expeditious discovery will help avoid duplicative discovery with the

proceeding, and allow for efficient litigation of the parallel proceedings.[1] Third, pre-Answer discovery of the type served to date by Complaint Counsel is clearly permitted by the FTC Rules of Practice and has been replicated in several recent administrative actions.

I. A Stay of the Administrative Proceedings Would be Contrary to FTC Rules of Practice and Policy, and Contrary to the Interest of the Parties and the Public

The FTC Rules of Practice state clearly that "[i]t is the policy of the Commission that . . . [administrative] proceedings shall be conducted expeditiously." 16 C.F.R. § 3.1. Moreover, the Rules require that "counsel for all parties shall make every effort

divestiture, before the "eggs are scrambled" completely. On the other hand, if a preliminary injunction were granted by the district court, presumably Respondents would desire a Commission decision as quickly as possible so that if the Commission were to find the merger lawful, Respondents could merge and bring the claimed benefits of the merger to prompt fruition.

Respondents cite a number of cases where the Commission did not continue with the administrative proceeding after the loss of the preliminary injunction motion. *See* Resp. Mot. at 2, n.1. Rather than supporting a stay of the administrative proceeding here, those cases are indicative of the difficulty the Commission has recently found in fashioning effective relief once the preliminary injunction is denied and the parties are permitted to close the transaction.[3] For example, as the Commission stated when discussing its decision to stay an administrative proceeding in a case when a preliminary injunction was denied, "The federal district court action was intended to maintain the independence and viability of the two hospitals so that if the FTC

but because the PI was denied "Freeman and Oak Hill subsequently completed their merger, and there have been significant changes to Oak Hill hospital since that time that could make divestiture difficult or inadequate."[4]

Many antitrust commentators, including former FTC official and current Arnold & Porter antitrust group head William Baer, have cited the difficulty the Commission has in fashioning effective relief after the parties are allowed to close a transaction:

> During the course of the post-merger litigation, the acquired firm's assets, technology, marketing systems, and trademarks are replaced, transferred, sold off, or combined with those of the acquiring firm. Similarly, its personnel and management are shifted, retrained, or simply discharged. In these ways, the acquiring and acquired firms are, in effect, irreversibly "scrambled" together. The independent identities of the acquired firm [redacted]
>
> [redacted]
>
> and restoring the acquired firm to its former status as an independent competitor is difficult at best, and frequently impossible.[5]

"[u]nnecessarily long proceedings waste Commission and private resources. Third parties are adversely affected by delay, both by having to endure extended legal uncertainty and because any remedy is postponed and likely made less effective."[7] Thus, the interests of Respondents, the Commission and the public are all served by expeditiously completing the administrative proceeding.

Respondents cite to the Statement of the Federal Trade Commission Policy Regarding

[redacted]

purportedly requiring the Commission to consider the evidentiary record developed in the preliminary injunction "*before* determining whether to move forward with an administrative

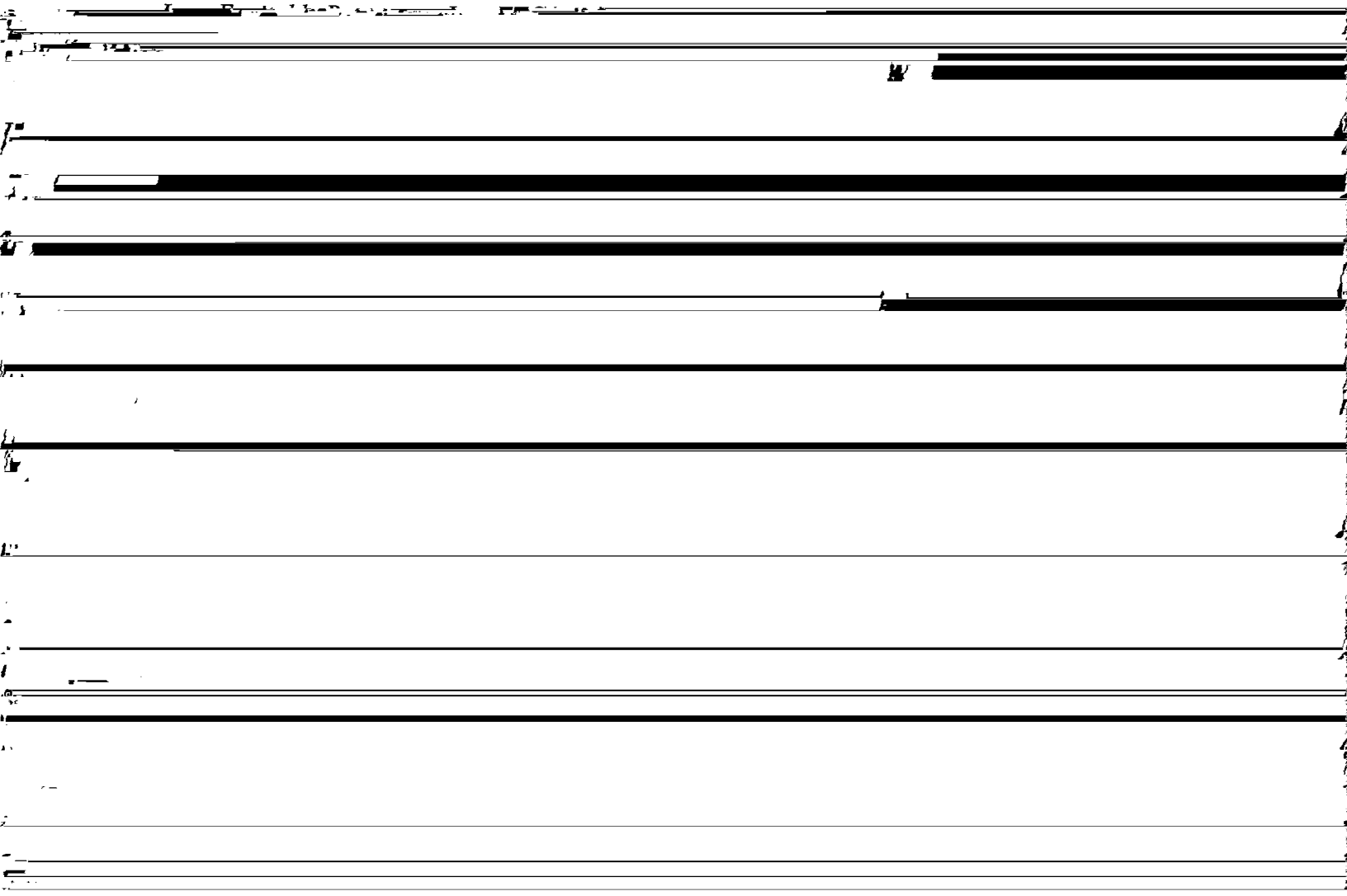
[redacted]

Respondents also argue that the "regular course of conduct" has been to stay administrative litigation during the pendency of a preliminary injunction proceeding in federal

district court. *See* Resp. Mot. at 1, 4. Respondents point in particular to *In re Arch Coal, Inc.*, FTC Docket. No. 9316, where Complaint Counsel sought an eight-week stay of the administrative litigation during the pendency of a four-month long preliminary injunction proceeding.[10] However, Respondents conspicuously fail to mention the most important fact about Arch Coal, that Administrative Law Judge Chappell denied the motion to stay

fact and expert discovery, expert depositions in the administrative proceeding, and to within one month of the start of the administrative trial.[11]

As in *Arch Coal*, there was no stay of the administrative proceedings during the preliminary injunction proceedings related to two other recent administrative merger challenges:



No. 9323. Thus, contrary to Respondents' claim that a stay of the administrative proceeding during the preliminary injunction action is the "regular practice," in three of the four most recent FTC preliminary injunction merger challenges, there was no stay of any kind in the administrative proceeding prior to the federal district court opinion.[12]

Respondents claim that they are aware of no instance in which the parties have engaged in substantial discovery in an administrative proceeding while also litigating a preliminary

whether it is taken in federal court or in the administrative proceeding.[13] There is no reason that identical discovery should be taken in both proceedings. In order to avoid duplicative discovery, Complaint Counsel has proposed to Respondents that no deposition of the same witness be taken in both proceedings without good cause shown. Respondents have, to date, declined that

II [redacted]

limitations on discovery at a scheduling conference, yet serving discovery before that conference (as was done here). Indeed, Respondents served discovery in the federal district court

[redacted]

proceeding prior to discussing limitations on discovery in the 26(f) conference.

CONCLUSION

For the foregoing reasons, Respondents' motion to stay this proceeding, or to stay discovery in this proceeding pending resolution of the preliminary injunction action should be denied.

Respectfully submitted,

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Matthew J. Reilly
Norman Armstrong Jr.

CERTIFICATE OF SERVICE

Opposition to Respondents' Motion to Stay Discovery And All Other Aspects of This