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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

ARDAGH GROUP, S.A.,
COMPAGNIE DE SAINT-GOBAIN, and
SAINT-GOBAIN CONTAINERS, INC.,

Defendants.

Case No. 1:13-CV-01021 (BJR)

PUBLIC VERSION

**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS
MOTION FOR PRELIMINARY INJUNCTION**

**REDACTED VERSION
FOR PUBLIC FILING***

*The Federal Trade Commission files this non-confidential redacted version of its Memorandum of Law in Support of its Motion for Preliminary Injunction, filed August 28, 2013. The Protective Order requires all information designated "Confidential" to be redacted from the public version of the pleading filed with the court. Although Defendants designated all information and documents redacted in this Memorandum as "Confidential," most of the information does not appear to be commercial information, the disclosure of which would cause injury to their businesses.

The Federal Trade Commission (“FTC” or the “Commission”) has commenced an action in this Court under Section of 13(b) of the FTC Act seeking to enjoin preliminarily Ardagh Group S.A. (“Ardagh”) from completing its acquisition of Saint-Gobain Containers, Inc. (“Saint-Gobain” or “Verallia North America”) until the resolution of the Commission’s pending administrative case to determine the legality of the proposed acquisition. The Commission respectfully submits this memorandum of law in support of its preliminary injunction motion.

INTRODUCTION

The Commission seeks to halt an acquisition that, if consummated, would dramatically concentrate the glass container industry in the hands of two manufacturers and lead to higher prices for glass beer and spirits bottles. For years, three manufacturers have dominated the \$5 billion glass container industry in the United States. The second- and third-largest of these manufacturers, Ardagh and Saint-Gobain, now propose to merge in a transaction that would create a durable duopoly. Under well-settled precedent and the Commission’s merger guidelines, this merger to duopoly is presumptively unlawful. Indeed, a top Ardagh sales executive stated in June 2013 that Ardagh believes the transaction “may not get approved” since “it is going from 3 to 2 major suppliers.”¹

The Commission has initiated an administrative proceeding to adjudicate the legality of the proposed transaction under the antitrust laws, and the trial in that proceeding begins on December 2, 2013. Thus, the only issue for this Court is whether to grant interim relief by enjoining the Defendants from consummating the proposed acquisition pending the upcoming merits trial. The Court should do so because such interim relief is necessary to prevent consumer harm and to preserve the possibility of an effective remedy.

¹ PX 1574.

Under Section 13(b) of the FTC Act, the Commission is entitled to a preliminary injunction “[u]pon a proper showing that, weighing the equities and considering the Commission’s likelihood of ultimate success, such action would be in the public interest.” 15 U.S.C. § 53(b). At this stage, the Commission is *not* required to prove whether the acquisition, is, in fact, illegal under the antitrust laws. “That responsibility lies with the FTC” after a full administrative hearing. *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008) (Brown, J.). The FTC creates a strong “presumption in favor of preliminary injunctive relief” by raising “questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals.” *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714-15 (D.C. Cir. 2001). The Commission undoubtedly has met that standard here.

To counter this strong presumption, coupled with the strong “public interest in effective enforcement of the antitrust laws,” defendants must show “particularly strong equities” that favor allowing the acquisition to close before trial. *Id.* at 726-27; *Whole Foods*, 548 F.3d at 1035 (Brown, J.). Defendants cannot do so. At best, Defendants’ arguments only underscore the “serious, substantial” questions to be resolved in the administrative trial.

This acquisition will likely cause anticompetitive effects in at least two relevant antitrust product markets: the manufacture and sale of glass containers to (1) beer brewers (“Brewers”) and (2) spirits distillers (“Distillers”). Both are relevant antitrust markets for the purposes of assessing the acquisition’s competitive impact because other types of containers, such as aluminum cans or plastic bottles, are not economically viable substitutes for glass.

The proper delineation of the relevant market is ultimately “a matter of business reality – a matter of how the market is perceived by those who strive to profit in it.” *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).

On that question, the evidence leaves little doubt.

- Glass container manufacturers refer to the “three majors” of glass container manufacturing, tell the investment community they operate in a glass container market, and calculate market shares based only on glass container sales.
- Aluminum and plastic container manufacturers have testified that they do not compete directly with glass.
- Glass container manufacturers bid for contracts knowing their customers have already excluded aluminum cans or plastic bottles from consideration.
- Brewers and Distillers who sell products in glass bottles want glass – not cans or plastic – because their customers demand it. As one Brewer explained when asked: “Who determines the mix of packaging? Consumers.”²
- Brewers and Distillers do not change their brands’ packaging based on variations in the relative prices of glass, metal, or plastic containers.

Unless enjoined, Ardagh’s planned \$1.7 billion acquisition of Saint-Gobain would produce a single firm controlling █ percent of the U.S. glass container industry, according to Ardagh’s own assessment. The only other major U.S. manufacturer – Owens-Illinois, Inc. (“O-I”) – controls roughly █ percent of the industry. The post-acquisition duopolists would collectively control approximately █ percent of the glass container market for Brewers and █ percent for Distillers, easily exceeding the levels required to establish a presumption that the acquisition violates the antitrust laws. The remaining competitors are fringe importers and small-scale or niche manufacturers.

Today, Ardagh, Saint-Gobain, and O-I – the “three majors,” to borrow a term from Ardagh’s documents – recognize their mutual incentives to avoid excess capacity that could lead to greater price competition. Indeed, Ardagh’s North American President described the glass container industry as having “evolved” to be “very disciplined with ‘well-balanced’ if not tight

² █

supply demand dynamics.”³ [REDACTED]

Still, Brewers and Distillers today benefit from competition among the major glass manufacturers by encouraging those manufacturers to bid for their business, and those benefits accrue to consumers. The proposed acquisition would end that competition between Ardagh and Saint-Gobain and lead to higher prices for beer and spirits bottles. It would also dramatically increase the ease and likelihood of coordination between the only two remaining Majors in a “highly concentrated market, with stable market shares, low growth rates and significant barriers to entry” – a situation that provides “few incentives to engage in healthy competition.” *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 66 (D.D.C. 2009) (Collyer, J.).

The barriers to entry in this market are extraordinarily high. Glass plants cost hundreds of millions of dollars and take years to build. Not surprisingly, Defendants tout the fact that “new market entrants are faced with meaningful barriers to entry, including significant start-up costs (estimated at \$200 million for a new plant),” and other barriers.⁶ Where, as here, the market is ripe for coordination and new entry is improbable, “no court has ever approved a merger to duopoly.” *Heinz*, 246 F.3d at 717.

³ PX 1260-004; Fredlake Dep. at 126-27.

⁴ [REDACTED]

⁵ [REDACTED] *see also* Grewe Dep. at 128 [REDACTED]

⁶ PX 1247-008.

Ed.: Statement of Facts omitted

V. The Commission Challenges Ardagh's Acquisition Of Saint-Gobain.

Ardagh and Compagnie de Saint-Gobain, Saint-Gobain's parent company, entered into a Share Purchase Agreement on January 17, 2013, pursuant to which Ardagh proposes to acquire Saint-Gobain for approximately \$1.7 billion on or before January 13, 2014. On June 28, 2013, the Commission voted to file an administrative complaint challenging the acquisition and authorized Commission staff to seek a preliminary injunction enjoining the acquisition pending the resolution of the Commission's administrative trial.

ARGUMENT

The question before this Court is whether it is in the public interest to order Defendants to refrain from closing their transaction until the FTC has concluded its ongoing administrative proceeding. Under controlling law, the answer is plainly yes.

I. THE FTC HAS RAISED "SERIOUS, SUBSTANTIAL" ISSUES APPROPRIATE FOR AN ADMINISTRATIVE TRIAL.

The Commission has determined that it has "reason to believe" that Ardagh's proposed acquisition of Saint-Gobain violates Section 7 of the Clayton Act and Section 5 of the FTC Act.

⁵⁵ PX 1379 ¶¶ 1, 10-13 (Complaint, *Anchor Glass Container Corp. v. Owens-Illinois, Inc.*, No. 8:01-cv-1849 (M.D. Fla. Sep. 26, 2001)).

In these circumstances, Section 13(b) of the FTC Act authorizes the Commission to seek a preliminary injunction halting the merger until the Commission “has had an opportunity to adjudicate the merger’s legality in an administrative proceeding.” *CCC Holdings*, 605 F. Supp. 2d at 35 (citing 15 U.S.C. § 53(b)). The merits trial is scheduled to begin on December 2, 2013 before an administrative law judge, and discovery in that action is nearly complete. Although the acquisition agreement permits Defendants to close in early 2014 (and could presumably be extended), Defendants have threatened to close their acquisition before the completion of the administrative trial. Ardagh intends to litigate the merits trial to conclusion regardless of whether this Court grants the Commission injunctive relief. Ardagh’s counsel told the administrative law judge: “[i]f the injunction issues, the parties intend to continue on the administrative proceeding. We will continue to litigate. . . .That is not bluster, Your Honor.”⁵⁶ Thus, the only issue for this Court is whether the Commission is entitled to a preliminary injunction to preserve its ability to obtain effective relief and to prevent consumer harm.

Section 13(b) of the FTC Act enables the Commission to seek to preserve the status quo in this precise situation. The legislation authorizes the Court to issue a preliminary injunction “where such action would be in the public interest—as determined by a weighing of the equities and a consideration of the Commission’s likelihood of success on the merits.” *Heinz*, 246 F.3d at 714. The Court must balance these two “public interest” considerations on a sliding scale. *See CCC Holdings*, 605 F. Supp. 2d at 35 (citing *Heinz*, 246 F.3d at 714); *Whole Foods*, 548 F.3d at 1035 (Brown, J.); *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 903 (7th Cir. 1989) (Posner, J.). The greater the FTC’s showing of likelihood of success on the merits, the heavier the

⁵⁶ PX 0005 (Initial Scheduling Conference Transcript) at 9.

defendants' burden to show "particularly strong equities" in their favor. *Whole Foods*, 548 F.3d at 1035 (Brown, J.); *Elders Grain*, 868 F.2d at 903.

In Section 13(b), Congress demonstrated its concern that "injunctive relief be broadly available to the FTC." *Heinz*, 246 F.3d at 714 (quoting *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C. Cir. 1980)). Accordingly, Section 13(b) eases the more stringent injunction standard required of private parties. *Id.*; *see also Whole Foods*, 548 F.3d at 1042 (Tatel, J.) ("[T]he FTC – an expert agency acting on the public's behalf – should be able to obtain injunctive relief more readily than private parties."). Thus, at this stage, the FTC is *not* required to prove, nor is this Court required to find, that the proposed acquisition would violate the antitrust laws. *CCC Holdings*, 605 F. Supp. 2d at 35 (citing *Staples*, 970 F. Supp. at 1070). As the D.C. Circuit recognized in *Heinz*, "[t]hat adjudicatory function is vested in the FTC in the first instance." 246 F.3d at 714 (quoting *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1342 (4th Cir. 1976)).

The Commission has met the standard for showing a likelihood of success on the merits because the evidence here raises "serious, substantial questions meriting further investigation." *Whole Foods*, 548 F.3d at 1049 (Tatel, J.); *id.* at 1035 (Brown, J.); *Heinz*, 246 F.3d at 714-15; *see also CCC Holdings*, 605 F. Supp. 2d at 36. Defendants' admissions alone raise serious questions of illegality surrounding this acquisition. Anchor alleged in its 2001 antitrust lawsuit that the "market for the manufacture and sale of glass containers in the United States is highly concentrated" and "the three largest producers . . . account for in excess of 90% of the domestic volume."⁵⁷ The glass container industry remains just as concentrated today as it was then.

The proposed acquisition would create a duopoly in markets with high entry barriers and conditions ripe for coordination – an outcome "no court has ever approved." *Heinz*, 246 F.3d at

⁵⁷ PX 1379 ¶ 13.

716-17; *see, e.g., CCC Holdings*, 605 F. Supp. 2d 26 (preliminarily enjoining three-to-two merger of insurance software providers); *FTC v. Swedish Match*, 131 F. Supp. 2d 151 (D.D.C. 2000) (preliminarily enjoining merger of loose-leaf tobacco firms where “the top two firms left. . . will have ninety percent of the market.”); *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997) (preliminarily enjoining three-to-two merger of office supply superstores); *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36 (D.D.C. 2011) (permanently enjoining three-to-two merger of tax software firms). There is no reason for this Court to be the first to bless such a merger.

Under the second prong of the Section 13(b) analysis, there is a general presumption in favor of the FTC in the weighing of the equities because “‘the public interest in the effective enforcement of the antitrust laws’ was Congress’s specific ‘public equity consideration’ in enacting” Section 13(b). *Whole Foods*, 548 F.3d at 1035 (Brown, J.) (quoting *Heinz*, 246 F.3d at 726). No compelling public equities favor allowing this acquisition to close before the trial. Private equity considerations, such as a risk that a transaction will not occur, are given little weight. *Whole Foods*, 548 F.3d at 1034-35 (Brown, J.); *CCC Holdings*, 605 F. Supp. 2d at 75-76. Here, because Defendants confirmed that they will litigate through trial regardless of this Court’s ruling, there is nothing to weigh. Preserving the status quo will protect the public interest and will not harm Defendants, who can close their transaction if they succeed in the ongoing administrative proceeding.

[Remainder of brief omitted]