IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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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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

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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).

[9] *Heinz*, 246 F.3d at 714, *citing FTC v. University Health, Inc.*

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.

[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 it7l5c747 Tc 0.07 Tj -hh Tf -0.1119 Tc

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. <u>Food Service Glassware in the U.S. Is an Antitrust Market.</u>

[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

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 -0.4363 Tc7unj 39.o763 Tw (constrain price i& Eoa3 TD /F oiubstitutsyn4ubsemited i Tc7unj 39

[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).

[18] *Staples*, 970 F. Supp. at 1075, *quoting Brown Shoe Co. v. U.S.*, 370 U.S. 294, 325

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

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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]**

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(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

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[43] **[redacted]**

[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

effect largely moots any effort by defendants to rebut the FTC's

[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.*

[redacted]

[52] **[redacted]**

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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. Maj that had arisen betweeen bet0.3L.ryantre bipmpetdentration in the market, and the defendants have not a

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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").

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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

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]

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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

[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]**

[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*

[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.

. . . a willing, independent competitor capable of effective *produ afon* in the . . . market." **[reda aed]** [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 Commissfon has demonstrated a likelihood of success on the merits, defendants face a difficult task of "justifying anything less than a full stop injun afon." *PPG*, 798 F.2d at 1506; *see Heinz*, 246 F.3d at 726; *Staples*, 970 F. Supp. at 1091. The strong presumpafon in favor of a preliminary injun afon can be overcome only if: (1) significant equities compel that the transa afon be permitted; (2) a less drastic remedy would preserve the Commissfon's ability to obtain complete relief at the conclusfon of administrative litigaafon; 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 injun afon, the government often cannot restore competition via divestiture, to the public's detriment. *Id.*; *Weyerhaeuser*, 665 F.2d at 1086 n.31. Se afon 13(b) enables the Commissfon to protect that interest by preventing busfnesses from being acquired so that competition will continue in the marketplace until the legality of the proposed acquisition is finally determined. Indeed, "Se afon 13(b) itself embodies congressfonal recognitfon 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 injun afon a afon 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 Communicaafons*,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").