IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| FEDERAL TRADE COMMISSION, | ) | |
| | ) | |
| Plaintiff, | ) | |
| v. | ) | Civ. No. 1:02CV00060 RBW |
| | ) | |
| LIBBEY, INC., *et al.*, | ) | FILED UNDER SEAL |
| | ) | **[REDACTED PUBLIC VERSION]** |
| Defendants. | ) | |

# MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION


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Introduction and Summary

Libbey, Inc. ("Libbey") seeks to acquire a key competitor, Anchor Hocking Corporation ("Anchor"), from Newell Rubbermaid Corp. ("Newell"). Libbey, the largest glassware maker in North America, already dominates the U.S. food service glassware market. As another district court wrote in Libbey's 1998 lawsuit to block a rival's entry, "Libbey, with a market share of about 65%, is a dominant manufacturer of glassware for the food service industry (*i.e.*, restaurants, hotels, clubs, and other institutions)."[1] Libbey has defended its dominant position in food service glassware by tying up distributors, penalizing those distributors for carrying competing goods, and suing entrants.

Anchor is one of Libbey's three significant competitors in the food service glassware market. By eliminating Anchor as a pricing constraint on Libbey, Libbey's acquisition of Anchor would substantially reduce competition in this already highly concentrated, **[redacted]** million a year market, and therefore violates the antitrust laws. As a result, food service distributors and customers likely would pay higher prices for glassware.[2]

Libbey and Anchor each produce and sell soda-lime glassware, primarily drinking glasses, in two distinct markets: the market for sales to the food service industry and the market for sales to retail stores. The customers in each market are different, the products are different, the sales and distribution systems are different, **[redacted]**. Libbey, the leading supplier of food service glassware, has a smaller

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[1] PX 372 at 4503. **[redacted]** Libbey told its shareholders that its food service market share was 64% in 1997, "according to management estimates." PX 367 at 2885. In February 2001, Libbey executives told their board of directors that Libbey's share of the food service market was **[redacted]**. References to, *e.g.*, PX ___ at 1234 are to documents; references to, *e.g.*, PX 631 **[redacted]** are to deposition transcripts; references to, *e.g.*, PX 3 ¶ __ **[redacted]** are to declarations. A list of declarants and deponents is provided as Appendix I.

[2] **[redacted]**

share of the retail market.[3] Anchor, while primarily a retail company, has aggressively targeted Libbey's food service customers.

The vast majority (80% or more) of food service glassware purchases are to replace glasses that are broken, stolen or become unuseable over time. Food service customers generally replace broken glasses with glasses that match their existing stock, so the glasses on the restaurant table will match. Therefore, a food service customer that has bought a line of Libbey glasses (as most customers have) will want to replace broken glasses with glasses that look indistinguishable from their existing stock.

Since so much of the sales are replacements, and so much of what needs to be replaced is Libbey glass, the most intense *price* competition in food service glassware is between Libbey and firms that make glasses that look like Libbey glasses – *i.e.*, "Libbey look-alikes." For at least 20 years, Anchor has been selling Libbey look-alikes,[4] and at prices lower than Libbey's prices. Anchor was the first firm to make and market Libbey look-alikes, and remains the leading seller of Libbey look-alikes today. Nearly **[redacted]** of Anchor's food service sales are Libbey look-alikes.

Only two other firms make any significant food service sales: Arc and Oneida. Oneida, like Anchor, sells Libbey look-alikes, but fewer items and **[redacted]** than Anchor. Arc mostly sells its own, higher-priced designs. Because Anchor has focused on providing a supply alternative to Libbey, Anchor has been a significant price constraint on Libbey. **[redacted]**

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[3] The FTC does not contend that the acquisition would reduce competition significantly in the market for retail or household glassware, where imported glassware is prevalent.

[4] **[redacted]** *Libbey Glass, Inc. v. Oneida Ltd.*, 61 F. Supp. 2d 700, 718 (N.D. Ohio 1999).

By acquiring Anchor, Libbey would eliminate one of its few rivals in the profitable food service glassware market, reducing the limited competition that exists today in this highly concentrated market, which Libbey already dominates. Libbey has long been the price leader, the firm others rely on to initiate price increases. Libbey has raised prices in each of the last several years. Other glassware suppliers tend to follow Libbey's lead in setting their own food service glassware prices.

Not surprisingly, several large customers are concerned that the acquisition would lead to higher prices and lost competition. This competition would be lost for years to come, for Anchor is unlikely to be replaced by the entry of new food service glassware suppliers. If a firm sought to use existing glassware manufacturing capacity to do what Anchor has done, it would still need to make large sunk investments in building distribution and inventory, and acquiring the molds needed to produce glassware that would substitute for Libbey's. These investments and risks make entry unattractive. Even firms that have available capacity have refrained from making those investments and entering this market.[5]

Oneida's experience, in entering food service glassware in 1998, serves as a cautionary tale to a prospective entrant. Oneida invested **[redacted]** in a line of molds and contracted with a foreign glass maker, Pasabahce, to produce glassware that could substitute for some of Libbey's food service glass. Libbey sued Oneida on the eve of Oneida's entry, alleging trade dress infringement, to keep Oneida from selling food service glassware. Oneida has been able to pursue business only after

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[5] Lancaster Colony Corp.'s glassware subsidiary, Indiana Glass, is the only U.S. glassware firm not already selling a substantial amount of food service glassware. **[redacted]** There are no operating glassware factories in Canada, and Libbey owns 49%, and is the exclusive distributor, of Vitrocrisa, the only significant glassware manufacturer in Mexico.

**[redacted]** settlement and, even after several years, has a market share only **[redacted]** that of Anchor **[redacted]**.

Since entry is unlikely, the merger would leave the food service glassware market with only three significant competitors. Neither the remaining U.S. manufacturer, Indiana Glass, nor competing imports are significant.[6] By Libbey's own calculation, two firms would have more than **[redacted]** of food service glassware sales after the merger. **[redacted]** Mergers that result in two firms having such a large share of a market have routinely been enjoined.[7] When a merger increases market concentration as much as this one would, "it will be presumed" that the merger "is likely to create or enhance market power or facilitate its exercise."[8]

Absent a preliminary injunction, Libbey would be free to acquire Anchor and "scramble the eggs," preventing any meaningful relief even if the Commission ultimately concludes, following plenary administrative litigation, that this transaction violates Section 7 of the Clayton Act, 15 U.S.C. § 18. Therefore, preliminary relief is essential to preserve the status quo pending administrative adjudication. *Heinz*, 246 F.3d at 726-27. Libbey has agreed not to consummate the acquisition until the Court rules

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[6] While a substantial amount of imported glass is sold in food service, it is overwhelmingly imported and sold by Libbey, Arc, Anchor and Oneida – often pursuant to exclusive distribution agreements. *See* pp. 14-16 below.

[7] *E.g., FTC v. Swedish Match North America, Inc.*, 131 F. Supp. 2d 151, 166 (D.D.C. 2000) (two firms with 90% of market for chewing tobacco); *FTC v. Cardinal Health, Inc.,* 12 F. Supp. 2d 34, 52-53 (D.D.C. 1998) (two firms with "close to 80%" of market for wholesale prescription drug distribution).

[8] U.S. Dep't of Justice & Federal Trade Comm'n, *Horizontal Merger Guidelines* § 1.51 (1992, rev'd 1997) (App. II hereto); *see FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 & n.9 (D.C. Cir. 2001), *citing FTC v. PPG Industries, Inc.,* 798 F.2d 1500, 1503 (D.C. Cir. 1986).

on the Commission's preliminary injunction motion, or on ten days' prior notice to the Commission. PX 48.

## Argument

### I. SECTION 13(b) OF THE FEDERAL TRADE COMMISSION ACT ESTABLISHES A PUBLIC INTEREST STANDARD FOR GRANTING INJUNCTIVE RELIEF.

Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), provides that a preliminary injunction may be granted "upon a proper showing that, weighing the equities and considering the FTC's likelihood of ultimate success, such action would be in the public interest." In enacting Section 13(b), Congress adopted a "public interest" standard. *Heinz*, 246 F.3d at 714; *see, e.g. FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1081-82 (D.C. Cir. 1981). Under that standard, the Court "must (1) determine the likelihood that the FTC will ultimately succeed on the merits and (2) balance the equities." *Heinz*, 246 F.3d at 714. 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."[9] The FTC satisfies its burden if it "raise[s] questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study,

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[9] *Heinz*, 246 F.3d at 714, *citing FTC v. University Health, Inc.*, 938 F.2d 1206,1217-18 (11th Cir. 1991); *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1162 (9th Cir. 1984); *see also Swedish Match*, 131 F.Supp. 2d at 156; *Cardinal Health,* 12 F. Supp. 2d at 45; *FTC v. Staples, Inc.,* 970 F. Supp. 1066, 1070-71 (D.D.C. 1997). This Court need not resolve all conflicts of evidence or analyze extensively all antitrust issues; that is the province of the administrative proceeding. *Warner Communications*, 742 F.2d at 1164, citing *FTC v. Lancaster Colony Corp.*, 434 F. Supp. 1088, 1094, 1096 (S.D.N.Y. 1977).

deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals."[10]

II. THE PROPOSED ACQUISITION VIOLATES THE ANTITRUST LAWS.

Section 7 of the Clayton Act prohibits any merger "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly." 15 U.S.C. § 18. "All that is necessary is that the merger create an appreciable danger of [anticompetitive] consequences in the future. A predictive judgment, necessarily probabilistic and judgmental rather than demonstrable, is called for." *Heinz*, 246 F.3d at 719; *see id.* at 713 (discussing legislative history).

Merger analysis requires determinations of: (1) the "line of commerce" or product market; (2) the "section of the country" or geographic market; and (3) the transaction's probable effect on concentration in the product and geographic markets. Evidence establishing these facts makes out a *prima facie* case and gives rise to a presumption of violation.[11] The Court of Appeals last year reaffirmed the reliability of market concentration as proof of the plaintiff's *prima facie* case, and held that defendants, not the government, must prove that a merger that substantially increases market

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[10] *Heinz*, 246 F.3d at 714-15; *University Health*, 938 F.2d at 1218; *Warner Communications*, 742 F.2d at 1162; *Swedish Match*, 131 F. Supp. 2d at 156; *Cardinal Health,* 12 F. Supp. 2d at 45; *Staples*, 970 F. Supp. at 1071.

[11] *Heinz*, 246 F.3d at 715; *University Health*, 938 F.2d at 1218; *U.S. v. Baker Hughes, Inc.,* 908 F.2d 981, 982-83 (D.C. Cir. 1990); *Warner Communications*, 742 F.2d at 1160; *Swedish Match*, 131 F. Supp. 2d at 156; *Cardinal Health*, 12 F. Supp. 2d at 52.

concentration nonetheless would not result in a substantial loss of competition.[12] In order "to meet this burden, the defendants must show that the market share statistics 'give an inaccurate prediction of the proposed acquisition's probable effect on competition.'"[13] High levels of concentration establish a strong *prima facie* case. "[T]he more compelling the *prima facie* case, the more evidence the defendant must present to rebut it successfully." *Heinz*, 246 F.3d at 725, *quoting Baker Hughes*, 908 F.2d at 991.

The application of merger law to this case is straightforward. Glassware sold to the U.S. food service industry is a distinct product and geographic market. It consists of items made and sold for food service and generally not available through retail stores. While the glassware demanded by the U.S. food service industry is made both here and abroad, almost all food service glassware made abroad is imported and sold by the same four firms – Libbey, Anchor, Arc and Oneida – that sell upwards of 90% of food service glass. Since food service distributors and customers overwhelmingly turn to these four firms, and would not turn to others, U.S. food service glassware can be defined as an antitrust product and geographic market. That market, following this merger, would be as highly

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[12] *Heinz*, 246 F. 3d at 715; *accord Baker Hughes,* 908 F.2d at 982-83; *U.S. v. Rockford Mem. Corp.,* 898 F.2d 1278, 1285-86 (7th Cir.) ("once the government showed that the merger would create a firm having a market share approaching, perhaps exceeding, a common threshold of monopoly power – two-thirds – it behooved the defendants *to present evidence* that the normal inference to be drawn from such a market share would mislead"), *cert. denied,* 498 U.S. 920 (1990); *Swedish Match*, 131 F. Supp. 2d at 167; *Cardinal Health*, 12 F. Supp. 2d at 54.

[13] *Swedish Match*, 131 F. Supp. 2d at 167, *quoting Staples*, 970 F. Supp. at 1083; *accord AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568, 574-75 (7th Cir. 1999) (rejecting defendants' "power buyer" argument); *Baker Hughes*, 908 F.2d at 991; *see generally Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1388 (7th Cir. 1986) (FTC's "showing that the challenged acquisitions gave four firms control over an entire market . . . went far to justify its prediction of probable anticompetitive effects"), *cert. denied*, 481 U.S. 1038 (1987).

concentrated as the baby food market would have been in *Heinz*, a level that "creates, by a wide margin, a presumption that the merger will lessen competition." 246 F.3d at 716; *see* pp. 22-24 below.

Firms not currently making glassware for the U.S. food service market are unlikely to do so after the merger, at current prices or in response to an anticompetitive price increase. The course of entry into food service taken by both Anchor and Oneida was to mimic Libbey designs, and thereby compete in the larger part of the food service market – replacements for Libbey glasses. That entry strategy requires investments in large numbers of specialized molds that would cost millions of dollars, and runs the risk of drawing a lawsuit from Libbey. That strategy was the one most likely to succeed quickly, and the most likely to provide meaningful competition. Any entry strategy would require the entrant to persuade distributors to carry the entrant's glass, displacing some of Libbey's, which under Libbey's rebate plans would raise the price of the distributors' remaining purchases from Libbey, thereby making distributors reluctant to buy from an entrant. *See* pp. 26 below.

The merger is likely to reduce competition. Anchor **[redacted]** is a competitive constraint on Libbey. By eliminating this constraint from Anchor, the merger will enhance Libbey's market leadership, and ultimately will lead to higher prices for food service glassware.

A. Food Service Glassware in the U.S. Is an Antitrust Market.

Libbey is the leading maker of soda-lime glassware in North America,[14] a line of products that includes many different styles of tumblers and stemware for beverages, and other products ranging from serving platters to candle holders.[15] Glassware sold to food service customers is distinct from other types of glassware: different pieces, styles, and sizes, different distribution channels, and different prices. **[redacted]**

The goal of merger analysis is to determine whether a merger is likely to reduce competition in a manner that would increase the risk of market power, *i.e.*, the ability of the merged firm profitably to raise price (alone or in concert with competitors). *Merger Guidelines* § 0.1. Product market definition advances that goal by identifying a relevant group of competitors, *i.e.*, those competitors that *would plausibly constrain* the exercise of market power. Only by identifying relevant, effective, constraining competitors can the court determine whether those competitors will prevent the merger from impairing competition.

The antitrust agencies and the courts often approximate the ultimate question of constraint by seeking to identify alternatives to which consumers likely would turn in the event of a small price

[14] Soda lime glassware (generally referred to as "glassware" in this memorandum) "is a mixture primarily of sand and soda ash, which is melted in a furnace at temperatures ranging 24- to 2800 degrees Farenheit. It flows from the furnace to a forming machine, where it is either . . . pressed or blown into a shape that resembles an end product." **[redacted]** Soda lime glassware is distinct from borosilicate glassware (*e.g.*, Pyrex™) and lead crystal. *Lancaster Colony*, 434 F. Supp. at 1092-93.

[15] Beverageware constitutes at least **[redacted]** of Libbey's food service glass. In 2000, **[redacted]** of Libbey's food service glassware manufactured in the U.S. was stemware, and at least **[redacted]** (and probably much more) was tumblers. PX 203 at 1710.

increase.[16] It is insufficient that another product is *in some sense* an alternative, if the product is not one that consumers would turn to in response to price changes – and therefore not one that would constrain price increases following the merger. Therefore, the relevant product market "must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn . . . ." *Times-Picayune Publishing Co. v. U.S.*, 345 U.S. 594, 612 n.31 (1953). For example, this Court recently found that "moist snuff competes with loose leaf [chewing tobacco] to a limited degree," but nonetheless *excluded* loose leaf from the product market:

> But there is ultimately an insufficient amount of evidence to convince the Court that moist snuff induces an adequate level of substitution *to constrain* loose leaf prices. To the contrary, the weight of the evidence demonstrates that moist snuff *is incapable of inducing substitution sufficient enough to render loose leaf price increases unprofitable* and cannot, therefore, be included in the relevant market on this basis.[17]

Here, the relevant inquiry is whether alternatives to food service glassware are likely to *induce substitution sufficient to constrain* a price increase on this glassware. Customers, and even Anchor

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[16] "A market is the set of sellers to which a set of buyers can turn for supplies *at existing or slightly higher prices*." *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 907 (7th Cir. 1989) (emphasis added). Market definition is an exercise to distinguish close competitive constraints from distant ones, so that the analysis can then proceed to examine whether the merger significantly reduces competition among *close* constraints. *See, e.g.,* 4 P. Areeda, H. Hovenkamp & J. Solow, *Antitrust Law* ¶ 929c (rev. ed. 1998) (hereafter "Areeda"). The antitrust agencies and the courts have implemented these tests by seeking to identify the smallest group of products over which prices could be profitably increased by a "small but significant" amount (normally 5%) for a substantial period of time (normally one year). *Staples*, 970 F. Supp. at 1076 n.8; *Merger Guidelines* § 1.11.

[17] *Swedish Match*, 131 F. Supp. 2d at 164 (emphasis added); *see generally* 4 Areeda ¶ 929d, at 130 (emphasis in original); *see generally id.* at 127-33 (discussing market definition examples of electric saws vs. electric and hand saws, and personal computers vs. personal computers and workstations); F. Scherer & D. Ross, *Industrial Market Structure & Economic Performance* 180-81 (3d ed. 1990) (discussing glass and plastic containers).

executives, agree they would not. Rather, it is Anchor's products, and other food service glassware, that closely constrain Libbey's prices.

In defining product markets, courts have repeatedly recognized that product markets are defined by examining "'practical indicia' including 'industry or public recognition of the [market] as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.'"[18] These "practical indicia" are "evidentiary proxies for direct proof of substitutability" among products. *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210, 218 (D.C. Cir. 1986). Indeed, this Court, applying the practical indicia that the Supreme Court has described, has held that distinct lines of distribution can comprise separate relevant markets, even for identical products.[19] In defining markets, courts often look to customers' perceptions of the marketplace, the defendants' documents reflecting

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[18] *Staples*, 970 F. Supp. at 1075, *quoting Brown Shoe Co. v. U.S.,* 370 U.S. 294, 325 (1962). *Brown Shoe* denominated narrower markets as "submarkets . . . which, in themselves, constitute product markets for antitrust purposes." 370 U.S. at 325, *quoted*, 970 F. Supp. at 1075. Therefore, courts have recognized that markets defined pursuant to *Brown Shoe*'s "practical indicia" can simply be described as "markets" rather than "submarkets." *Allen-Myland, Inc. v. International Business Machines Corp.*, 33 F.3d 194, 208 n.16 (3d Cir.), *cert. denied*, 513 U.S. 1066 (1994); *H.J., Inc. v. Internat'l Tel. & Tel. Co.*, 867 F.2d 1531, 1540 (8th Cir. 1989); *Satellite Television & Associated Resources, Inc. v. Continental Cablevision of Va. Inc.*, 714 F.2d 351, 355 n.5 (4th Cir. 1983).

[19] *Cardinal Health*, 12 F. Supp. 2d at 47-51 (limiting relevant market to prescription drugs distributed by wholesalers, and excluding other means of prescription drug distribution); *Staples*, 970 F. Supp. at 1075-80 (finding both a "broad market encompassing the sale of consumable office supplies by all sellers" and a relevant antitrust market of "the sale of consumable office supplies through office supply superstores").

the "business reality" of "how the market is perceived by those who strive to profit in it,"[20] and industry or public perception of separate markets.[21]

1. *Food Service Glassware Is a Unique Set of Products.*

Food service customers typically use a variety of different types of glassware for the different types of beverages they serve. These customers do not often change the styles of glassware they use in their restaurants, so the vast majority of soda-lime glassware sold to food service customers in any given year is sold to replace pieces that are broken or otherwise unusable. **[redacted]** To replace those pieces, restaurants and other food service customers seek to purchase identical items. **[redacted]** As the court wrote in Libbey's suit against Oneida:

> In this market, income from sales of replacement glasses substantially exceeds income from initial sales of glassware. Once a customer purchases glasses of a particular design, it is advantageous for that customer to replace broken glassware with glasses of the same design. Where that design is available from only one manufacturer, that manufacturer will be the sole supplier to that customer and that manufacturer will benefit accordingly.

61 F. Supp. 2d at 710-11. The need to purchase interchangeable items as replacements makes it impractical to switch to different products – such as glassware sold by retailers for household use, or

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[20] *FTC v. Coca-Cola Co.*, 641 F. Supp. 1128, 1132 (D.D.C. 1986), *vacated as moot*, 829 F.2d 191 (D.C. Cir. 1987); *see Swedish Match*, 131 F. Supp. 2d at 162 (customer and competitor testimony, and defendants' business documents, found more persuasive than expert testimony).

[21] *Olin Corp. v. FTC,* 986 F.2d 1295, 1299 (9th Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994)*; Rothery*, 792 F.2d at 218 n.4 ("industry or public recognition of the [submarket] as a separate economic unit matters because we assume that economic actors usually have accurate perceptions of economic realities").

plastic or crystal drinkware.[22] These products, therefore, are not competitive alternatives to the soda-lime glassware that food service customers demand.

Libbey and Anchor supply glassware to distinct groups of customers for food service and retail, and indeed manufacture different products for each of these groups of customers. **[redacted]** Typically Libbey and Anchor's food service items are sold exclusively or almost exclusively in the food service channel. Only **[redacted]** of Anchor's glassware items are sold in both channels. **[redacted]** The vast bulk of Libbey's food service sales are of items that are almost never sold in retail stores.[23] Since the items are different, customers cannot avoid higher prices by buying food service glass at retail stores.[24]

Food service customers require a far broader range of sizes and types of glass within each style than are made for retail sale. Libbey's "Embassy" line of stemware, which accounts for almost **[redacted]** of its food service sales, consists of 35 different items (25 of which Anchor copies). **[redacted]** Libbey's "Gibraltar" line of tumblers, which accounts for almost **[redacted]** of its food service sales, consists of 21 different items (16 of which Anchor copies).[25] **[redacted]** Libbey and its competitors provide the broad line of products that food service customers need, and maintain an extensive inventory of replacement glassware. **[redacted]** Glass makers also develop distinct sales

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[22] **[redacted]**

[23] **[redacted]**

[24] **[redacted]** That would not change even if food service prices increased significantly. **[redacted]**

[25] **[redacted]**

strategies for food service and retail glassware, and evaluate market shares, pricing and profitability separately for each customer group. **[redacted]**

Firms in the industry recognize that prices of food service glassware lines tend to be higher than in retail, on average, and follow different pricing trends. **[redacted]**[26] **[redacted]**[27]

2. *Other Products Are Not Adequate Substitutes for Food Service Glassware.*

Nor would food service customers find *other* products, such as plastic or crystal, to be acceptable alternatives to replace broken glasses. Plastic and lead crystal are distinct from glass, and have different uses. Those products do not constrain the prices of glassware to food service customers.

**[redacted]** the quality of the items on the tabletop is a reflection on the company as a whole. **[redacted]** Glassware conveys a much more positive impression on customers than does plastic. Plastic drinkware becomes scratched more easily than soda-lime glassware and the clarity of plastic drinkware diminishes every time it is run through the dishwasher. **[redacted]** most food service customers would not be willing to tarnish their reputation by serving beverages to consumers in plastic drinkware **[redacted]** Several customers attest that a 5-10% increase in the price of soda-lime glassware would not cause them to substitute to plastic drinkware.[28]

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[26] **[redacted]** *See Swedish Match*, 131 F. Supp. 2d at 165 ("significant evidence has demonstrated that prices of loose leaf and moist snuff move independently of each other," supporting finding of distinct loose leaf product market).

[27] **[redacted]**

[28] **[redacted]**

**[redacted]** [29] **[redacted]**

**[redacted]** [30]

3. *The Relevant Geographic Market is Limited to Firms that Supply the U.S. Food Service Market.*

Libbey, Anchor, Arc and Oneida compete to supply glassware to food service customers in the United States. All four have extensive marketing operations in the U.S.[31] **[redacted]**

Libbey closed the only glassware factory in Canada in 1999. PX 676 at 15-16, 51. Through its 1998 joint venture, Libbey owns 49%, and is the exclusive U.S. distributor, of the only significant glassware manufacturer in Mexico, Vitrocrisa. **[redacted]** The **[redacted]** import and sell glassware made in Europe and Asia, in many cases pursuant to exclusive distribution agreements.[32] While there are no precise data specifying imports for food service other than by **[redacted]**, Libbey's ordinary course of business estimate is that "all others" (*i.e.*, unaffiliated imports) constituted **[redacted]** of food service sales, **[redacted]**. [33]

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[29] **[redacted]**

[30] **[redacted]** *see Swedish Match*, 131 F. Supp. 2d at 165 (relying on "the dearth of documents introduced by the defendants to show that moist snuff products are taken into account in competitively pricing loose leaf" tobacco).

[31] **[redacted]**

[32] Libbey is the exclusive distributor for glassware produced in Italy by Luigi Bormioli. **[redacted]** Arc is the North American subsidiary of Arc International in France. **[redacted]** Oneida is the exclusive distributor for Pasabahce, CALP and Schott Zweisel glassware. **[redacted]**

[33] **[redacted]**

**[redacted]**[34] **[redacted]**

Imports thus do not provide significant competition to Libbey or other U.S. food service glassware sellers today.[35] The remaining issue is whether these firms *would* enter the market and provide competition in response to an anticompetitive price increase after the merger. We discuss at pp. 23-27 below the barriers to entry any soda lime glassware maker (foreign or domestic) would face entering food service. Foreign firms would face additional challenges. The high duty rates on glassware can add as much as 32% to the cost of glassware imported from abroad.[36] Shipping costs and inventory carrying costs could add another **[redacted]** or more to the delivered cost.[37] **[redacted]** [38] Thus, while there are glassmakers overseas, these firms are not in a position to replace the competition that would be lost by this acquisition. Indeed, several of the overseas producers **[redacted]** have gone out of business.[39]

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[34] **[redacted]**

[35] **[redacted]** Libbey's SEC filings have identified the retail market as the market in which it faces competition from foreign glassware manufacturers. PX 41 at 8 (imports "principally in retail"); PX 43 at 6 (Libbey's retail business "generally competes against a larger group of competitors, including foreign manufacturers, than it competes with for foodservice sales").

[36] **[redacted]**

[37] **[redacted]**

[38] **[redacted]**

[39] **[redacted]**

**[redacted]** [40] To the extent that European producers have had any impact in the United States, they have been aligned with domestic companies.[41]

Whether the glassware itself is manufactured in the United States or abroad, the only firms that have succeeded in selling glassware to the U.S. food service industry are the four firms that have made substantial investments in capital equipment and U.S. marketing and distribution networks. **[redacted]** It is a matter of semantics whether the market is defined as the United States (or North America) or the world[42]; the significant fact is that only firms that specifically invest to compete for U.S. food service sales are in the market, and only four such firms – Libbey, Anchor, Arc and Oneida – are at all significant.

B. This Merger Will Significantly Increase Concentration.

"Merger law 'rests upon the theory that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and raise price.'" *Heinz*, 246 F.3d at 715, *quoting PPG*, 798 F.2d at 1503. A merger that results in a significant increase in concentration, and produces a firm that has an undue percentage share of the market, is so inherently likely to lessen competition substantially that it "must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." *Swedish Match*, 131 F. Supp. 2d at 166, *quoting U.S. v. Philadelphia Nat'l Bank,* 374 U.S. 321, 363

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[40] **[redacted]**

[41] Luigi Bormioli's president told the trade press that "[Libbey] is the best marriage I could find. [Libbey's] reputation is one of the best and their market penetration is the best in the business. The business of foodservice is where sales coverage and distribution are very important." PX 156 at 1.

[42] **[redacted]**

(1963)*; accord Heinz*, 246 F.3d at 715. Therefore, "sufficiently large HHI figures establish the FTC's *prima facie* case that a merger is anticompetitive." *Heinz*, 246 F.3d at 716, *citing Philadelphia Nat'l Bank*, 374 U.S. at 363; *Baker Hughes*, 908 F.2d at 982.

This acquisition would only increase Libbey's already overwhelming share of food service glassware sales. Libbey already sells **[redacted]** of the glassware purchased by these customers. PX 647 at 12. Libbey has maintained that dominant market share over a period of years, even while maintaining *higher prices* than other suppliers. After the acquisition, its share of food service sales would approach **[redacted]**, far exceeding the level that has been held to be presumptively unlawful. *Heinz*, 246 F.3d at 715, *citing Philadelphia Nat'l Bank*, 374 U.S. at 364. "The already commanding position that [Libbey] holds in this concentrated market raises an almost absolute prohibition to further enhancement of that position by acquisition." *Coca-Cola*, 641 F. Supp. at 1134 (combined market share of 42% held presumptively unlawful).

The merger will increase market concentration significantly, to very highly concentrated levels. In PX 47, the FTC presents concentration calculations based on market share estimates made by the defendants in the ordinary course of business, and by other industry participants. Those post-merger concentration estimates range from 4732 to 6025, increasing by 622 to 1200.[43] Based on Libbey's own ordinary course of business estimates, the Herfindahl-Hirschman Index would increase by 622, to

[43] **[redacted]**

4732 – roughly the concentration level this Circuit has said "creates, by a wide margin, a presumption that the merger will lessen competition."[44]

An analysis of market shares should also consider the size of the merged entity in comparison to the other market participants. *U.S. v. Phillipsburg Nat'l Bank*, 399 U.S. 350, 367 (1970) (three times the size); *PPG*, 798 F.2d at 1502-03 (two and one-half times as large). Where a merger produces a firm that is significantly larger than its closest rivals, it increases the likelihood that the firm will be able to raise prices without fear that the small sellers will be able to take away enough business to defeat the price increase.[45] As described by the 9th Circuit, when faced with a similar acquisition by an established market leader:

> Crown, with its leadership in production and sales of the product-line papers, its great disparity in size as compared with other competitors in the area, and its position as a price leader in the

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[44] *Heinz*, 246 F.3d at 715-16 (post-merger HHI of 4775, increase of 510); *PPG*, 798 F.2d at 1505-06 (post-merger HHIs estimated from 3184 to 5213, increases ranging from 175 to 1795 are "overwhelming"); *Swedish Match*, 131 F. Supp. 2d at 167 (HHI increase of 1514, to 4733, "does not present a close call"). Courts have barred mergers resulting in substantially lower concentration levels. *Warner Communications*, 742 F.2d at 1163 (four-firm concentration ratio of 75%); *Cardinal Health*, 12 F. Supp. 2d at 52 (mergers resulting in two firms with 40% and 37% respectively "clearly cross the 30% threshold"). The HHI is the sum of the squares of the market shares of firms in the market; if the post-merger HHI exceeds 1800 and the increase exceeds 100, the merger is presumed to be anticompetitive. *Merger Guidelines* §§ 1.5, 1.51; *see Heinz*, 246 F.3d at 716 n.9; *AlliedSignal*, 183 F.3d at 574 n.3.

[45] *See Rockford*, 898 F.2d at 1283-84; *Pacific Coast Agric. Export Ass'n v. Sunkist Growers*, 526 F.2d 1196, 1204 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976); H. Hovenkamp, *Federal Antitrust Policy* § 12.4c (1993) ("markets may often have small niches or pockets where new firms can carve out a tiny position for themselves without having much of an effect on competitive conditions in the market as a whole").

market, was already in a dominant position before the merger. Its acquisition of St. Helens could not help but substantially increase that dominance.[46]

Here Libbey is *already* more than **[redacted]** times the size of the next largest supplier to the food service industry, **[redacted]**, and after the acquisition will be more than **[redacted]** times the size of the third largest, **[redacted]**.

C. This Merger Will Harm Competition Substantially.

By proving that the acquisition will increase concentration significantly in the food service glassware market, the Commission establishes its *prima facie* case that a merger is anticompetitive. *Heinz*, 246 F.3d at 716 (likelihood of success demonstrated by showing that market concentration would increase substantially). The burden of production and proof shifts to the defendants to rebut this presumption of anticompetitive harm.[47] As the Court of Appeals has twice held, "the more compelling the *prima facie* case, the more evidence the defendant must present to rebut it successfully." *Heinz*, 246 F.3d at 725, *quoting Baker Hughes*, 908 F.2d at 991.

Anchor has been Libbey's most persistent price competitor, and Anchor's elimination would relieve Libbey of the burden of that competition. The compelling evidence of likely anticompetitive

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[46] *Crown Zellerbach Corp. v. FTC*, 296 F. 2d 800, 835-36 (9th Cir. 1961). In *PPG*, Judge Bork found that "an entity with a combined market share two and one half times larger than that of the nearest competitor and rais[ing] the HHI to 3295," far lower than the concentration levels found here (even on Libbey's expert's calculation), left "no doubt that the pre- and post-acquisition HHIs and market shares found in this case entitle the Commission to some preliminary relief." 798 F.2d at 1503.

[47] *U.S. v. Marine\ Bancorporation*, 418 U.S. 602, 631 (1974); *Heinz*, 246 F.3d at 715; *Baker Hughes*, 908 F.2d at 982-83. Courts have examined evidence of ease of entry, *Baker Hughes*, 908 F.2d at 987-89; *Cardinal Health*, 12 F. Supp. 2d at 54-58; *U.S. v. United Tote,* 768 F. Supp. 1064, 1071-82 (D. Del. 1991)*; see Heinz*, 246 F.3d at 715 n.7; and efficiencies, *Heinz,* 246 F.2d at 720-22; *Staples*, 970 F. Supp. at 1086-88; among other issues, in considering whether the presumption from concentration has been rebutted.

effect largely moots any effort by defendants to rebut the FTC's *prima facie* case.[48] Moreover, any potential entrant – domestic or foreign – would need to make large sunk investments to even attempt to enter the relevant market, and would face a large risk that it would not succeed in generating the sales necessary to make those investments profitable. Therefore, entry sufficient to restore competition is unlikely.

1. *The Merger Will Eliminate Substantial Competition Between Libbey and Anchor.*

Anchor, one of only three competitors that Libbey faces in the food service market, competes primarily by offering customers an alternative source of replacement glassware that looks like Libbey glassware, but which is significantly lower priced. Nearly **[redacted]** of Anchor's food service sales are of Libbey look-alikes.[49] **[redacted]** Anchor has implemented this strategy by providing customers with a lower priced alternative to Libbey.[50]

Competition from Anchor has forced Libbey to respond at many accounts nationwide by providing increased discounts to food service customers, reducing Libbey prices. **[redacted]** [51]

**[redacted]**

But for this merger, Anchor's aggressiveness would increase and continue to benefit food service customers. **[redacted]**

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[48] *See Toys 'R Us Inc. v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000) ("direct evidence of anticompetitive effect" proves market power).

[49] **[redacted]**

[50] **[redacted]**

[51] **[redacted]**

Anchor also has improved its manufacturing position. **[redacted]**

With its large domestic capacity, and the investments it has made in developing its line of replacement glassware, Anchor is well positioned to compete against Libbey in food service. **[redacted]**

With these investments in and improvements to its manufacturing, Anchor can be expected to continue to compete aggressively against Libbey in food service. **[redacted]** Anchor has been one of few competitors to challenge Libbey, **[redacted]**. Thus, "the merger would result in the elimination of a particularly aggressive competitor in a highly concentrated market, a factor which is certainly an important consideration when analyzing possible anti-competitive effects." *Staples*, 970 F. Supp. at 1083 (citation omitted).

2. *Libbey Already Exercises Price Leadership in Food Service Glass.*

Anchor's strategy has been particularly important in providing competition in a market which displays a consistent pattern of price leadership by Libbey. **[redacted]** described Libbey's influence on its pricing strategy: **[redacted]** [52] **[redacted]** [53]

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[52] **[redacted]**

[53] **[redacted]** The Court of Appeals last year recognized the antitrust laws' concern about price leadership: "In an oligopolistic market characterized by few producers, price leadership occurs when firms engage in interdependent pricing, setting their prices at a profit-maximizing, supra-competitive level by recognizing their shared economic interests with respect to price and output decisions." *Heinz*, 246 F.3d at 724 n.23, *citing Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993).

**[redacted]** [54] **[redacted]** In 1999, Arc's CEO told a trade journal that Arc would not be "pulled into" the price competition that had arisen between Libbey and Oneida because Arc's "institutional glassware products differ from Libbey's and Oneida's." PX 204 at 2866. **[redacted]** [55]

**[redacted]** [56] **[redacted]** [57]

**[redacted]** [58]

In 1999, Libbey acquired an interest in Vitrocrisa, whose subsidiary, World Crisa, had previously sold glassware into the foodservice market and, like Anchor, had sold Libbey look-alike items. PX 41 at 4; **[redacted]** *see Libbey v. Oneida*, 61 F. Supp. 2d at 703. After Libbey acquired its interest in Vitrocrisa, Libbey eliminated North American glassware capacity by closing the only glassware plant in Canada, which Libbey had acquired only five years earlier. PX 676 at 15-16.

3. *The Acquisition Would Lead to Higher Prices.*

By eliminating Anchor, Libbey will have even more success in increasing price for food service glassware. Major food service industry participants, including several large end-user customers,

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[54] **[redacted]**

[55] **[redacted]**

[56] **[redacted]**

[57] **[redacted]** In a competitive market, firms with excess capacity would increase output to soak up its excess capacity, and thereby increase sales of its product. Persistent excess capacity can be evidence of price fixing. R. Posner, *Antitrust Law: An Economic Perspective* 66-67 (1976).

[58] *See Swedish Match*, 131 F. Supp. 2d at 168 (describing the "anticompetitive behavior already exhibited within the market" and concluding "this pattern of anticompetitive behavior stems from high concentration in the market, and the defendants have not adequately demonstrated that competition will be facilitated by increasing that concentration").

believe that the merger will lead to higher soda-lime glassware prices. **[redacted]** [59] The Court need not determine that competition will in fact be diminished, *Heinz*, 246 F.3d at 719, but direct evidence of a loss of competition should negate any attempt to rebut the FTC's *prima facie* case. *See Toys 'R Us*, 221 F.3d at 937 (proof of market effects makes "elaborate market analysis" unnecessary).

4. *Entry is Unlikely to Defeat the Acquisition's Anticompetitive Effects.*

For entry to rebut the presumption of anticompetitive effect, the evidence must show not merely that a firm might enter, but that "entry into the market would likely avert anticompetitive effects from [the] acquisition."[60] Entry must be "timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects" of a proposed transaction.[61] For new entry to be likely, the sales opportunities available to a new entrant must be sufficient to enable the entering firm to operate at a large enough scale to make entry profitable. *Merger Guidelines* § 3.3.

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[59] **[redacted]**

[60] *Staples*, 970 F. Supp. at 1086, *quoting Baker Hughes*, 908 F.2d at 989; *accord Swedish Match*, 131 F. Supp. 2d at 170; *Cardinal Health*, 12 F. Supp. 2d at 55. In order for entry to be sufficient to restore competition, it must be entry that replaces the competition that existed prior to the acquisition. *Cardinal Health,* 12 F.Supp 2d at 58; *see also United Tote*, 768 F. Supp. at 1082 (rejecting entry defense when "entry . . . would not constrain anticompetitive price increases by incumbents").

[61] *Merger Guidelines* § 3.0; *see Cardinal Health*, 12 F. Supp. 2d at 55-58 (adopting "timely, likely, and sufficient" test). This Court has recognized that the Court of Appeals has explicitly endorsed the "sufficiency" element of the entry test: "[T]he Court must consider whether, in this case, 'entry into the market would likely avert anticompetitive effects from [Staples'] acquisition of [Office Depot].'" *Staples*, 970 F. Supp. at 1086, (*quoting Baker Hughes*, 908 F.2d at 989). Similarly, in *Cardinal Health*, the court found that defendants had failed to come forward with sufficient evidence of sufficiency of entry (and of likelihood of entry) to rebut the presumption from concentration. 12 F. Supp. 2d at 58.

The entry hypothesis advanced by defendants before the FTC is that an existing glassware maker (presumably in Europe or Asia) would, in response to a small profit opportunity, make and export to the United States glassware pieces demanded by the U.S. food service industry.[62] An entrant would need to establish relationships with distributors, since **[redacted]** or more of food service volume moves through distributors. **[redacted]** Since distributors seek to meet the needs of their food service clients, distributors demand broad product lines within each style, and multiple styles. Since the largest part of the market is replacements for Libbey-style glass, the most fruitful course for an entrant would be to copy Libbey styles, as Anchor and Oneida have done. Libbey itself told another district court why Oneida did so:

> Apparently unsuccessful in offering only Schott Zwiesel lines of tabletop glassware, Oneida recently decided to market, sell, and distribute glassware which slavishly copies a number of Libbey's distinctive and highly successful glassware lines.

PX 371 at 4799 ¶ 14. The court agreed with Libbey that copying Libbey designs was the most promising avenue for entry:

> To be sure, Oneida's ability *quickly* to capture market share will be impaired if it cannot lawfully sell its copies of Libbey's patterns to customers who heretofore have bought Libbey glassware.[63]

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[62] There has been no new construction of a soda-lime glassware plant in the U.S. in over 20 years, **[redacted]**.

[63] *Libbey v. Oneida*, 61 F. Supp. 2d at 711 (emphasis added). **[redacted]** In merger analysis, slow entry is not effective, constraining entry. Entry must be *timely, i.e.*, normally within two years. *Merger Guidelines* § 3.2; *see United Tote*, 768 F. Supp. at 1080 ("a two year time frame is an appropriate measure of the time period in which significant anticompetitive harm can occur in the absence of entry"); *U.S. v. Ivaco, Inc.*, 704 F. Supp. 1409, 1420 (W.D. Mich. 1989) (three years is too long to "pose a significant constraint on price increases"); *FTC v. Bass Brothers Ents.*, 1984-1 Trade Cas. ¶ 66,041 (N.D. Ohio 1984) ("time delays of [three to five years] would protect a non-competitive industry from destabilizing competition").

Therefore, to enter quickly and capture significant market share, a firm with existing glassmaking capability would still need to make a large sunk investment in new glassware molds, would have to compensate distributors for the loss of Libbey rebates and discounts, and would then face the risk of trade dress litigation from Libbey. Not surprisingly, customers, incumbents and prospective entrants view these barriers as overwhelming.

a. *A New Entrant Would Need to Persuade Distributors To Carry its Line.*

In the food service glassware industry, capturing a significant share would be particularly difficult. Glassware companies make the vast majority of food service sales through distributors.[64]

**[redacted]** [65]

The vast majority of distributors already carry **[redacted]**. Many distributors do not want to work with more than one glassware supplier. **[redacted]**

**[redacted]**

To gain distributors, a company must make a long-term commitment to produce certain glassware patterns. **[redacted]** This risk will likely inhibit new entry:

**[redacted]** [66]

**[redacted]** the risk that a new entrant will abandon production is sufficiently great to avoid buying from new entrants. **[redacted]**

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[64] **[redacted]**

[65] **[redacted]**

[66] **[redacted]**

b. *A New Entrant Would Need to Make Substantial Sunk Investments to Develop a Full Line of Glassware.*

Libbey, Anchor and their competitors provide their food service customers with a range of glassware pieces. Libbey produces at least **[redacted]** different pieces for the food service industry. **[redacted]** Anchor offers over **[redacted]** Libbey look-alike pieces and about another **[redacted]** unique designs. **[redacted]** A new producer would need to produce a full line of glassware products, rather than simply a few **[redacted]** [67]

To compete with Libbey, a potential new supplier therefore would need to invest **[redacted]** simply to develop the **[redacted]** or more different sets of glassware molds needed to manufacture a sufficient line of glassware, **[redacted]** for each glassware style, shape and size.[68] **[redacted]**

c. *Because Most Distributors Already Carry Libbey Glassware, An Entrant Would Struggle To Find Adequate Distribution.*

**[redacted]** Libbey has maintained a "Primary Distributor Program" ("PDP") with participating distributors, **[redacted]**. [69] **[redacted]**. [70] **[redacted]** [71] **[redacted]**

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[67] **[redacted]**

[68] **[redacted]**

[69] **[redacted]**

[70] **[redacted]**

[71] **[redacted]**

d. *The Threat of Litigation Makes Entry or Expansion Unlikely*.

Since Libbey holds so much of the food service market, and so much of food service sales are replacements, the logical entry strategy is to compete for sales of replacements for Libbey glasses, *i.e.*, Libbey look-alikes: **[redacted]** Oneida followed precisely this strategy **[redacted]**

In response, Libbey sued Oneida, alleging trade dress infringement in violation of the Lanham Act, 15 U.S.C. § 1125(a), seeking both a preliminary injunction and damages. *Libbey v. Oneida*, 61 F. Supp. 2d at 703. Although the court denied Libbey's preliminary injunction motion because Libbey had not shown irreparable injury, PX 372 at 4513-17, it also denied defendants' summary judgment motions, allowing the case to proceed to jury trial.[72] **[redacted]**

**[redacted]** Nor can other firms – incumbents or entrants – be confident that they can make or sell *the very glasses that Anchor is now selling* in competition with Libbey.

**[redacted]** new competition – domestic or foreign – is unlikely. **[redacted]** [73]

5. *Defendants' Asserted Efficiencies Cannot Save this Transaction.*

Defendants argued before the FTC that the proposed acquisitions would result in significant efficiencies. The ultimate issue under Section 7 is whether a proposed merger is likely to lessen competition substantially in any line of commerce in any section of the country, and if it is determined

[72] 61 F. Supp. 2d at 720. The court also ruled that a new entrant could not defend based on laches, even though Anchor had been selling the same (presumably infringing) items in competition with Libbey for 20 years, *id.* at 718-19; that a foreign manufacturer that sells glassware to a U.S. firm for import thereby subjects itself to Lanham Act liability, 61 F. Supp. 2d 720, 722-23 (N.D. Ohio 1999); and that the foreign manufacturer would have to defend itself in a jury trial in the home town of the U.S. corporation. 1999 U.S. Dist. LEXIS 13432 (N.D. Ohio July 12, 1999). These holdings could well make a foreign manufacturer skittish about competing against Libbey in food service. **[redacted]**

[73] **[redacted]**

that a merger would have such an impact, proven efficiencies, however great, "will not insulate the merger from a Section 7 challenge."[74] Moreover, "the high market concentration levels present in this case require, in rebuttal, proof of extraordinary efficiencies," *Heinz*, 246 F.3d at 720, and those efficiency claims must be tested in "a rigorous analysis . . . in order to ensure that those 'efficiencies' represent more than mere speculation and promises about post-merger behavior." *Id.* at 721. Defendants thus face a heavy burden in attempting to demonstrate their asserted efficiencies.

**[redacted]**[75] **[redacted]** Even if fully credited, the claimed savings are small compared to the size of the **[redacted]** million food service glassware market.[76] Before crediting any efficiencies, Libbey must demonstrate and the court must find "that these economies ultimately would benefit competition and, hence, consumers."[77]

6. *Defendants' "Restructuring" of the Transaction Is a Sham, and Is Unlikely to Allow Newell to Continue as a Food Service Competitor*

Newell determined in March 2001 that Anchor, while profitable, was not profitable enough to be part of Newell's core retail products business. **[redacted]** PX 88 (Anchor is a "solid, but ultimately non-core business"). Anchor's food service business was even less a core business than its retail

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[74] *University Health*, 938 F.2d at 1222 n.29, *cited by Heinz*, 246 F.3d at 720; *see Cardinal Health*, 12 F. Supp. 2d at 63 ("the critical question . . . is whether the projected savings from the mergers are enough to overcome the evidence that tends to show that possibly greater benefits can be achieved by the public through existing, continued competition").

[75] **[redacted]**

[76] **[redacted]**

[77] *Heinz*, 246 F.3d at 720, *quoting University Health*, 938 F.2d at 1223; *accord Staples*, 970 F. Supp. at 1090 (finding that defendants had failed to prove the portion of their cost savings that would be passed on to customers as lower prices).

business: Newell is primarily a retail company, **[redacted]**. Nonetheless, on January 3, 2002, on the eve of the FTC's then-deadline for filing this lawsuit, Newell told the FTC that it and Libbey were restructuring their deal – purportedly to satisfy the FTC's concerns – so that Newell would continue to sell some food service glassware. **[redacted]**

Defendants proposed on January 10, 2002, that Newell sell all of Anchor's manufacturing capability to Libbey, **[redacted]**.[78] **[redacted]** Nothing would prevent Newell from exiting food service glassware at its earliest convenience, and a company that demands 15% operating margins from its businesses **[redacted]** [79]

As the parties now propose to restructure the acquisition, Libbey would still acquire the core of Anchor's food service business: **[redacted]** its trade name **[redacted]**.[80] The FTC and the Court should reject these late attempts "to improve [defendants'] litigating position." *Hospital Corp.*, 807 F.2d at 1384. Where defendants have attempted unilaterally to restructure transactions to cure antitrust concerns, courts have demanded that such "curative divestitures" be to a new competitor that is "in fact

[78] **[redacted]**

[79] Newell's former chief executive told Newell's shareholders that Newell expects a 15% operating margin from each of its businesses. PX 620 at 8. Newell projects only a **[redacted]** operating margin in food service glassware – **[redacted]** PX 87 at 16. *See Franklin Elec. Co.*, 130 F. Supp. 2d at 1033 ("the scheme looks more questionable" where small investment allows company to walk away from curative divestiture).

[80] As of the date of this memorandum, defendants have not in fact restructured the transaction, PX 86 at 3, **[redacted]**. The Court need not even consider the ephemeral possibility that defendants *might* restructure the transaction. *Consolidated Gold Fields v. Anglo American Corp.*, 698 F. Supp. 487, 502 (S.D.N.Y. 1988); *Chemetron Corp. v. Crane Co.*, 1977-2 Trade Cas. ¶61,717 at 72,390 (N.D. Ill. 1977).

. . . a willing, independent competitor capable of effective *production* in the . . . market." **[redacted]** [81]

The Court should reject this sham "curative divestiture" out of hand.

## III. THE FACTS OF THIS CASE DEMONSTRATE THE NEED FOR PRELIMINARY INJUNCTIVE RELIEF

Where, as here, the Commission has demonstrated a likelihood of success on the merits, defendants face a difficult task of "justifying anything less than a full stop injunction." *PPG*, 798 F.2d at 1506; *see Heinz*, 246 F.3d at 726; *Staples*, 970 F. Supp. at 1091. The strong presumption in favor of a preliminary injunction can be overcome only if: (1) significant equities compel that the transaction be permitted; (2) a less drastic remedy would preserve the Commission's ability to obtain complete relief at the conclusion of administrative litigation; and (3) a less drastic remedy would check interim competitive harm.[82]

In balancing the equities, the principal public equity is the effective enforcement of the antitrust laws. *Heinz*, 246 F.3d at 726. Without a preliminary injunction, the government often cannot restore competition via divestiture, to the public's detriment. *Id.*; *Weyerhaeuser*, 665 F.2d at 1086 n.31. Section 13(b) enables the Commission to protect that interest by preventing businesses from being acquired so that competition will continue in the marketplace until the legality of the proposed acquisition is finally determined. Indeed, "Section 13(b) itself embodies congressional recognition of

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[81] *White Consolidated Inds. v. Whirlpool Corp.*, 781 F. 2d 1224, 1228 (6th Cir. 1986) (emphasis added); *accord Franklin Elec.*, 130 F. Supp. 2d at 1033 (defendants' burden to show that proposed cure does not alter the competitive arena); *Chemetron*, 1977-2 Trade Cas. at 72,390 (citing cases).

[82] *See PPG*, 798 F.2d at 1506-07. In a preliminary injunction action under FTC Act § 13(b), the FTC is not required to show irreparable harm. *Heinz*, 246 F.3d at 714; *Elders Grain*, 868 F.2d at 903; *Warner Communications,* 742 F.2d at 1159.

the fact that divestiture is an inadequate and unsatisfactory remedy in a merger case . . . ."[83] To preserve competition pending administrative adjudication, and to assure the availability of a remedy should the Commission find a violation on plenary review, a preliminary injunction is necessary.

Conclusion

For the foregoing reasons, the Court should grant the Commission's motion for a preliminary injunction against the proposed acquisition.

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[83] *Heinz,* 246 F.3d at 726 (citing legislative history); *PPG*, 798 F.2d at 1508; *FTC v. Rhinechem Corp.*, 459 F. Supp. 785, 787, 790 (N.D. Ill. 1978); *Lancaster Colony*, 434 F. Supp. at 1096 ("At best, divestiture is a slow, cumbersome, difficult, disruptive and complex remedy").

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