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. 13-CV-1021 (BJR) **PUBLIC (REDACTED)**

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO THE FEDERAL TRADE COMMISSION'S MOTION FOR A PRELIMINARY INJUNCTION

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September 18, 2013

Excerpts--Full version may be found on class web site

Defendants Ardagh Group S.A. ("Ardagh"), Compagnie de Saint-Gobain ("CSG"), and Saint-Gobain Container, Inc. (d/b/a "Verallia" or "VNA") (collectively, "Defendants") respectfully submit this Memorandum of Law in Opposition to the Federal Trade Commission's ("FTC") Motion for a Preliminary Injunction enjoining Ardagh's proposed acquisition of VNA.

PRELIMINARY STATEMENT

The FTC's Motion for a Preliminary Injunction is fundamentally flawed. Ignoring directly on-point precedent, the FTC paints a picture of three powerful glass manufacturers colluding against their stranded customers—beer brewers and liquor distillers—and claims that this Court must act to prevent a merger that will convert an anticompetitive oligopoly to an uncontrollable duopoly. This picture bears no resemblance to reality. The evidence and controlling law make clear that the FTC's motion should be denied.

First, the FTC's alleged relevant product markets—glass containers for beer and for liquor—are legally unsustainable. The FTC's "glass-only" markets ignore the reality that glass container manufacturers are fighting a losing battle against the makers of metal and plastic containers. Glass container manufacturers have struggled in the face of high operating costs, declining demand, and bankruptcies, always one price increase away from losing further volume to alternative packaging. More troubling, the FTC's assertion of "glass-only" product markets ignores controlling legal precedent in which these markets have been explicitly rejected by the Supreme Court, this Court, and the FTC itself. This precedent alone requires rejection of the FTC's market definitions. And developments since the time of this controlling precedent further prove that the relevant markets cannot comprise glass only—today, over 50% of all domestically-packaged beer is packaged in aluminum cans and over 40% of all domestically-packaged spirits is packaged in plastic containers.

Second, the FTC's alleged nationwide geographic market for beer containers ignores the high shipping costs of beer bottles and the testimony of beer customers that distant plants cannot effectively compete for their business. Courts uniformly have held that high transportation costs relative to a product's price typically result in narrow geographic markets. In this case, the geographic market for beer containers is much narrower than the United States.

Third, even if the appropriate relevant markets are glass-only (which they are not), the merger will not have an anticompetitive effect. There is limited competition between Defendants for the sale of beer or spirits containers due to high freight costs, geographically dispersed plants, specialized production lines, and lack of excess capacity, and so there is little meaningful competition that could be impacted by the merger. In addition, both the beer and spirits industries are characterized by a handful of very powerful buyers that are well-equipped to keep glass container prices low. Indeed, ███ customers account for almost ██% of Ardagh's beer container revenues, while ███ other customers account for over ██% of Ardagh's liquor container revenues. Moreover, these customers are protected by long-term contracts that lock in pricing terms and constrain Ardagh's ability to raise prices after the merger.

Fourth, Ardagh entered into this transaction because it will result in synergies (such as overhead costs savings, reductions in production costs, and manufacturing footprint efficiencies) of at least $95 million annually, which have a present discounted value well in excess of ██████. Many of these gains, which will not happen absent this transaction, will be passed on to the customers and others (e.g., lower manufacturing costs) will benefit customers by enabling the combined company to better compete with nonglass packaging, ensuring its long-term survivability.

Fifth, the balance of the equities weighs against the drastic remedy of a preliminary injunction. A preliminary injunction would not simply "preserve the status quo" pending completion of the administrative proceeding; it could effectively doom the merger. While Ardagh is committed to defending the transaction to a final resolution, the merger agreement terminates if the merger is not closed by mid-January, 2014. Thus, if the merger is enjoined, Ardagh may not have the chance to pursue the case to its administrative conclusion.

Finally, Ardagh is restructuring the transaction to further demonstrate that an injunction is not warranted. The restructuring, which is contingent upon the merger closing, has two parts: (1) Ardagh is selling three beer bottle plants and one plant that makes liquor bottles to a capable and well-financed third-party that will be a new and significant competitor, and (2) Ardagh is providing craft beer customers an option to extend their existing supply contracts to 2023, locking in their premerger pricing terms (at the customer's election) for up to ten years. The FTC could not meet its burden to obtain a preliminary injunction against the original transaction and certainly cannot meet its burden against the restructured transaction.

[Background omitted]

APPLICABLE LAW

Section 7 of the Clayton Act bars mergers "'the effect of [which] may be substantially to lessen competition, or to tend to create a monopoly' in 'any line of commerce or in any activity affecting commerce in any section of the country.'" *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 35 (D.D.C. 2009) (quoting 15 U.S.C. § 18). The FTC must establish three elements to prove a Section 7 claim: "(1) the relevant product market in which to assess the transaction, (2) the geographic market in which to assess the transaction, and (3) the transaction's probable effect on competition in the relevant product and geographic markets." *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 117 (D.D.C. 2004) (citing *United States v. Marine Bancorporation*, 418 U.S. 602, 618-23 (1974)). The FTC has "the burden on every element of their Section 7 challenge, and a failure of proof in any respect will mean the transaction should not be enjoined." *Id.* at 116.

Under 15 U.S.C. § 53(b), "[t]he FTC has the burden of proof in presenting this motion for a preliminary injunction to show a likelihood of success on the merits" of its Section 7 Clayton Act claim. *FTC v. Owens-Illinois, Inc.*, 681 F. Supp. 27, 33-34 (D.D.C. 1988), *vacated as moot*, 850 F.2d 694 (D.C. Cir. 1988) (per curiam). The FTC may establish a presumption in favor of preliminary injunctive relief by raising questions "so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation." *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714-15 (D.C. Cir. 2001). But the presumption is *rebuttable*, *id.* at 725, *see FTC v. Whole Foods Mkt, Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008), and courts will deny a preliminary injunction where the FTC fails to demonstrate a likelihood of prevailing on the merits.[18] Although the FTC's burden may be somewhat lower than that of a private litigant seeking interim injunctive relief, "the FTC's burden is not insubstantial." *Arch Coal, Inc.*, 329 F. Supp. 2d at 116. It is certainly not the low bar the FTC wishes for itself in its papers. (*See* FTC Br. at 2, 14). A district court may not "simply rubber-stamp an injunction whenever the FTC provides some threshold evidence; it must 'exercise independent judgment' about the questions § 53(b) commits to it." *Whole Foods*, 548 F.3d at 1035 (quoting *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1082 (D.C. Cir. 1981)). Moreover, "'[a] showing of a fair or tenable chance of success on the merits will not suffice for injunctive relief.'" *Arch Coal*, 329 F. Supp. at 116 (quoting *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1051 (8th Cir. 1999)); *see FTC v. Swedish Match*, 131 F. Supp. 2d 151, 156 (D.D.C. 2000) (same); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1072 (D.D.C. 1997) (same).

[18] *See, e.g.*, *FTC v. Lab. Corp. of Am.*, No. SACV 10–1873 AG (MLGx), 2011 WL 3100372 (C.D. Cal. Mar. 11, 2011) (denying preliminary injunction); *FTC v. Lundbeck, Inc.*, Civ. Nos. 08-6379 (JNE/JJG), 08-6381 (JNE/JJG), 2010 WL 3810015 (D. Minn. Aug. 31, 2010) (same), *aff'd*, 650 F.3d 1236 (8th Cir. 2011); *FTC v. Foster*, No. CIV 07-352 JBACT, 2007 WL 1793441 (D.N.M. May 29, 2007) (same); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004) (same); *FTC v. Butterworth Heath Corp.,* 946 F. Supp. 1285 (W.D. Mich. 1996) (same), *aff'd*, 121 F.3d 708 (6th Cir. 1997) (unpublished); *Owens-Illinois,* 681 F. Supp. at 27 (same).

A district court must also "balance the likelihood of the FTC's success against the equities." *Whole Foods*, 548 F.3d at 1035.

[Remainder of brief omitted]