2004).

[4] *Id.*; *see* Defs.' Answer to FTC Complaint ¶¶ 8-9.

Commission 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,[5] and thereafter issued its administrative complaint challenging the merger.[6]

Defendants admit that they have not amended their May 29 merger agreement to incorporate the proposed sale of the Buckskin mine to Kiewit,[7] and it is the May 29 Arch-Triton merger agreement which forms the basis of the FTC's complaint seeking a preliminary injunction. Arch's contract with Kiewit is separate and distinct from, and has not been made part of, the May 29 Arch-Triton merger agreement. The defendants try to gloss over this critical distinction, but the fact that the parties have *not* chosen to restructure their transactions as a three-party deal or to amend the May 29 Arch-Triton merger agreement is significant. Although the defendants try to present the two transactions as if they were inextricably conjoined, there is nothing in the contracts that compels this conclusion. Indeed, the Arch-Kiewit contract is entirely contingent upon Arch first acquiring all of Triton, and contains provisions that allow one or both parties to walk away from the deal.[8] The deal might also be renegotiated.[9]

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[5] Among other things, Arch's proposed sale of the Buckskin mine alone, even to an appropriate acquirer, would do nothing to address the competitive harm that would result from Arch's acquisition and control of Triton's North Rochelle mine, which produces 8800 Btu SPRB coal.

[6] The agency's decision to reject Arch's proposed sale of the Buckskin mine to Kiewit as inadequate to address the competitive concerns arising from the Acquisition is part of the agency's unreviewable exercise of its prosecutorial discretion. *See FTC v. Standard Oil Co.*, 449 U.S. 232 (1980).

[7] Defs.' Answers to FTC Complaint ¶ 8.

[8] *See* PX0283, Asset Purchase Agreement between Kiewit Mining Acquisition Company and Arch Coal, Inc., dated as of January 30, 2004, at 033. For example, Article XII, § 12.1 (d) (Termination) provides that either Arch or Kiewit, at any time after May 17, 2004 (the

Thus, unlike in *FTC v. Libbey, Inc.*, 211 F.Supp.2d 34 (D.D.C. 2002), where the parties had amended their merger agreement and the court considered the parties' amended merger agreement in and of itself to be "subject to [Clayton Act] Section 7's prohibitions," defendants here have *not* amended their May 29 merger agreement. Arch's acquisition of all of Triton is the *only* transaction squarely in issue before this Court that is "subject to [Clayton Act] Section 7's prohibitions." *Id.* at 46.

II. Consideration Of Permanent Relief, Including The Proposed Sale Of The Buckskin Mine, Is Beyond The Scope Of The Preliminary Injunction Hearing Under Section 13(b).

In its complaint before this Court, the FTC seeks only preliminary injunctive relief pursuant to section 13(b) of the FTC Act in aid of its administrative trial, *In re Arch Coal, Inc., et al.*, FTC Docket. No. 9316 (April 7, 2004). The Commission has broad prosecutorial discretion to determine the means by which it will pursue a particular violation of law,[10] and has determined

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"Expiration Date"), can terminate the agreement if the closing on the Arch-Kiewit transaction, as determined by the closing on the Arch-Triton transaction, has not occurred before that date.

[9] The Court has granted Kiewit's motion to participate in the preliminary injunction action as an *amicus curiae* for the limited purpose of arguing its own intention to acquire the Buckskin mine. Order (May 5, 2004). The FTC did not object to Kiewit's limited participation subject to the caveat that, in the FTC's view, Kiewit's intention to acquire the Buckskin mine through its arrangement with Arch is irrelevant as a matter of law to the issues properly before the Court in the preliminary injunction hearing. The FTC does not question Kiewit's desire and good faith intention to acquire the Buckskin mine. However, *Arch* may renegotiate its executory contract with Kiewit. And while Kiewit understandably prefers the "fire sale" price it has agreed to with Arch to the price it may have to pay in a competitive bid for the Buckskin mine, Kiewit's contract with Arch is not properly before this Court as proposed permanent relief for the Acquisition for the limited purpose of the preliminary injunction hearing. Moreover, if the Acquisition is blocked by the Commission on antitrust grounds, Kiewit can negotiate directly with Triton for acquisition of the Buckskin mine, or Kiewit could renew its offer to acquire all of Triton.

[10] *See FTC v. Universal-Rundle Corp.*, 387 U.S. 244, 251 (1967). Indeed, the Commission's determination whether its administrative expertise is required is itself an exercise

to fulfill its statutory responsibility to enforce section 5 of the FTC Act and section 7 of the Clayton Act by trying the merits of its charges that the proposed Arch-Triton merger may violate those Acts in its administrative forum. Through its adjudicative proceeding, the Commission will apply its administrative expertise to explore the issues presented, examine fully the conduct alleged in the administrative complaint and, ultimately, fashion appropriate permanent relief for any violations found.

Thus, under the jurisdictional and procedural framework provided in the FTC Act and the Clayton Act,[11] permanent relief is an issue reserved for determination by the Commission in the

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of administrative discretion that is controlling if reasonable. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *American Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 968 (D.C. Cir. 1985)("[I]n reviewing an agency's construction of a statute which it administers, courts must give deference to the agency's interpretation."). *Chevron* deference is appropriate to an agency's statutory interpretation regarding the scope of subject matter jurisdiction, as is the case here. *See, e.g., Your Home Visiting Nurse Servs., Inc. v. Shalala*, 525 U.S. 449, 453-54(1999).

[11] *See* 15 U.S.C. §§ 21(a)-(d) (FTC authorized to enforce Clayton Act via administrative proceedings with review by court of appeals); 15 U.S.C. §§ 45(a)-(d) (FTC authorized to enforce FTC Act via administrative proceedings with review by the court of appeals). Unlike other governmental plaintiffs, the FTC is expressly authorized to enforce the Clayton Act administratively under section 11 of the Act, 15 U.S.C. §21. In contrast, when the Department of Justice challenges an acquisition under Clayton Act § 7, injunctive relief can be secured only through the district courts pursuant to section 15 of the Act, 15 U.S.C. § 25. Clayton Act challenges brought by the Justice Department, *e.g., United States v. Franklin Electric Co., Inc.,* 130 F.Supp. 2d 1025 (W.D. Wisc. 2000) (DoJ action challenging acquisition under Clayton Act § 7), are thus distinguished from Clayton Act challenges brought by the FTC under Clayton Act § 11. Similarly, the States, acting in *parens patriae* capacity on behalf of their residents, can secure injunctive relief from Clayton Act violations only through the district courts pursuant to section 16 of the Clayton Act, 15 U.S.C. § 26. *See California v. American Stores Co.*, 697 F. Supp. 1125 (C.D. Calif. 1988), *aff'd in part and rev'd in part,* 871 F.2d 837 (9th Cir. 1989), *rev'd on other grounds,* 495 U.S. 271. Clayton Act challenges brought by the States and by private plaintiffs under Clayton Act § 16, *e.g., White Consolidated Inds. v. Whirlpool Corp.*, 781 F.2d 1224 (6th Cir. 1986) (private action to enforce Clayton Act § 7), are also distinguished from FTC actions under Clayton Act § 11.

first instance in its ongoing administrative proceeding,[12] and subject to review by the Court of Appeals. In *those* proceedings, defendants and other parties will be able to present evidence and argument regarding permanent remedy.[13] Indeed, whether the proposed sale of the Buckskin mine to Kiewit would constitute adequate permanent relief if the Acquisition ultimately is found to be illegal is an issue that has already been joined in litigation in the FTC's administrative

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[12] Defendants filed their answers to the administrative complaint on April 28 and hearings on the merits of the charges in the complaint are now scheduled to begin on October 12. Scheduling Order, FTC Docket 9316 (May 13, 2004). Counsel for the defendants misrepresent the circumstances that led to the FTC's request for a stay of the administrative proceeding and portray this as needlessly imposing further prejudice to the survival of their proposed merger. Defs.' Pretrial Brief in Opposition at 9 n. 2. At the May 10 scheduling conference before this Court, counsel for the defendants refused the FTC's offer to try the FTC's preliminary injunction action on the papers as provided for in this district's local rules, which would have allowed the FTC to proceed directly to trial on the merits in the administrative proceeding as originally scheduled on July 6. Initial Scheduling Conference (April 14, 2004), Tr. at 6-7, 30. Defense counsel protested that defendants did not want to be in the position of defending the merger in two proceedings at the same time. *Id.*, Tr. at 35. Prior to the May 11 prehearing conference before the Administrative Law Judge ("ALJ"), Arch's counsel stated that, if the administrative proceeding continued, Arch intended to use discovery secured in the administrative proceeding in the preliminary injunction proceeding before this Court. To prevent defendants/respondents from using the administrative proceeding to circumvent this Court's limitations on discovery, Complaint Counsel in the administrative proceeding moved for a stay of discovery and other activity in the administrative action pending conclusion of the preliminary injunction action before this Court. Thereafter, by incorporating the record in this case into the administrative proceeding, we believed the October 12 hearing date set by the ALJ would still be preserved. Complaint Counsel's Motion to Stay this Proceeding or, in the Alternative, to Stay Discovery, filed May 12, 2004. In any event, the ALJ has now denied the motion for a stay and the administrative trial is now set for October 12.

[13] The Court has appropriately limited discovery in this proceeding in recognition that this "is a complex matter with a very expedited discovery and hearing schedule, but which only involves preliminary, not permanent, injunctive relief." Order (May 7, 2004), at 2 (emphasis in original). The Plaintiff States have agreed to be bound by the results of the FTC's administrative proceeding. Order, Def. Rule 65(a)(2) Mot., at 2 n.1 (May 6, 2004) ("May 6 Order"). Accordingly, considerations of judicial economy, minimizing inconvenience to overlapping witnesses and avoiding prejudice to the FTC's administrative proceeding on the merits militate in favor of excluding from the preliminary injunction hearing testimony and other evidence relevant only to a final merits determination and to permanent relief.

proceeding.[14] Thus, the issue of permanent relief, including the proposed sale of the Buckskin mine to Kiewit, is beyond the scope of this preliminary proceeding.

A. Consideration of the Arch-Kiewit deal will potentially deprive the Commission of its authority to order permanent relief.

It is well-established that if the Commission finds that the Acquisition violates section 5 of the FTC Act or section 7 of the Clayton Act, it has broad discretion in fashioning appropriate permanent relief.[15] The Commission's responsibility, in that event, is to ensure that competition is fully maintained or restored, whether that requires permanently enjoining the entire Acquisition, a divestiture of some or all of the assets in issue, or some other appropriate relief.

Absent a preliminary injunction, if Arch were permitted to acquire Triton and dismantle

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[14] In their answers to the administrative complaint in Docket 9316, defendants/respondents deny the complaint's allegation that "[t]he transfer by Arch of Triton's Tier 3 Buckskin mine to Kiewit does not remedy the potential anticompetitive effects of the Acquisition in the SPRB or in 8800 Btu coal. Buckskin and R.A.G. would be unable to constrain a coordinated price increase in the SPRB." (Arch's and Triton's Answers to FTC Docket 9316 Complaint ¶ 46).

[15] *See FTC v. National Lead Co.*, 352 U.S. 419, 428 (1957) ("[T]he Commission is clothed with wide discretion in determining the type of order that is necessary to bring an end to the unfair practice found to exist. . . . It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist."); *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965) ("[i]t has been repeatedly held that the Commission has wide discretion in determining the type of order that is necessary to cope with unfair practices found, and that Congress has placed the primary responsibility for fashioning orders upon the Commission."); *accord United States v. E. I. Du Pont De Nemours and Co.*, 366 U.S. 316, 334 (1961)("[f]or it is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor."); *see also Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 940 (7th Cir. 2000); *Removatron International Corp. v. FTC*, 884 F.2d 1489, 1498-99 (1st Cir. 1989); *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1393 (7th Cir. 1986); *Borden, Inc. v. FTC*, 674 F.2d 498, 516 (6th Cir. 1982); *Atlantic Refining Co. v. FTC*, 381 U.S. 357, 377 (1965); *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 392 (1959); *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952).

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 new competitor. Evidence developed in the administrative proceeding may lead the Commission to determine that splitting the Buckskin mine from the North Rochelle mine may, among other things, eliminate the competitive benefits and efficiencies from having a single new competitor that would be able to supply the market with both 8400 Btu and 8800 Btu SPRB coal, just as Triton did, thereby fully restoring Triton's pre-merger competitive presence in the market. But Kiewit is not a respondent in the FTC proceedings and could not be ordered to surrender the Buckskin mine so that the two mines could continue to operate under common ownership and control. Thus, Arch's proposed relief could irreparably prejudice the Commission's ability to fashion a complete and effective permanent remedy at the end of administrative proceedings.

The role of the district court in evaluating a section 13(b) preliminary injunction complaint is to determine whether the FTC has established a likelihood of success on the merits of its case by "raising questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals." *FTC v. H.J. Heinz*, 246 F.3d 708, 714-15 (D.C. Cir. 2000) (citations omitted). While the court also must balance the equities in rendering any decision, once it makes a determination that the FTC has established a likelihood of success, a presumption arises in favor of a preliminary injunction and the court faces "a difficult task in justifying anything less than a full stop injunction" to preserve the *status quo* during the pendency of the administrative litigation. *FTC v. PPG Industries, Inc.*, 798 F.2d 1500, 1506 (D.C. Cir. 1986). The district court reviews the FTC's section 13(b) preliminary

injunction case not as an ultimate fact-finder, but as a court of limited jurisdiction. *See, e.g.*, *FTC v. Food Town Stores, Inc.* 539 F.2d 1339, 1342 (4th Cir. 1976) (the adjudicatory function in such a case lies not with the district court, but is "vested in the FTC in the first instance.").

As this Court has recognized,[16] and defendants concede, the Court has no jurisdiction in the FTC's action under section 13(b) to render a decision on the merits or to impose permanent remedial provisions. *Accord FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1162 (9th Cir. 1984) (the court's "task is not to make a final determination on whether the proposed [acquisition] violates section 7, but rather to make only a preliminary assessment of the [acquisition]'s impact on competition."). Thus, any affirmative decree by this Court that would require the proposed sale of the Buckskin mine, such as ordering Arch to consummate its transaction with Kiewit, or that would oversee the terms of such a sale, would necessarily be an order for permanent relief, and would be beyond the scope of the Court's jurisdiction under section 13(b) of the FTC Act. If these Triton assets are sold to a third party, they could not be recovered should the Commission (or the Court of Appeals) determine after full administrative review that Arch's proposed remedy is insufficient. At that point, Triton would have been irreversibly eliminated from the market, and the Commission's ability to return the market to its pre-merger competitive state would be lost.

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[16] "It is plain that this Court cannot address in this action whether the FTC is entitled to permanent injunctive relief under either the Federal Trade Commission Act or the Clayton Act. The FTC seeks relief solely under section 13(b) of the FTC Act, 15 U.S.C. § 53(b), which allows for preliminary injunctive relief only and places the resolution of the FTC's antitrust case on the merits outside the scope of this Court's jurisdiction. All parties now agree with that proposition." May 6 Order at 2.

B. The Court should not consider the proposed sale of the Buckskin mine to Kiewit as a basis for denying the FTC's requested preliminary injunctive relief.

Because there is no basis under section 13(b) of the FTC Act for the Court affirmatively to order the sale of the Buckskin mine, the Court should also refrain from considering it as a basis for denying the preliminary injunction. As discussed above, in the absence of an order requiring the sale of Buckskin, Arch and Kiewit are free to renegotiate, rescind, or otherwise alter their private contractual arrangement, so there would be no guarantee that the proposed "relief" envisioned at the preliminary injunction hearing will ultimately come to pass. More importantly, if the sale of Buckskin were in fact consummated, an important asset of Triton would be placed beyond the reach of the Commission in any attempt by the agency ultimately to restore pre-merger competition through an administrative order of permanent relief. In this sense, failure to enjoin the Arch-Triton merger based on consideration of the proposed Buckskin sale effectively would amount to imposition of a permanent divestiture remedy by this Court that would deprive the Commission of its jurisdictional authority on the merits.

Inherent in any argument the defendants may have for insisting that this Court consider the Buckskin sale is the concession that, without it, the Arch-Triton merger raises serious and substantial questions. *See FTC v. H.J. Heinz*, 246 F.3d 708, 714-15 (D.C. Cir. 2000). If the Court determines that the Arch-Triton merger does *not* raise such questions, then the Court need not take the proposed Buckskin sale into account to deny preliminary relief. Indeed, *only* if such questions *are* raised by the merger should consideration of permanent relief, and in particular, Arch's self-help "remedy," potentially make any difference in the outcome. In that event, however, the FTC would have demonstrated a likelihood of success on the merits, and

preliminary injunctive relief would be the appropriate outcome under section 13(b).[17]

C. The equities do not justify consideration of the proposed sale of Buckskin to Kiewit.

As this Court has recognized, defendants' real concern is not that they would be deprived of a "meaningful Clayton 7 review" and decision on the merits in the administrative proceeding.[18] Rather, defendants' concern is that, if a preliminary injunction is issued, private

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[17] It should be noted that the Commission is not compelled to take into account the proposed sale of the Buckskin mine in its ongoing administrative trial on the merits, and neither is the Court in this preliminary proceeding. *See Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1384 (7th Cir. 1986). In *Hospital Corp.*, the defendant HCA acquired, in a non-HSR reportable transaction, two competing hospitals in Chattanooga, TN, and assumed management services contracts for two others. As a cumulative result of those transactions, HCA either owned or managed five of the eleven hospitals in the relevant geographic area. After the FTC began investigating the transactions, the defendant canceled one of the management contracts, presumably lessening the net competitive effects of its transactions. The Commission subsequently instituted an administrative adjudication and determined that the acquisition of the hospitals and management contracts violated section 7 of the Clayton Act. On appeal, the defendant argued that the agency failed to consider the effect of the canceled management contract during the administrative proceeding. Judge Posner nonetheless found that the Commission could properly ignore the post-investigation change in circumstances:

> Later one of the management contracts was canceled; and one of the lesser issues raised by Hospital Corporation, which we might as well dispose of right now, is whether the Commission should have disregarded the assumption of that contract. We agree with the Commission that it was not required to take account of a post-acquisition transaction that may have been made to improve Hospital Corporation's litigating position. The contract was canceled *after the Commission began investigating* Hospital Corporation's acquisition of Hospital Affiliates, and while the initiative in cancelling was taken by the managed hospital, Hospital Corporation reacted with unaccustomed mildness by allowing the hospital to withdraw from the contract. . . . Post-acquisition evidence that is subject to manipulation by the party seeking to use it is entitled to little or no weight.

Hospital Corp. of America v. FTC, 807 F.2d 1381, 1384 (7th Cir. 1986).

[18] "Defendants' real complaint, therefore, is with the statutory scheme Congress created through the enactment of section 13(b), which allows these bifurcated proceedings with a preliminary injunction decided in district court and the merits of the FTC's case resolved before

considerations may cause them to elect to abandon the Acquisition rather than proceed to trial on the merits in the FTC proceeding. Just as in the *Heinz* case, however, any cognizable public equities from the Acquisition should survive the issuance of a preliminary injunction:

> 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.

Heinz, 246 F.3d at 726-27 (citations omitted). As discussed above, the parties have *not* amended the May 29 Arch-Triton merger agreement to incorporate the proposed sale of the Buckskin mine to Kiewit, so any efficiencies that would result from a direct sale by Triton of Buckskin to Kiewit are *not* specific to the Arch-Triton merger. It is possible that the survival of the proposed Acquisition through the FTC proceeding may require, *inter alia*, renegotiation of the purchase price defendants have agreed upon, "but that is at best a 'private' equity," *Heinz*, 246 F. 3d at 726-27, which should not affect the strong presumption in favor of a preliminary injunction if the FTC demonstrates a likelihood of success on the merits in the preliminary injunction hearing. *Id.*; *FTC v. PPG Industries, Inc.*, 798 F.2d 1500, 1506 (D.C. Cir. 1986),

In this case, any remedy other than entry of the presumptive full-stop injunction would neither safeguard effective relief in the event the merger is ultimately found unlawful nor check interim competitive harm. Rather, such relief would not be interim at all as it would effectively dispose of one of Triton's key assets permanently. At the end of the administrative proceeding, neither the Commission nor the Court of Appeals would be able to restore the current state of competition by having a single competitor, replacing Triton, control both the Buckskin and North

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the Commission. But that, too, is beyond the Court's control." May 6 Order at 4.

Rochelle mines, with the capability to offer the market both 8400 Btu and 8800 Btu SPRB coal. Thus, not only do the equities weigh against the Arch-Triton merger, but Arch's proposed "interim" relief would result in the permanent disposition of an important asset of Triton. Accordingly, if the Court should find that the FTC has established a likelihood of success by raising serious questions going to the merits, there would be no basis for ordering any relief other than a full-stop preliminary injunction.

Conclusion

Defendants' submission of further evidence and argument on Arch's proposed sale of Triton's Buckskin mine to Kiewit would not streamline the preliminary injunction hearing, but would instead extend the scope of the hearing into inquiry into matters of remedy that are appropriately left to the FTC's administrative trial on the merits. Whether the FTC has established a likelihood of ultimate success on the merits, and whether the *status quo* should be preserved during the administrative proceeding – not the contours of a permanent remedy – are the proper inquiries for the upcoming preliminary injunction hearing. If the Court is persuaded that the FTC has met this burden, then a preliminary injunction should issue; no lesser relief will be adequate to maintain the *status quo* and protect interim competition.

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

Respectfully submitted,

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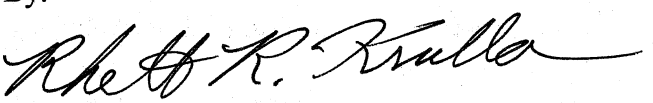

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