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.*,) **REDACTED PUBLIC VERSION**
)
Defendants.

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Introduction and Summary

Defendants ask the Court to vacate its preliminary injunction order of April 22, 2002, by which the Court has enjoined, pending administrative adjudication, the proposed acquisition by defendant Libbey, Inc. (ALibbey@) of Anchor Hocking Corp. (AAnchor@) from defendant Newell Rubbermaid Corp. (ANewell@).[1] Defendants claim Achanged facts,@ but defendants have *not* materially changed the fact that their restructuring of Newell=s food service glassware business likely would increase Newell=s cost of goods, the Court=s principal concern. Defendants do not bother to address the other concerns the Court expressed (other than key employees), nor other concerns identified by the FTC that the Court did not need to reach, finding sufficient reasons to be troubled by the concerns it noted.

[1] Section 13(b) of the FTC Act requires that the FTC issue an administrative complaint within 20 days of the grant of a preliminary injunction, or the injunction is dissolved. 15 U.S.C. ' 53(b). The FTC voted unanimously to issue its administrative complaint on May 9, 2002. PX 857 (new). That complaint alleges that Libbey

several problems with defendants= purported fix. Newell=s cost of Peldar-supplied glass would be Asignificantly higher@ than Anchor=s in at least three components: manufacturing cost, inventory cost and tariffs. Op. 18; *see also id.* at 10 n.20. Newell would rely on supply from Colombia, Aa country that currently and has been experiencing for many years civil unrest and internal instability.@ *Id.* at 9-10. Newell has no Aviable business plan that will address how it will be able to place a competitively priced product on the market with a higher cost to acquire its glassware, without passing this higher cost on to consumers.@ *Id.* at 10.

Most important, the Court found that Athe amended merger would result in the *loss of the plants* used by Anchor to manufacture food service glassware . . . .@ *Id.* at 18 (emphasis added). AAnchor is Libbey=s most formidable competitor in the food service glassware market,@ *id.* at 3, precisely because Anchor *makes* glassware at low-cost factories that it operates. As Anchor=s own executives testified, the food service business Ais more of a maintained capacity filler . . . It helps fill the plant . . .@ PX 653 at 115-16 (Volles); *see also* PX 29 & 9 (Glasner).

Defendants now claim that they have addressed two of the Court=s concerns: Newell=s glassware costs and Anchor=s key employees.[2] Defendants have not addressed the greater part of

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[2] Defendants miss at least half of the point of the Court=s (and the FTC=s) concern regarding key employees. Not only was Newell not keeping those key employees; Newell had an employee who expected to be working for Libbey negotiate a supply agreement B the terms of which are still in effect [illegible]

Newell=s cost disadvantage B the increased tariff and inventory costs it will incur by outsourcing from Colombia. Instead, they dispute the Court=s findings by relying on arguments about inventory costs that the Court has already rejected. *See* Def. Mem. 6 n.2; pp. 7-8 below. Even if defendants have in fact reduced Peldar=s prices by **[Redacted]**, Newell=s costs will still be **[Redacted]** above Anchor=s. *See* pp. 6-8 below.

Defendants have done nothing to address the fact that Newell is still relying on supply from Colombia, or that it still does not have a viable post-merger business plan. Defendants have done nothing to address the fact that their merger, even as Arestructured,@ would eliminate Libbey=s Amost formidable competitor@ in the manufacture and sale of food service glassware. Nor have defendants even purported to address other serious problems with their scheme that the FTC identified: Newell has no supply for products, including stemware, that comprise more than **[Redacted]** of Anchor=s food service sales.

Defendants also urge the Court to enter a Aconsent injunction@ that falls far short of a full stop injunction, the remedy the Court of Appeals has recently and repeatedly held is the FTC=s presumptive remedy once the FTC has shown a likelihood of success on the merits,[3] which the Court has found. Op. at 29. Defendants= proposed order does nothing to prevent interim harm to competition, and does not even accomplish the purpose defendants claim B to preserve the availability of an ultimate remedy. The proposed order does not even purport to require Newell to preserve Anchor=s food service

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[3] at, 7TD (D.C. Cir. T1);9 0 TD 075 -3367316 172.5 T057

business as a viable business.[4] It only purports to preserve the physical assets of the business, and does not even do that: If civil war in Colombia leads to the destruction of the food service glassware molds, defendants would put the risk of that loss on the FTC, the Court, competition and the public. Def. Proposed Order at 4, see pp. 13-17 below.

Nor have defendants made any *new* showing that Asignificant equities favor the transaction,@ as required by *Weyerhaueser*, 655 F.2d at 1085. Instead, their equity claims are weaker now than when the Court rejected them on April 22. Defendants told the Court that Aif this Court issues a preliminary injunction the acquisition will effectively die.@ Op. at 31. Accepting defendants= assertion, the Court nonetheless held that defendants= financing claim was insufficient to tip the equities in their favor. *Id.* But predictions of the deal=s demise were premature: Defendants now claim that the deal (and Libbey=s financing) will survive for an unspecified time, just not long enough for administrative adjudication. Def. Mem. 8. The Court should give no weight to defendants= shifting stories of the deal=s demise.

The FTC has had no discovery or investigation of defendants= amended merger agreement or supply contracts. To accommodate defendants= claimed need for expedition, the FTC waived discovery and agreed to submit the preliminary injunction motion on the papers. Stipulation & Order

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[4] Likewise, defendants belatedly object to the FTC=s form of injunction (which was submitted in substantially the same form on January 14, 2002), claiming that they should not be required to maintain the competitive *status quo* pending administrative adjudication. Defendants= Opposition to Plaintiff=s Motion for Clarification and Modification of Preliminary Injunction Order (May 8, 2002). Defendants apparently seek to shut down Anchor=s food service business and argue that the merger would not eliminate competition. *Cf. Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1387 (7th Cir. 1986). Defendants acknowledge that this Court has issued identical injunctions in the past. Def. Opp. Br. 2 (May 8, 2002); *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 68 (D.D.C. 1998); *FTC v. Alliant Techsystems, Inc.*, 808 F. Supp. 9, 13 (D.D.C. 1992).

Regarding Pre-Hearing Arrangements at 1 (January 21, 2002). Accordingly, our only information is what defendants have chosen to put before the Court.

The Court has correctly recognized that these matters could and should be fully vetted in the FTC=s administrative process, not in this Court.[5] Now, with defendants= purported timing deadline passed, it is time for full discovery on defendants= amendments to their merger agreement and their machinations to secure Court approval. That discovery should be conducted in the FTC=s administrative process, but if the Court were to vacate the preliminary injunction, the FTC should be allowed to take discovery in this Court prior to any such vacatur.

Argument

I. DEFENDANTS= PURPORTED CHANGES IN FACT DO NOT MATERIALLY ALTER THE ANTICOMPETITIVE EFFECTS OF THEIR AMENDED MERGER

In granting the preliminary injunction, the Court concluded that it should assess whether the FTC had shown a likelihood of success on a claim that defendants= amended merger agreement was likely to be anticompetitive, Op. at 16; that an amended merger agreement that purports to create or maintain a competitor should be examined by reference to whether it impaired the surviving competitors= ability to compete, =

(S.D.N.Y. 2001) (citation omitted). AWhile the court has considerable discretion in ruling on a Rule 59(e) motion, the reconsideration and amendment of a previous order is an extraordinary measure.@ *Zyko v. Department of Defense*, 180 F. Supp. 2d 89, 91 (D.D.C. 2001). A[T]he burden is on the moving party to demonstrate that the Court overlooked controlling decisions or material facts that were before the Court on the original motion and might >materially have influenced its earlier decision.=@ *Building Service*, 127 F. Supp. 2d at 492 (citation omitted).

A. Defendants Have Not Materially Improved Newell=s Cost Disadvantage

Once again, defendants have changed their agreement, not for business reasons but to try to satisfy the Court. Def. Mem. 1, 4; *see* Op. at 10 n.21; PFF Supp. App. I (chronology of changes to merger agreement). In the two months since the FTC showed that Newell=s cost of goods under the Peldar supply agreement was 4.3% higher than Anchor=s costs, defendants did nothing to lower their costs.[7] Only when the Court enjoined the merger did Newell negotiate a lower price. Had the Court denied the preliminary injunction motion and permitted the parties to merge, Newell apparently would have been content with the higher price.

Defendants claim that Newell has persuaded Owens-Illinois to lower Peldar=s prices by **[Redacted]**, putting Peldar at a **[Redacted]** price advantage to Anchor. DX 207 **&** 5 (Jordan); Def. Mem. 5. Defendants still offer no explanation why, if glassware is available all over the world at substantially lower costs, Newell has committed to prices only **[Redacted]** lower than Anchor=s costs.[8]

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[7] **[Redacted]**

[8] The **[Redacted]** cost advantage disappears when depreciation for rim tempering equipment is included. Newell has agreed to provide this equipment to Peldar for **[Redacted]**. DX 186 ' 5.1.

Nor have defendants addressed tariff costs. Defendants claim that under the supply contract *Peldar* will bear those costs, Def. Mem. 6 n.2, failing to mention that the same contract (Aall other terms of [which] have remained unchanged,@ Def. Mem. 4) provides that the imposition of tariffs would be an occasion of *force majeure*, excusing performance by Peldar. DX 186

Nor have defendants ameliorated Newell=s increased inventory carrying costs, a consequence of relying on glassware made in Colombia. Rather than offer new facts, defendants simply reassert the argument the Court has already rejected B that Athe FTC has grossly overestimated RCP=s inventory costs.@[9] Defendants do not dispute that Newell=s inventory costs will be higher than Anchor=s, nor have defendants disputed that the methodology used by the FTC in its February 25 and 27 submissions, PX 849, PFF 607-609, is appropriate (nor have they offered an alternative methodology); they have only disputed Newell=s opportunity cost of capital. *See* PFF 620 n.5 (2d supp. Mar. 1, 2002).

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[9] Def. Mem. 6 n.2. Defendants rely solely on one of Dr. Addanki=s several declarations, DX 187 (Feb. 22, 2002), which addressed the FTC=s submissions of February 18, 2002. The FTC at oral argument withdrew that calculation, Tr. 41-42, and corrected it. PX 849;

Newell=s *incremental*

B.

3. *Newell Still Does Not Have a Business Plan for Food Service Glassware*

The Court found that Newell has Afailed to present any evidence that it has a viable business plan.@[12] That is still the case. The only business plan Newell has ever offered was PX 698, presented to the FTC on January 10, 2002, by Michael Moorefield, who as president of RCP was supposed to run the food service business. *Id.*; *see* PFF 481. Mr. Moorefield is no longer with Newell.[13]

Defendants argued that the FTC cannot instruct businessmen on how to run their businesses, tr. 85-86, 91, but Newell=s business people are nowhere to be seen: Defendants= *lawyers* are devising these business arrangements, not based on any business judgment but to try to get the merger past the

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[12] Op. at 10. Although defendants told the Court on February 8, 2002, that RCP had a food service glassware business plan, that business plan (based on buying glassware from Libbey) had long since been abandoned. PFF 612.

[13] Mr. Moorefield was replaced as president of RCP on April 15, 2002, *before* the Court ruled on the preliminary injunction motion. PX 859 (new). Defendants asked the Court to rely on Mr. Moorefield=s declaration, and the Court cited Mr. Moorefield=s declaration regarding Newell=s ability to compete effectively in the food service glassware market, Op. at 10-11, yet defendants did not tell the Court that Mr. Moorefield was no longer with Newell.

Anchor=s unique competitive advantage against Libbey is that, by having its own factories, Anchor is a

U.S.C. ' 53(b), where the district court=s role is to determine whether the status quo should be preserved pending administrative adjudication. The ultimate outcome, including the ultimate remedy, is for the FTC to determine, subject to review by the Court of Appeals. *See* PCL 21.

II. DEFENDANTS=PROPOSED ORDER IS NOT AN APPROPRIATE ALTERNATIVE TO A FULL STOP INJUNCTION.

Defendants also propose to enter into a Aconsent injunction@ that they claim would Aeliminate any concern that >unscrambling the eggs after the fact may not be a realistic option.=@ Def. Mem. 7 (quoting Op. at 30, internal quotations omitted). Defendants have shown neither a change in the balance of the equities nor that their proposed order would preserve the FTC=s ultimate remedy B to eliminate 1 4 0

safeguarding them should they need to be reunited with Anchor=s factories. *See* pp. 15-17 below.

A. Defendants Have Not Met Their Burden of Rebutting the Presumption in Favor of a Full Stop Injunction.

In urging that the equities favored allowing the merger, defendants argued that their transaction would perish with their financing on April 30, 2002. Libbey=s chairman so attested to the Court, DX 2

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favor, and defendants= previous statements on this subject suggest that their current representations should be given little weight.

of God, Government restrictions, *wars, insurrections*, and/or any other cause beyond its reasonable control.

Def. Proposed Order, at 4 (emphasis added). War and insurrections were occurring even as defendants submitted this order, so defendants anticipate that their proposed order would fail to accomplish the very purpose B preserving the assets B that defendants claim. Defendants do not mention in their motion or memorandum that they seek to transfer the risk of loss of the molds to the FTC, much less justify doing so. There is no sense in which the Court could accept defendants= order and meet the Adifficult task [of] justifying anything less than a full stop injunction,@ as *PPG* requires. 798 F.2d at 1506.

More generally, defendants= proposed order does nothing to preserve Anchor=s food service business as an ongoing entity. It is not even a hold separate order, *rejected* by the Court of Appeals in *PPG*. Even though Athe district court . . . fashioned a very stringent order to keep the companies separate and competitive while preserving the perceived public and private benefits that flowed from the merger,@ the appellate court reversed, ordering a full stop injunction.[19] Even the Avery stringent order@ rejected in *PPG*, would be inadequate to prevent interim competitive harm or to preserve Anchor=s food service *business* (not merely the physical assets used in the business). As the Court of Appeals

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[19] 798 F.2d at 1506. That hold separate order allowed APPG to acquire only bare beneficial ownership of the voting securities of Swedlow,@ not the right to vote those shares or control or influence Swedlow=s operations. *Id.* at 1507 n.10. Defendants= proposed order allows Libbey to acquire and run Anchor=s factories, among other assets, and to run them subject to only minimal commitments (essentially that Libbey will not close the factories or remove equipment). It likewise allows Newell to abandon the food service business entirely, so long as the physical assets are Amaintained@ in Colombia (unless of course they are lost through war or insurrection).

held:

> The *Weyerhaeuser* court also stated that under a hold separate order, Acompetition between the enterprises will not retain the vigor it had prior to the merger.@ 665 F.2d at 1086 (footnote omitted). The court concluded that hold separate orders would not be appropriate Awhere the competitiveness of firms in a particular industry turns, in large part, on aggressive or innovative management initiatives.@ *Id.*

PPG, 798 F.2d at 1508-09. This Court has already found that Anchor is Libbey=s most formidable competitor, Aand has plans to more aggressively target Libbey=s customers in the future.@ Op. at 5; *see* p. 2 above. That aggressive competition would be lost even under a genuine hold separate order, much less under the illusory promises of defendants= Aconsent injunction.@ The risk of that loss mandates a full stop injunction, as consistently held by the Court of Appeals.

<u>Conclusion</u>

For the foregoing reasons, the Court should deny defendants= motion to vacate this Court=s order granting the FTC=s motion for a preliminary injunction.

May 13, 2002

Respectfully submitted,

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