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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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, [redacted] customers account for almost [redacted]% of Ardagh's beer container revenues, while [redacted] other customers account for over [redacted]% 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 [redacted]. 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

For decades, the glass container industry has been under siege from the makers of alternative packaging. Across every product segment in which glass container manufacturers compete, glass manufacturers have lost market share to makers of aluminum cans and plastic containers. In fact, the total shipments of U.S. glass containers declined 23% since 1992.[1] Faced with these unrelenting losses to alternative packaging, Anchor Glass (the predecessor U.S. business to Ardagh) went into bankruptcy three times between 1996 and 2006; Owens-Illinois ("OI") stock has dropped 40% since 2008 (while the Dow has increased almost 20%); and CSG

[1] *See* DX103, DX104, Expert Report and Exhibits of Dr. Chetan Sanghvi (Sept. 4, 2013) ("Sanghvi Rpt.), Ex. 6.

has struggled for five years to find a willing buyer for its glass container business.[2] This is not a picture of a powerful and profitable oligopoly.

In fact, it is an industry in which the glass container manufacturers do not set volumes or prices based on competition with each other, let alone an ability to raise prices and make outsized profits; they set them generally at the minimum level needed to make a sufficient return to survive.[3] Glass container manufacturing has high recurring fixed costs,[4] and, as demand for glass containers has declined over time, glass manufacturers have had no choice but to close furnaces and reduce capacity.[5] Glass manufacturing also requires significant reinvestment into the business, as furnaces have a limited life span and millions of dollars in capital needs to be infused into plants to keep them operational.[6] After years of selling their products at what the FTC acknowledges was "suicide pricing" in order to fill excess capacity,[7] leading to multiple bankruptcies in the industry, each glass manufacturer began to recognize that, if it was going to survive, it had to sell its products at prices sufficient not only to cover its short-run variable costs but also its long-run fixed costs, periodic rebuilding costs, and the cost of capital.[8] Pricing in this

[2] [redacted]

[3] [redacted] Sanghvi Rpt. ¶¶ 172-73.

[4] Sanghvi Rpt. ¶ 40. [redacted].

[5] Sanghvi Rpt. ¶¶ 87-89; [redacted].

[6] Sanghvi Rpt. ¶¶ 41-42; [redacted].

[7] FTC's Memorandum of Law in Support of its Motion for Preliminary Injunction (Aug. 28, 2013) ("FTC Br.") 8.

[8] [redacted] Sanghvi Rpt. ¶¶ 87, 97-99, 124; [redacted].

way is not indicative of market power or collusion; it reflects individually rational decisions of firms responding to declining demand and the threat of losing volume to alternative packaging.[9]

In the beer industry, every year brings new innovations to alternative packaging, and can and plastic manufacturers mince no words in stating that their strategy involves stealing market share from glass manufacturers.[10] In the last decade, millions of containers have shifted from glass to cans every year.[11] The evidence shows that brewers evaluate their product mix based, in large part, on the cost savings they can generate by switching to alternative packaging.[12]

In the liquor industry, the story is the same. Thirty years ago, few would have believed that significant quantities of liquor would ever be packaged in plastic. Today, almost 100% of the smaller sized spirits containers are packaged in plastic, and plastic containers account for

[9] [redacted] Ardagh IH [redacted] Ardagh IH [redacted] Saint-Gobain Tr. [redacted] (explaining defendants make pricing decisions by reference to their costs). Despite what the FTC suggests is an oligopoly of glass manufacturers with the power to extract supracompetitive prices from captive consumers, Defendants are earning modest margins on their products—including on products where there is no meaningful competition from other glass manufacturers. Sanghvi Rpt. ¶ 91.

[10] *See* DX113, Expert Report of Rob Wallace (Sept. 4, 2013) ("Wallace Rpt.) 6-17; [redacted]

[11] The Brewers Almanac reports that between 2004 and 2012 annual shipments of cans increased from 98,075,146 to 109,657,898, while annual shipments of glass bottles decreased from 85,815,753 to 75,235,212. *See* DX204, Beer Institute, Brewers Almanac, *National Draught and Container Share Estimates, 1981-2012 With Shipments (31 Gallon Barrels)* (2013), *available at* http://www.beerinstitute.org/assets/uploads/Brewers_Almanac-_20131.xlsx. Instead of focusing on the last ten years, the FTC compares the share of beer in cans in 1981 versus today. *See* FTC Br. at 29. But such a comparison is misleading because it does not account for the rise of craft and premium beer as a percentage of the marketplace. For a number of years, this rise allowed the glass manufacturers to retain market share, as craft and premium beer was initially packaged only in glass. But as discussed further *infra*, that has now shifted as craft brewers increasingly package their beer in cans, and a steady loss of market share has ensued.

[12] [redacted] (discussing that [redacted] should signal intent to shift to alternative packaging in face of increased prices for glass); [redacted].

between 26% and 42% of all other sizes for off-premises sales.[13] This shift to plastic is not limited only to certain sizes or "value" brands.[14] Bacardi Superior Rum, Smirnoff Vodka, Seagrams Whiskey, and Jim Beam, for example, are all available in plastic bottles.[15] Distillers are constantly reevaluating their product packaging mix and considering what additional brands and sizes they should shift to plastic.[16] The fear of losing business to alternative packaging acts as a significant constraint on glass manufacturers.[17]

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.

[13] Sanghvi Rpt., Ex. 10; Wallace Rpt. 17-20.

[14] [redacted].

[15] Sanghvi Rpt. ¶ 253 & Ex. 39.

[16] [redacted].

[17] Sanghvi Rpt. ¶¶ 130-145. The economics of the industry are such that even a perceived increase of only 2% in the probability of losing a customer to alternative packaging as a result of a 5% price increase in glass containers is sufficient to prevent a glass container manufacturer from increasing prices. *Id.* ¶ 143 & Ex. 18.

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.

ARGUMENT

I. The FTC Has No Likelihood of Proving its Alleged "Glass-Only" Relevant Product Markets Because It Excludes Significant Nonglass Competitive Products

The FTC's motion should be rejected, first and foremost, because the FTC cannot show a likelihood of success in proving its alleged "glass-only" product markets. "Merger analysis begins with defining the relevant product market." *Swedish Match*, 131 F. Supp. 2d at 156 (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962). A relevant product market defines the product boundaries within which "meaningful competition" exists, *United States v. Cont'l Can Co.*, 378 U.S. 441, 449 (1964), and consists of products that exhibit a "reasonable interchangeability of use" and "cross-elasticity of demand" with one another. *Brown Shoe*, 370 U.S. at 325. It is "'essential that the FTC identify a credible relevant market before a preliminary injunction may issue,'" because "'[w]ithout a well-defined relevant market, an examination of a transaction's competitive effects is without context or meaning.'" *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1080 (N.D. Ill. 2012) (quoting *FTC v. Freeman Hosp.*, 69 F.3d 260, 268 n.12 (8th Cir. 1995)); *see Tenet Health Care Corp.*, 186 F.3d at 1051.

A. The FTC's Market Definitions Are Foreclosed by Decisions Issued by the Supreme Court, this Court, and the FTC Itself

Reading the FTC's brief, one might think that this case raises issues of first impression. But in cases that are on all fours with the instant case, the Supreme Court, this Court, and the FTC itself each has examined and rejected proposed glass-only container markets for reasons that foreclose the FTC's market definitions here. *See Cont'l Can*, 378 U.S. at 441; *Owens-Illinois*, 681 F. Supp. at 27; *In re Owens-Illinois, Inc.*, 115 F.T.C. 179 (1992). The FTC does not meaningfully address this directly on-point precedent, choosing instead to argue its case as though the law were a blank slate. Nothing could be further from the truth.

1. *Continental Can*

In *Continental Can*, the Supreme Court held that a merger between the second largest can producer and the third largest glass producer violated Section 7 of the Clayton Act after finding that glass and metal containers were in the same relevant product market for all end uses—*including beer*—for which they competed. 378 U.S. at 449, 455. As the Court noted:

> It is quite true that glass and metal containers have different characteristics which may disqualify one or the other, at least in their present form, from this or that particular use; that the machinery necessary to pack in glass is different from that employed when cans are used; that a particular user of cans or glass may pack in only one or the other container and does not shift back and forth from day to day as price and other factors might make desirable; and that the competition between metal and glass containers is different from the competition between the can companies themselves or between the products of the different glass companies. *These are relevant and important considerations but they are not sufficient to obscure the competitive relationships which this record so compellingly reveals.*

Id. at 450 (emphasis added). In reaching this conclusion, the Supreme Court found that, as in the instant case, "an intense competitive battle on behalf of the beer can and the beer bottle is being waged both by the industry trade associations and by individual container manufacturers," *id*. at 451-52; that "the rivalry between cans and glass containers is pervasive," *id*. at 456; and that the competition between glass container and can manufacturers was manifest in their efforts to encourage container customers to shift from one packaging material to another by creating new, more attractive or more functional containers and engaging in advertising campaigns to overcome or reinforce customer prejudices regarding various materials, *id*. at 450-52. These findings, especially when combined with developments since *Continental Can* (*see infra* Section I.B), are fatal to the glass-only market definitions that the FTC proposes here.

Remarkably, the FTC devotes scant attention to this controlling precedent, arguing that the Court should ignore it. (FTC Br. at 32-33.) But the only "authority" the FTC could muster in support of its call for this Court to ignore controlling Supreme Court precedent is a single sentence in a casebook written by then-Professors Richard Posner and Frank Easterbrook in 1981 saying that "if the merger had been between two manufacturers of cans (or of bottles), the Court would surely have held that cans (or bottles) were an appropriate 'submarket' in which to appraise the effects of the merger." R. Posner & F. Easterbrook, ANTITRUST CASES, ECONOMIC NOTES AND OTHER MATERIALS 366-67 (2d ed. 1981). But a conclusory statement made in passing in the "Notes and Questions" section of a law school casebook—even one written by distinguished scholars—could hardly justify the reversal by this Court of Supreme Court precedent.[19] Defendants are not aware of a single case where a court has rejected *Continental Can* based on the purported "authority" cited by the FTC or on any other basis. To the contrary, courts (including this Court in *Owens-Illinois* and, indeed, courts where now-Judges Posner and Easterbrook now preside) have consistently recognized that *Continental Can* remains good law.[20]

2. Owens-Illinois/Brockway: D.C. District Court

Even if the comments of scholars in a textbook could somehow cast doubt on the viability of *Continental Can,* this Court made clear that it is controlling in this Circuit. In *FTC v.*

[19] *See Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 58 (1st Cir. 1999) ("Scholarly debate about the continuing viability of a Supreme Court opinion does not, of course, excuse the lower federal courts from applying that opinion.").

[20] *See Menasha Corp. v. News Am. Mktg., In-Store, Inc.*, 238 F. Supp. 2d 1024, 1034 (N.D. Ill. 2003) (Easterbrook, J.) (rejecting arguments that reflected "the very approach to defining relevant markets repudiated by the Supreme Court in *United States v. Continental Can Co.*"), *aff'd,* 354 F.3d 661, 664 (7th Cir. 2004) (citing *Continental Can* to support affirmance of lower court's market definition analysis); *see also Se. Mo. Hosp. v. C.R. Bard, Inc.*, 642 F.3d 608, 615 (8th Cir. 2011) (citing *Continental Can* favorably in discussion of market definition); *Malaney v. UAL Corp.*, 434 F. App'x 620, 620 (9th Cir. 2011) (same); *Worldwide Basketball & Sport Tours, Inc. v. Nat'l Collegiate Athletic Ass'n*, 388 F.3d 955, 962 (6th Cir. 2005) (same); *DSM Desotech, Inc. v. 3D Sys. Corp.*, No. 08-1531, 2013 WL 389003, at *11 (N.D. Ill., Jan. 31, 2013) (same); *OSF Healthcare Sys.*, 852 F. Supp. 2d at 1075 (same).

Owens-Illinois, Inc., 681 F. Supp. 27 (D.D.C. 1988), this Court applied *Continental Can* to deny the FTC's petition under Section 13(b) for a preliminary injunction (the same procedural posture as this case). That case involved the proposed merger of OI and Brockway, the largest and third largest producers of glass containers in the United States at the time, respectively. Together, they had a combined share of 38% in glass containers, *id*. at 32 n.13 – not appreciably different than in the instant case.[21] Tellingly, Judge Green observed that, "[i]n large part, the instant case i[s] a 1980s revival of the 1960s classic *United States v. Continental Can*," *Owens-Illinois*, 681 F. Supp. at 34, and that "[t]he reasoning of *Continental Can* remains valid today." *Id*. at 36.

In denying the FTC's petition, Judge Green held that it would be improper to exclude nonglass alternatives from the relevant market. Judge Green concluded that "the relevant market in [that] case must be broadly defined as rigid-walled containers, which comprise glass, plastic, metal, and paper, rather than as an 'all glass' container market." *Id*. at 46. Among other things, Judge Green found that the evidence showed "not only that alternative packaging is feasible and is being used for many of the end use segments in question, but also that different types of packaging compete with each other in the eyes of modern consumers" and that there was "extensive present and future intermaterial competition in the glass and other packaging industries." *Id*. at 37, 46.

With respect to beer containers, the Court noted that "the largest elastic end use for glass containers is beer; it accounts for over 30% of the United States demand for glass containers, and there is no dispute that glass containers for beer compete directly with cans for packaging." *Id*. at 45. It is bewildering that after *Continental Can* found that glass bottles and metal cans were in

[21] According to the FTC's economist, a combined Ardagh/VNA firm would have a share of [redacted]% in a glass beer bottles and a [redacted]% share of glass liquor bottles. *See* DX131, Expert Report of Frederick R. Warren-Boulton, Ph.D. (August 28, 2013) ("Warren-Boulton Rpt.") at 47.

the same relevant market, and after the FTC seemingly did not even contest before Judge Green that glass bottles and metal cans compete for beer packaging, it now reverses course.

With respect to liquor containers, Judge Green found that glass bottles and plastic containers are in the same relevant product market. The Court observed that the FTC's position on liquor packaging was particularly "weak[ ]" given that the FTC had "acknowledge[d] that liquor producers have inelastic demand for glass containers only in certain package sizes and qualities of liquor." *Id*. at 43. The Court found that both the smaller 50 ml and the larger 1.75 liter sizes were largely in plastic containers and that the FTC had "shown that only the 750 ml., 1 liter, and the 'higher priced brands'" are not converting, largely because of "quality and image concerns." *Id*. This Court concluded that "the penetration of plastic into the liquor market is significant" and that "this end use segment can be considered fairly elastic." *Id*. That is only more true today.

3. Owens-Illinois/Brockway: The Federal Trade Commission

After this Court denied the FTC's motion to enjoin the OI/Brockway merger, the FTC continued the administrative litigation. At the conclusion of the litigation, the FTC dismissed the entire complaint. In its decision, the FTC examined the effects of the merger in ten end-use markets, rejecting the claims in four of the end-uses for failure to prove a glass-only relevant product market and in the remaining six for failure to prove anticompetitive effects.

In its relevant market analysis, *the FTC rejected an all-glass product market in every end-use where nonglass usage was at least 5% and at least one significant commercial customer used nonglass packaging*. *In re Owens-Illinois*, 115 F.T.C. at 298-320. In spaghetti sauce containers, for example, the FTC found that a nonglass market share of just 4-5% warranted rejection of a glass-only product market for that end-use. *Id*. at 308-09. The FTC found a failure to prove a glass-only market despite testimony from two large customers (Ragu and Classico) that "they would not convert their packaging from glass to metal cans or plastic even if the price of glass were to increase by 20%" because metal cans lacked "clarity and ready resealability," that plastic jars suffered from "lack of clarity, oxygen permeability, and collapse under vacuum," and that both types of nonglass containers "would not appeal to consumers." *Id*. at 308. To the FTC, what was important was that one customer (Hunt) had recently entered the market with a metal can that "had captured a 4-5% market share," that another customer (Chef Boyardee), although "not a major competitor, also packages its spaghetti sauce in cans," and that Ragu, "which uses only glass for its retail spaghetti sauce sales, uses cans for institutional sales." *Id*. In light of that evidence, the FTC "conclude[d] that a market for the supply of glass spaghetti sauce containers has not been proved. The existing presence of a substantial competitor with a well-known brand name and a 4-5% market share shows that metal cans compete with glass in this end-use segment." *Id*.

The FTC also rejected the very same glass-only product market in distilled spirits that it now advances because "[t]here has been a steady loss of the market to plastic bottles." *Id*. at 306 (internal quotations omitted). The FTC found that the 50 ml size had already converted to plastic and the 1.75-liter sizes were rapidly converting. *Id*. at 306-07. While the FTC acknowledged that the popular mid-sized containers were not substantially converting yet, it found dispositive that spirits producers "are using or actively evaluating alternatives to glass for the mid-range sizes," and that many producers were using plastic in 750-ml and 1-liter sizes. *Id*. at 307.[22]

The contrast with the end-uses in which the FTC found glass-only markets appropriate is stark: *the FTC accepted glass-only markets only for those end-uses where (a) the market share of nonglass alternatives in the end-use was zero or close to zero, and (b) there were technological barriers that effectively prevented the use of nonglass containers*. As a result, the FTC accepted

[22] Similarly, the FTC rejected glass-only product markets in shelf-stable juices, *id*. at 305, and baby juice, *id*. at 319.

glass-only relevant product markets in jams and jellies, mayonnaise, pickles, wine coolers, wine, and processed baby food, because each of these end-uses had substantial technological barriers *and* nonglass shares of zero or very close to zero. *Id*. at 309-18.

Remarkably, despite the fact that the FTC's *Owens-Illinois* decision directly contravenes the FTC's market definitions in this case, the FTC devotes only *a single paragraph* of its brief to that opinion. (FTC Br. at 33.) The FTC grossly mischaracterizes the decision as having merely held that "competitive responses from the many remaining post-merger glass container suppliers would make anticompetitive effects unlikely." (*Id*.) To the contrary, the FTC dismissed the claims in distilled spirits, shelf-stable juices, spaghetti sauce, and baby juice *solely* on market definition grounds. Only in the remaining end-uses—where the FTC found technological impediments to the use of nonglass containers and de minimis or no nonglass container use—did the FTC apply a competitive effects analysis to reject the claims.

In addition, the FTC contends that "more recent legal authorities" have "clarified the standards for defining relevant product markets" and thus "provide the lodestar for this Court to follow." (*Id*.) But the contention is hollow, because the FTC fails to identify either the superseding legal authorities or the clarifications they supposedly made. The contention also is disingenuous, as the market definition test used in the *Owens-Illinois* case is essentially the same that the FTC applies today.[23] In light of this directly on-point precedent foreclosing its proposed market definitions, the FTC cannot satisfy its burden of showing a likelihood of success on the merits.

[23] The "hypothetical monopolist" market definition test was first introduced in the 1982 DOJ Merger Guidelines. *See* U.S. DEP'T OF JUSTICE, MERGER GUIDELINES § II.A (1982). By 1992 the FTC was using the Guidelines' hypothetical monopolist market definition test, *see In re Owens-Illinois*, 115 F.T.C. at 295-97, and formally joined the Justice Department in adopting merger guidelines with that test. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 1.1 (1992). That same test continues today essentially unchanged in the most recent revision of the merger guidelines. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 4 (2010) ("2010 MERGER GUIDELINES").

B. Developments Since *Continental Can* and *Owens-Illinois* Further Support Rejection of the FTC's Alleged "Glass-Only" Markets

In the years since the *Continental Can* and *Owens-Illinois* decisions were issued, nonglass containers for beer and liquor have continued their fierce battle with glass containers, displacing ever increasing swaths of the glass packaging industry. Indeed, each of the material factors considered by the courts and the FTC in these prior decisions—percentage of packaging in nonglass containers, use of nonglass containers by major manufacturers, customer acceptance of nonglass containers, absence of technological barriers to the use of nonglass containers, innovation competition between glass and nonglass containers, and trade association image competition—remains true today or has changed in ways that further support rejection of the FTC's alleged glass-only markets.

Beer. Today, 63.5% of beer is packaged in nonglass containers.[24] This is far above the 4-5% threshold set by the Commission in *Owens-Illinois* and significantly exceeds the penetration of nonglass containers in any of the *Owens-Illinois* end-use markets in which the FTC rejected a "glass-only" relevant product market. Aluminum cans constitute the primary form of packaging for beer, comprising 53.2% of all beer containers.[25] This percentage convincingly demonstrates all of the *Owens-Illinois* factors for including nonglass containers generally and aluminum cans in particular in the relevant market: high penetration rates, customer acceptance, merchant use, and the lack of any technological impediment to the use of nonglass containers to package beer.[26]

[24] Sanghvi Rpt. ¶¶ 20(a), 64-70 & Ex. 8.

[25] *See* DX204, *Beer Institute, supra*, note 11, at 3. Excluding draught increases can usage to 59.1%.

[26] Moreover, the shift in favor of cans is far from over. In 2003, 43% of all beer was packaged in glass containers, but this has dropped 6.5 percentage points to 36.5% by 2012 as brewers shifted their volume from glass to nonglass containers. This represents a loss of over 10 million beer bottles to aluminum cans annually in the last eight years alone. *Id*. at 26. The Brewers Almanac reports that between 2004 and 2012 annual shipments of cans increased from

Much of this change has been due to shifts in the container mix by the country's two "mass beer" producers: Anheuser-Busch Inbev (ABI) and MillerCoors. Together, these two producers alone account for approximately [redacted]% of all of the beer sold in the United States.[27] In 2012, [redacted]% of ABI's beer was sold in aluminum cans and [redacted]% in glass bottles.[28] Similarly, in 2012 [redacted]% of MillerCoors' revenues were attributable to beer packaged in aluminum cans whereas only [redacted]% was for beer sold in glass bottles.[29]

Craft beers, once packaged exclusively in glass bottles, also have been rapidly adopting aluminum cans. Whereas only 20 craft brewers packaged their beer in cans in 2005, today over 330 craft breweries—including all major craft brewers, such as Boston Beer, Sierra Nevada, New Belgium, Lagunitas, and Harpoon—package over 1175 brands in cans.[30] There are craft can festivals,[31] web pages extolling the virtues of canned craft beer,[32] and news reports on the craft beer can revolution.[33]

98,075,146 to 109,657,898, while annual shipments of glass bottles decreased from 85,815,753 to 75,235,212. *See* DX204, *Beer Institute*, *supra*, note 11, at 3.

[27] Sanghvi Rpt ¶ 47. The remainder is craft beer and imports. Sanghvi Rpt. ¶¶ 19, 45-55.

[28] *Id*. ¶ 73. [redacted]

[29] Sanghvi Rpt. ¶ 73; [redacted].

[30] *See* Craft Cans, www.craftcans.com (last accessed Sept. 13, 2013); *see also* DX115, Expert Report of Michael Kallenberger (Sept. 4, 2013) ("Kallenberger Rpt.") 3-6.

[31] *See, e.g.*, DX189, *Ameri-CAN Canned Craft Beer Festival*, Craft Beer, http://cannedcraftbeerfest.com/event.html (last accessed Sept. 16, 2013); DX192, CANvitational (http://www.canvitational.com); Kallenberger Rpt. 3-6.

[32] *See, e.g.*, DX180, Bradley Foster, *Our Picks for the Top Canned Craft Brews Across the USA*, Thrillist (May 12, 2013), http://www.thrillist.com/drink/nation/the-33-best-craft-beers-in-a-can; DX181, *Can Buy Me Love: Canned Summer Seasonals*, Craft Beer, http://www.craftbeer.com/craft-beer-muses/can-buy-me-love-canned-summer-seasonals (last accessed Sept. 17, 2013); Kallenberger Rpt. 12.

[33] *See, e.g.*, DX195, Larry Olmsted, *Craft Beers Say Hello Cans, Goodbye Bottles: An Aluminum Revolution*, Forbes (May 1, 2013) (includes video of Jim Koch, founder and brewer of Samuel Adams), *available at* http://www.forbes.com/sites/larryolmsted/2013/05/01/craft-beers-say-hello-cans-goodbye-bottles-an-aluminum-revolution/; DX203, Tom Rotunno, *The Once-Lowly Can Is Boosting the Beer Biz*, CNBC.com, Customer Nation (June 6, 2013), *available at* http://www.cnbc.com/id/100793351; DX196, Michael Felberbaum, *With some tweaks, cans make comeback in craft beer*, AP (July 2, 2013), *available at* http://bigstory.ap.org/article/some-tweaks-cans-make-comeback-craft-beer-0; DX201, Steven Perlberg, *Why Canned Beer Is Way Better Than Bottled Beer*,

As in *Continental Can*, there continues to be vigorous innovation competition to create new cans to attract beer packaging volume.[34] In the last year alone, ABI introduced four new aluminum can containers: the 12 oz. "sleek can" for Bud Light Platinum; the "bow tie" Budweiser can; the reclosable aluminum bottle for Bud Light Platinum; and the Bud Light Vented Can, which allows consumers to create a vent to improve airflow when pouring or drinking the beer.[35] For its part, MillerCoors has developed cans with temperature-sensitive ink indicating a drinkable chill, the "Punch Top Can" (another vented can), and the aluminum pint bottle.[36] Boston Beer, after a decade of telling its customers that it would never package Samuel Adams beer in cans, developed a new can (the "Sam Can") and began commercially selling Samuel Adams Boston Lager in cans.[37] (Boston Beer is also offering a royalty-free license for the Sam Can to other craft brewers, presumably to encourage the adoption of cans by craft brewers.) Sly Fox Brewing Company, another craft brewer, has introduced a new "topless" can with a completely removable top (the "360 Lid").[38] Ball Corporation, a major manufacturer of

Business Insider (Aug. 15, 2013), *available at* http://www.businessinsider.com/why-canned-beer-is-better-2013-8; DX200, Sonya Chudgar, *Cans Make a Comeback For Beer Marketers Large And Small*, Advertising Age (July 9, 2013), *available at* http://adage.com/article/news/cans-make-a-comeback-beer-marketers-large-small/242936/; *see also* Kallenberger Rpt. at 3-4, 12-13.

[34] *See, e.g.*, DX194, Kristen Leigh Painter, *High-Tech Beer Cans Pop The Top On Innovation*, Denver Post Business (Aug. 26, 2013), http://www.denverpost.com/business/ci_23940309/high-tech-beer-cans-pop-top-innovation.

[35] *See* DX186, Press Release, Anheuser-Busch, World's Most Unique Beer Can: Budweiser Introducing Bowtie-Shaped Can on May 6 (Apr. 17, 2013); DX185, Press Release, Anheuser-Busch, Bud Light Platinum Launches New Reclosable Aluminum Bottle in Las Vegas (June 11, 2013); *see also* Wallace Rpt. 6; Kallenberger Rpt. 4-5, 10; DX114, Expert Report of Raymond Bourque (Sept. 4, 2013) ("Bourque Rpt.") 3-6.

[36] DX183, MillerCoors, *A History of Innovation*, (http://www.millercoors.com/Our-Beers/Innovation/History-of-Innovations.aspx) (last accessed Sept. 16, 2013).

[37] *See* DX195, Larry Olmsted, *Craft Beers Say Hello Cans, Goodbye Bottles: An Aluminum Revolution*, Forbes, May 1, 2013 *available at* http://www.forbes.com/sites/larryolmsted/2013/05/01/craft-beers-say-hello-cans-goodbye-bottles-an-aluminum-revolution/. The embedded video interview of Jim Koch, founder and brewer of Samuel Adams, on the development of the Sam Can is especially informative.

[38] DX198, *Sly Fox Beer Opens Up Flavor & Aroma with the 360 Lid*, Sly Fox News (March 25, 2013), http://www.slyfoxbeer.com/index.php/front/news_archive/141.

aluminum cans, reportedly has invested $400 million in growing its specialty can capabilities.[39] PET bottles are also making inroads into beer packaging. Most significantly, Miller Coors recently announced that over the next two years it will be converting close to [redacted]% of the beer it currently packages in glass—all its largest beer containers (the 32 oz and 40 oz sizes)—to plastic bottles.[40] Each of these developments has come at the expense of glass container manufacturers.[41] And the mass brewers well understand that these trends toward alternative packaging constrain glass manufacturers in their negotiations over price. For example, [redacted]

Spirits. In the liquor industry, plastics' market share has steadily grown and continues to grow at a rapid rate.[44] Today, almost 100% of the smaller sized spirits containers are packaged in plastic.[45] And plastic has made and is continuing to make significant inroads into all other sizes:

[39] *See, e.g.,* DX194, Kristen Leigh Painter, *High-tech beer cans pop the top on innovation*, Denver Post Business (Aug. 26, 2013), *available at* http://www.denverpost.com/business/ci_23940309/high-tech-beer-cans-pop-top-innovation.

[40] *See* DX184, MillerCoors.com, Sustainable Packaging (https://www.millercoors.com/Great-Beer-Great Responsibility/Environmental-Stewardship/Sustainable-Packaging.aspx). In light of this recent announcement, the FTC's breezy dismissal of the long-term competitive threat of PET (*see* FTC Br. at 7 n.27) is entirely insufficient.

[41] It is also clear that one of the primary reasons that the brewers continually shift production is because of the cost savings they can achieve. [redacted] (discussing PET conversion); [redacted].

[42] [redacted].

[43] [redacted]

[44] Many high-end spirits brands are imported already bottled and are not part of the addressable U.S. container market, although their presence gives a skewed impression that nonglass containers have a weak presence in premium liquors. These high-end brands include Dewars, Chivas Regal, Tanqueray, Grey Goose, Absolut, Glenlivet, and Bombay Sapphire.

[45] [redacted]

Off Premises Distilled Spirits Packaged in PET Bottles[46]

Size	2007	2012	Change
50 ml	91%	97%	6%
100 ml	81%	92%	11%
200 ml	24%	33%	9%
375 ml	18%	28%	10%
750 ml	19%	26%	7%
1000 ml	27%	40%	13%
1750 ml	36%	42%	6%
Total	35%	44%	9%

As this table shows, every size experienced significant growth in the use of plastic bottles over the last five years. Indeed, every container size is well above the *Owens-Illinois* five percent threshold, including the 750 ml and 1 liter containers that had experienced little nonglass container use at the time of the *Owens-Illinois* decision.

While the shift of liquor volume to plastic began in the value brands, it is becoming more and more common to see premium brands in plastic as well.[47] Every year, plastic makers are actively seeking to draw additional business away from the glass manufacturers by presenting precisely these facts to distillers.[48] [redacted], the [redacted] spirits distiller, recognizing the cost savings achievable by shifting to plastic, has begun [redacted] to "[d]evelop technology to enable super premium PET offerings for [redacted] that rival the best-in-class glass packaging as to look, feel and bottle designs," so that it can begin packaging more of its "super premium" brands in plastic.[49] The cost savings that can be realized are simply too good to pass up—and that would become even more true if glass manufacturers were to raise their prices.

[46] Sanghvi Rpt., Ex. 10; *see also* Bourque Rpt. ¶ 10.

[47] Many premium brands are now available in PET, including offerings from major distillers such as Jim Beam, Canadian Club, Jack Daniels, Southern Comfort, Smirnoff and Captain Morgan. [redacted].

[48] *See, e.g.*, [redacted]

[49] [redacted]; Sanghvi Rpt. ¶ 81.

Finally, as in *Continental Can*, there is significant competition between the manufacturers and their trade associations to promote the use of their containers at the expense of other types of containers. For example, through the Glass Packaging Institute, Defendants (along with other glass container manufacturers) are constantly trying to tout the benefits of their products for fear that they will lose additional volume to alternative packaging.[50] Trade associations for metal and plastic packaging vigorously promote efforts to convince customers to switch from glass.[51] As the Supreme Court recognized, if demand for glass containers were anywhere near as inelastic as the FTC suggests, there would be no need for such marketing.

C. The FTC's Arguments and Evidence Are Insufficient to Carry its Burden on Relevant Product Markets

In support of its alleged relevant product markets, the FTC advances a variety of legally and factually deficient arguments, several of which were already rejected by the three squarely on-point cases discussed above. Specifically, the FTC highlights the unique properties of glass as foreclosing switching, makes arguments reflecting the position that switching and cross-elasticity of demand is to be measured in the short-run, asserts that customers will not switch to nonglass containers even in the long-run because of consumer preferences for glass containers, and argues that the documents of the parties reveal that they perceive that they compete only against other glass container manufacturers.[52] None of these arguments can sustain the FTC's burden.

[50] *See* DX008, Glass Packaging Institute Decl. (Bragg); [redacted].

[51] DX191, Can Manufacturers Institute, Put Cans to Work for You, http://www.cancentral.com/beverage-cans/presentations-promos; DX202, *The Aluminum Association*, *Aluminum Association Mission*, http://www.aluminum.org/AM/Template.cfm?Section=Mission_and_Vision&Template=/CM/HTMLDisplay.cfm&ContentID=25633; Society of the Plastics Industry, About Plastics, http://www.plasticsindustry.org/aboutplastics/

[52] The FTC also argues that a complaint filed in 2001 by Anchor against OI is probative of the FTC's alleged glass-only market. *See* FTC Br. at 11-12 (citing *Anchor Glass Container Corp. v. Owens-Illinois, Inc.*, No. 8:01-cv-01849-SCB (M.D. Fla. Sept. 26, 2001). The argument deserves short shrift. The complaint was voluntarily dismissed prior to any adjudication of the law or the facts. To the extent it alleged a glass-only market for all containers or for "*premium* beer" and "*certain* distilled spirits," it was contrary to findings in fully adjudicated cases. In addition, the developments in the twelve years since that complaint – including the significant inroads that cans

Unique properties of glass containers. The FTC's argument that glass has unique properties that customers require and prevents switching to nonglass containers (FTC. Br. at 6-7) deserves scant attention. No doubt some customers feel strongly about using glass containers, just as other customers feel strongly about using, for example, cans for beer.[53] But *Continental Can* put to rest any notion that unique characteristics that appeal to some but not all customers define their own relevant market.[54] Today, over 63% of beer and almost 44% of spirits are packaged in nonglass containers, conclusively demonstrating that the "unique" characteristics of glass are not dominating customer container choice. Moreover, the continuing erosion of glass' share in favor of other substrates makes clear that this trend has not reached "saturation"; glass will continue to lose ground to other substrates for the foreseeable future, and any increase in the price of glass will only accelerate that conversion.

Short-run/long-run switching. The FTC argues that switching to nonglass containers cannot be done in the short run and that the inability to switch quickly excludes nonglass containers from the relevant product market. (FTC Br. at 28-29). As a threshold matter, the FTC conveniently ignores the fact that many of the customers at issue here already package their products in both glass and other substrates, and have additional packaging capacity that they can

and plastic have made into areas where glass manufacturers once felt untouchable (such as premium beer and distilled spirits) – establish that even the narrower markets proposed by Anchor would not be viable today. Similarly unavailing is the FTC's reliance on positions taken by Ardagh in a case before the European Commission on its acquisition of the Dutch metal can company, Impress, (FTC Br. at 21). The FTC takes those arguments out of context, as Impress manufactures metal containers for end-uses that do not use glass containers.

[53] For example, can aficionados argue that beer cans are impermeable to light (which causes beer to spoil), lighter than glass and hence use less energy for transport, and have higher recycling rates. *See, e.g.*, DX190, *Canned or Bottled*, Beer Paradigm (Jan. 6, 2012), http://beerparadigm.wordpress.com/2012/01/06/canned-or-bottled/; Ronnie Crocker, *The Humble Can Gains Respect Among Craft Beer Brewers*, Cooking Light, (Sept. 6, 2010), http://www.chron.com/business/article/The-humble-can-gains-respect-among-craft-beer-1619312.php; DX 182, Michelle Klug, *Microbrewers Canning Craft Beer for Quality*, http://www.cookinglight.com/entertaining/wine/canned-craft-beer-00412000077778/; *see also* Wallace Rpt. 6-7; 12-17; Kallenberger Rpt. at 5,11.

[54] *See supra*, Section I.A.1.

utilize to alter the mix of packaging rapidly between glass and other substrates even in the so-called "short run". More fundamentally, however, the Supreme Court categorically rejected an identical argument in *Continental Can*:

> [T]hough the interchangeability of use may not be so complete and the cross-elasticity of demand not so immediate as in the case of most intraindustry mergers, there is *over the long run* the kind of customer response to innovation and other competitive stimuli that brings the competition between these two industries within s 7's competition-preserving proscriptions.

378 U.S. at 453-55 (emphasis added). The Court applied this view in particular to price: "Moreover, price is only one factor in a user's choice between one container or the other. That there are price differentials between the two products or that the demand for one is not particularly or immediately responsive to changes in the price of the other are relevant matters but not determinative of the product market issue." *Id.* at 455. Instead, the Supreme Court found that the *long run* is the appropriate time frame to assess the competition between glass and metal and that over the long run the vying for the patronage of container customers was intense. *Id.*[55]

Customer testimony. The FTC cites to testimony from a handful of customers that assert—in conclusory fashion and without any real analysis—that they would not switch from glass containers to alternative packaging materials in response to a 5-10% increase in the price for glass. (FTC Br. at 18 n.60.) This evidence has little probative value.

First, as Judge Bates noted in *Arch Coal,* in many contexts "antitrust authorities do not accord great weight to the subjective views of customers in the market." *Arch Coal,* 329 F. Supp.

[55] Judge Green in *OI/Brockway* also adopted a long-run perspective to assessing competition, which permits container customers to consider, analyze, plan, test market, and implement a switch to a different type of container, *Owens-Illinois*, 681 F. Supp. at 37 n.23 ("[T]he relevant time frame within which to view elasticity is approximately two years. In other words, conversions by purchasers between types of containers must be feasible within this time frame for demand and supply to be considered elastic.").

2d at 145. Judge Green in *Owens-Illinois* expressed similar reservations about subjective customer testimony of the type elicited by the FTC here:

> One methodology used by the FTC in exploring the elasticity of demand in this case was to explore buyers' perceptions of substitutability by inquiring directly of them whether they would switch to alternative packaging 'in the event of a 5 to 10% increase' in the price of glass containers. . . . While this technique elicits information specific to the end uses at issue, the opinions of purchasers must be viewed in light of their actual behavior.

Owens-Illinois, 681 F. Supp. at 38, n.32. Professors Areeda, Hovenkamp and Solow agree, concluding that the "[l]east reliable [evidence of market definition] is 'subjective' testimony by customers that they would or would not defect in response to a given price increase." 2A PHILLIP E. AREEDA, HERBERT HOVENKAMP & JOHN L. SOLOW, ANTITRUST LAW ¶ 538b, at 205. *See also US v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1031 (N.D. Cal. 2004).

Second, as detailed above, substantial amounts of both glass beer bottle and glass liquor bottle volumes have switched and continue to switch every year to nonglass alternatives, which in itself calls into question the accuracy of such testimony. In any event, the FTC's attempt to prove that *some* customers would not switch in response to a glass price increase is legally irrelevant, since the relevant question is not whether there exists "a small minority of customers" whose purchases would be unaffected by an anticompetitive price increase, but rather "whether *enough* customers within an end-use segment selectively subjected to anticompetitive prices would substitute alternative products to make the hypothesized small but significant price increase unprofitable." *In re Owens-Illinois*, 115 F.T.C. at 300-01 (emphasis in original). Given the cost structure of the glass manufacturing industry (high recurring fixed and rebuild costs, low variable costs), even small reductions in sales volume have a large impact on profitability.[56]

[56] The FTC's reliance on [redacted] is both legally and factually wrong. (FTC Br. at

Economic analysis shows that a hypothetical monopolist in glass containers would *not* raise prices because loss of even a small amount of market share to alternative materials would render the price increase unprofitable.[57]

Company documents. The FTC puts great weight on the focus that the parties' internal documents purportedly place on other glass manufacturers. The case law, however, does not bear this weight. Although "industry recognition" is one of the "practical indicia" for defining a market, *FTC v. Staples*, 970 F. Supp. 1066, 1079 (D.D.C. 1997), the D.C. Circuit has recognized it as one of the less important indicia, taking a back seat to economic criteria. *See Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 219, n.4 (D.C. Cir. 1986); *see also Whole Foods*, 548 F.3d at 1045 (same). Moreover, the FTC's Merger Guidelines acknowledge that "relevant markets" for purposes of antitrust law are "not always intuitive and may not align with how industry members use the term 'market.'" 2010 MERGER GUIDELINES § 4. It is hardly surprising—and not at all probative—that numerous business documents concerning short-term competition or competition relating to individual bids and contracts reference glass competitors. Moreover, the FTC ignores other internal documents reflecting analyses or concerns regarding the threat of nonglass packaging,[58] as well as the testimony of company executives as to their consideration of the long-run threat of customer switching in considering pricing and customer relationships.[59]

19.) As a threshold matter, [redacted] did not and does not have access to the detailed cost information that would be required to conduct this analysis at any level of accuracy. Nor is [redacted]'s perception ultimately relevant – it is Defendants' perception that matters. And on that issue, once again, the evidence is clear. Sanghvi Rpt. ¶¶ 130-44.

[57] Sanghvi Rpt. ¶¶ 130-44.

[58] [redacted]

[59] [redacted]

* * *

In sum, directly on-point decisions have rejected the glass beer and liquor container markets that the FTC advocates here. They did so based on market conditions—such as the non-trivial shares nonglass substitutes had achieved—that reflected compelling evidence of meaningful competition. Developments since these decisions, including substantial market share gains at the expense of glass, provide even stronger evidence of vigorous competition and thus even more strongly support the conclusion that a glass-only beer or liquor container market would not accurately reflect competitive realities. Fundamentally, the FTC's market definition arguments in this case reflect the view that these prior decisions got it wrong. Even if there were any basis whatsoever for such a brazen position (which there is not), the mere fact that the FTC needs to overcome the enormous obstacle of squarely on-point negative precedent from multiple authorities establishes that it cannot show a likelihood of success on the merits.[60] The FTC's motion should be denied, since it cannot demonstrate a likelihood of success in providing its alleged relevant product market.

II. The FTC Has No Likelihood of Proving its Alleged Nationwide Geographic Market for the Sale of Glass Beer Bottles

Apart from the impropriety of the FTC's alleged product market, the FTC's motion must be rejected with respect to beer containers for the independent reason that the FTC cannot show a likelihood of success in proving that the United States is a relevant geographic market. The "relevant geographic market" defines the region "in which the seller operates, and to which the

[60] *Cf. League of Women Voters of Me v. Diamond*, 82 F.3d 546, 547 (1st Cir. 1996) (finding party failed to show "likelihood of success on the merits" in light of on-point negative Supreme Court precedent and "given the uniform holdings of the various state court decisions that have addressed analogous arguments"); *Cuban Am. Bar Ass'n, Inc. v. Christopher*, 43 F.3d 1412, 1424 n.8 (11th Cir. 1995) (finding party failed to show "likelihood of success on the merits" where its arguments were based on reasoning that was "contrary to binding precedent in this circuit").

purchaser can practicably turn for suppliers." *Arch Coal*, 329 F. Supp. 2d at 123 (citing *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961)). Defining the geographic market is a "pragmatic" undertaking and the FTC must "present evidence of practical alternative sources to which consumers . . . would turn if the merger were consummated." *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285, 1291 (W.D. Mich. 1996), *aff'd*, 121 F.3d 708 (6th Cir. 1997) (unpublished). Courts deny injunctions when the FTC fails to satisfy its burden of establishing the relevant geographic market. *See Tenet Health Care Corp.*, 186 F.3d at 1053; *FTC v. Freeman Hosp.*, 69 F.3d 260, 262 (8th Cir. 1995).

The FTC's geographic market showing is woefully inadequate. Despite the fact that proof of a relevant geographic market is an essential element of its prima facie case, the FTC's entire affirmative case for a nationwide market consists of only *two short sentences*: "Defendants have geographically distributed networks of manufacturing plants that enable them to compete on a nationwide basis," and "Defendants bid and capture business throughout the country, often shipping to customers hundreds of miles away from their plants." FTC Br. at 33-34. But the FTC could not be more factually mistaken: only certain of Defendants' specifically configured plants make either beer or spirits containers, not some national "network";[61] and because of the high cost of shipping beer bottles, Defendants' ability to compete critically depends on how close their customers are located to the supplying glass container plant.[62]

[61] Ardagh's plants are all in the East and Midwest; only four of Ardagh's nine plants make any meaningful amount of beer containers and only three make any meaningful amount of spirits containers. VNA's numbers are similar. Six of VNA's 13 plants make beer containers and three make spirits containers.

[62] Glass plant production lines are designed to manufacture containers for one particular end-use, such as beer, liquor, or pickles. A plant configured to produce pickle jars cannot be reconfigured quickly or easily to produce beer bottles. *See* DX066, Warren-Boulton Tr. 27:5-28:4, 30:8-31:24. To the contrary, reconfiguring a production line to produce a different type of glass container is difficult, time-consuming and costly. [redacted]. Such conversions typically would take a minimum of six months to complete and costs of millions or tens of millions of dollars. *Id.* Such conversions are thus unsurprisingly rare. *See* Sanghvi Rpt. ¶¶ 36-44.

The FTC does not even acknowledge its own evidence on this score. Dr. Warren-Boulton, the FTC's economist, opines that shipping beer bottles an additional 100 miles would increase the delivered price by about 2.6 percent.[63] This indicates that a 5% price increase will only enable a beer plant to ship less than an additional 200 miles and still be price competitive. In a situation where the underlying manufacturing costs are similar for all domestic glass makers, this sharply restricts the relevant geographic market for beer containers to local or perhaps regional geographic markets at best, but in any event not the national market that the FTC alleges. *See Kaplan v. Burroughs Corp.*, 611 F.2d 286, 292 (9th Cir. 1979) (finding that "physical delivery limitations and significant transportation costs, among other factors, confine the geographic market for antitrust purposes"); 2010 MERGER GUIDELINES § 4.2 ("The scope of geographic markets often depends on transportation costs.").

A simple example illustrates the absurdity of the FTC's alleged national geographic market for beer bottles. [redacted]

[63] Warren-Boulton Rpt. ¶ 78.

[64] [redacted].

[65] [redacted].

[redacted][66] With delivered cost differences of these magnitudes, the geographic market cannot be national.[67]

The more glass bottles a brewer is purchasing, the more important freight costs become.[68] That is why mass brewers generally purchase glass from suppliers with plants located close to filling locations.[69] More generally, as Dr. Sanghvi observes:

> The pattern of shipments from Anchor's mass beer container plants corresponds closely to the understanding that distance is a very meaningful factor in the cost-effectiveness of supplying glass bottles to mass beer plants. About half the shipments out of Anchor's mass beer plants travel less than [redacted] miles, and more than three-quarters of the shipments out of those plants travel less than [redacted] miles. . . . [redacted] [of VNA's] shipments out of mass beer plants are within [redacted] miles, and more than [redacted] percent are within [redacted] miles. Even after taking into account the fact that [VNA]'s mass beer plants [redacted] than do Anchor's, the relevant geographic market for the supply of glass bottles to mass beer customers cannot be described as national.[70]

[66] [redacted]

[67] For an analysis of the inability of Ardagh's Warner Robins, GA, plant to cost-effectively compete to supply the [redacted] brewery, *see* Sanghvi Rpt. ¶¶ 210-219. [redacted]

[68] Sanghvi Rpt. ¶¶ 50-51, 54.

[69] [redacted] Sanghvi Rpt. ¶ 51 & Exs. 28, 29.

[70] Sanghvi Rpt. ¶ 188. Dr. Warren-Boulton states that "[i]t is not at all unusual for there to be several category-capable plants that are closer to the customer than the supplying plant." Warren-Boulton Rpt. ¶ 81. Dr. Warren-Boulton's analysis reveals a fundamental lack of understanding of the glass container plant economics. First, he defines a "category-capable plant" as a plant producing 5% or more of its annual output in tons in a given category in any year between 2008 and 2012. Warren-Boulton Rpt. ¶ 80. Yet many of these so-called "category-capable" plants lack the machine configuration to produce the millions of beer bottles required for mass brewers. In his deposition, Dr. Warren-Boulton admitted that while he was sure there were differences between machines that make beer bottles and other machines, he didn't know more on the subject (DX066, Warren-Boulton Tr. 27:5-28:4), that he didn't know what machines produce beer bottles vs. other containers but would not be surprised if different equipment was required to make beer bottles (*id*. at 30:08-32:6), and he did not know what such equipment changes would cost and had undertaken no investigation of this issue (*id*. at 38:5-39:6). Second, the capacity may already be committed under long-term contracts and hence not available for bidding on new business. Third, the capacity may no longer be available because the machines have been reconfigured to produce other products or the plant closed.

Large craft brewers (such as [redacted]) are faced with the same problem and similarly try to source glass from the closest possible plants.[71] Almost [redacted]% of Ardagh beer business, and [redacted]% of VNA's beer business, is with mass brewers ([redacted]) and large craft brewers.[72] If [redacted]% of the beer container market is local (or at most regional), then, as Dr. Sanghvi concludes, the relevant geographic market for beer containers cannot be nationwide, as the FTC alleges.

In addition, if there is a national relevant geographic market as the FTC alleges, there should be a relatively even distribution of sales by the glass container companies to at least craft brewers in the various geographic regions according to their national market shares. But, as Dr. Sanghvi shows, the distribution of sales to craft brewers is highly irregular, with [redacted]% of Ardagh's sales in the Northeast, [redacted]% of VNA's sales in the Midwest, while [redacted] sells about [redacted]% of the craft beer bottles sold in the West and the South.[73] This substantial skew in each company's sales indicates that location matters, and hence the relevant geographic market for beer containers is *not* national.

Ignoring these facts, the FTC attempts to justify a nationwide market for all glass beer bottles with two anecdotal examples of plants serving or attempting to serve customers located significant distances away. (FTC Br. at 34.) First, the FTC points to a low quantity order by small craft brewery in [redacted] where Defendants allegedly submitted bids for business that would have been located 1,400 miles away from their plants. But VNA never provided a price quote or a bid (nor did Ardagh; a distributor did so independently), and in any event, as the FTC

71 [redacted]

72 DX229, *Anchor and Verallia Top Beer & Spirits Customers: Verallia U.S. Sales to Beer End Use Segment 2012 (Top 10 Customers by Sales Dollars)*, National Economic Research Associates (2012).

73 Sanghvi Rpt. ¶ 54; Ex. 38.

acknowledges, [redacted], which had a "significantly" closer plant, won the bid. (*Id.*) Second, the FTC notes that in 2012 Ardagh shipped beer bottles to all but one of [redacted] plants. (*Id.*) But the FTC admits that the reason for the long-distance shipping in that case was unexpected "beer bottle shortages" (*id.*) and ignores that the shipments were of only small volumes to cover short-term shortages in the [redacted] plants, that [redacted] paid the freight, and that these shipments were not economically viable on any permanent basis. The FTC cannot fulfill its burden of establishing a nationwide market for glass beer bottles with factually incorrect summary assertions and atypical examples.[74]

III. Even if the Markets Are "Glass-Only," the Transaction Does Not Have a Likelihood of Substantially Lessening Competition

Even if this Court were to agree with the FTC's claim that this merger should be analyzed with respect to nationwide markets for glass beer or liquor containers, the Court should deny the FTC's motion because the evidence rebuts any presumption of anticompetitive effects and establishes that the transaction does not have a likelihood of substantially lessening competition. *See FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001); *see generally United States v. Baker Hughes Inc.*, 908 F.2d 981, 982-83 (D.C. Cir. 1990).

There are at least four reasons why this Court should conclude that the acquisition does not have a likelihood of substantially lessening competition in the sale of glass beer or liquor containers: (1) there is limited meaningful competition for the sale of beer or spirits containers

[74] *See, e.g., Donald B. Rice Tire Co., v. Michelin Tire Corp.*, 483 F. Supp. 750, 756 (D. Md. 1980) (recognizing that two geographic areas "are ordinarily separate markets where there are no or only episodic sales between them and where transport costs exceed any price differentials between the two areas," and defining geographic market as the immediate Baltimore-Washington metropolitan area because "transportation costs generally prevented sales in other areas"); *United States v. Amsted Indus., Inc.*, No. 71-3124, 1972 WL 544, at *3 (N.D. Ill. Feb. 3, 1972) (finding that the proper way to define the geographic market where there was a freight penalty "would be to plot circles around the various [product] manufacturing plants, with points on the circle determined by that point in increasing freight costs where effectual competition with a competitor's plant becomes unfeasible" and that, while the court lacked the data to draw those circles, "[t]he great influence of freight rates on price makes it clear that this would not be a national market").

between Ardagh and VNA, so that there is no "substantial" competition to lessen as a result of the transaction; (2) buyer concentration and buyer power are enormous, and buyers exercise their power to keep glass container prices and margins low; (3) Defendants' business is primarily conducted through long-term contracts, some with terms extendable as long as ten years, that further constrain the combined firm's ability to raise price after the merger; and (4) the transaction will not increase the likelihood of tacit collusion because of the characteristics of the glass container industry.

A. The Transaction Will Not Substantially Lessen Competition because There Is Only Limited Competition Between Ardagh and VNA

Section 7, by its terms, prohibits a merger only if there is a reasonable probability that the transaction will "substantially" lessen competition in some relevant market. 15 U.S.C. § 18. If two firms do not presently compete substantially for business, their merger will not substantially lessen competition. *See, e.g., United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 121 (1975). Contrary to the FTC's assertion that "[h]ead-to-head price competition between Ardagh and [VNA] is common" (FTC Br. at 10), there is in fact limited meaningful head-to-head competition between Ardagh and VNA. Effective competition for a given customer supply contract requires that Ardagh and VNA each have (1) plants sufficiently close to the customer to be able to supply it cost-effectively given the high costs of transporting glass bottles; (2) the plants must be configured to produce bottles of the type the customer requires, and (3) the plant has the capacity sufficient to produce the quantity of bottles notwithstanding the multiyear contractual obligations the company has to supply other customers.[75] Taken together, these factors eliminate most

[75] In theory, a plant could be converted from producing one type of bottle to another, or from servicing one customer to another; but the costs of doing so are generally prohibitive, particularly given the tight margins at which Defendants operate their business and the need to meet all of their contractual obligations without interruption. *See generally* Sanghvi Rpt. ¶¶ 36-44.

competition between Ardagh and VNA in the sale of beer bottles.[76] The few instances that the FTC cites of competition are either mischaracterized or exceptions.

Ardagh and VNA do not meaningfully compete to supply mass brewers. Glass beer containers are low-value, low-margin, high-volume products that have to be delivered to the customers "just in time" since breweries do not carry large inventories. As a result, mass beer plants—which are highly specialized for high-speed beer bottle production and produce millions of beer bottle a year—are typically located near the mass brewery customer. Even a cursory review of maps showing the respective geographic locations of Ardagh's U.S. plant locations as compared to those of VNA reveals that there is limited geographic overlap (or competition) for the parties' mass beer business.[77]

In craft beer, Ardagh and VNA sell largely to different parts of the country, again due to the locations of their respective plants configured to make beer bottles.

Shares in Glass Beer Bottle Sales to Craft Brewers[78] (2012)		
	Ardagh	**VNA**
Northeast	[redacted]%	[redacted]%
Midwest	[redacted]	[redacted]
South	[redacted]	[redacted]
West	[redacted]	[redacted]

The lack of competition in sales of beer bottles to craft brewers is confirmed by the deposition testimony.[79] The few instances of competition cited by the FTC between Ardagh and VNA for

[76] *See* Sanghvi Rpt. ¶¶ 156-163 & Exs. 21-25 (demonstrating that the "diversion" between Ardagh and VNA falls below the critical threshold to provide the combined firm with even the incentive to raise prices anticompetitively, regardless of market definition and notwithstanding its inability to make such price increases stick).

[77] Sanghvi Rpt. Ex. 27; [redacted]

[78] Sanghvi Rpt. ¶¶ 241-243 & Ex. 38.

sales to craft brewers are so limited that it cannot rise to the level of substantial competition within the meaning of Section 7.[80]

There is also limited competition between Defendants in spirits. For example, Ardagh does not have liquor plants that can cost-effectively compete for [redacted].[81] Moreover, Defendants face competition from a number of glass spirits bottle manufacturers, including smaller domestic companies and foreign imports.[82]

The limited meaningful head-to-head competition between Ardagh and VNA that would be eliminated by the merger is more than offset by the procompetitive benefit of creating a stronger company. *See FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1054 (8th Cir. 1999) (reversing district court decision due to its failure to consider procompetitive effects of proposed merger, including evidence showing that "a hospital that is larger and more efficient than [individual hospitals] will provide better medical care than either of those hospitals could separately" and "will be able to attract more highly qualified physicians and specialists and to offer integrated delivery and some tertiary care"). Indeed, many customers have testified that

[79] [redacted]

[80] Even the competition in [redacted] between Ardagh and VNA for a contract to supply [redacted] does not, on close analysis, rise to this level. *See* Sanghvi Rpt. ¶¶ 210-234. Besides, [redacted] is protected in its supply and pricing terms under current contracts until 2023. *See infra* Section III.C.

[81] Sanghvi Rpt. ¶ 259.

[82] Sanghvi Rpt. ¶¶ 58-59, Exs. 11-12.

they believe it would be to their benefit to have two strong glass manufacturers instead of, as is the case now, one overwhelmingly strong player and two that place a distant second and third.[83]

B. The Bulk of Defendants' Business Involves a Few Large Buyers that Possess Tremendous Bargaining Power and Can Protect Themselves

The possibility of anticompetitive effects is further rendered highly unlikely by the fact that the bulk of Defendants' business is with large, powerful customers. It is well-established that "[a] concentrated and knowledgeable buying side makes collusion by sellers more difficult." *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 905 (7th Cir. 1989).[84] It would be difficult to imagine a more concentrated or knowledgeable buying side than American brewers and distillers.

[redacted] customers account for [redacted]% of Ardagh's beer container revenues, while [redacted] other customers account for over [redacted]% of Ardagh's liquor container revenues. For VNA, [redacted] customers account for over [redacted]% of beer container revenues, while [redacted] customers account for over [redacted]% of spirits container revenues. In 2012, [redacted] alone accounted for [redacted]% of Ardagh's beer bottle sales and [redacted]% of VNA's beer bottle sales; [redacted] accounted for over [redacted]% of Ardagh's liquor bottle sales; and [redacted] accounted for over [redacted]% of VNA's liquor bottle sales.[85] [redacted] Further, ABI continues to take steps to reduce its reliance on glass suppliers and expand its own capabilities: (1) ABI operates a glass bottle

[83] [redacted]

[84] *See In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 656 (7th Cir. 2002) (finding, in context of price-fixing allegations, that price fixing is typically ruled out in markets "that are concentrated on the buying side, enabling the buyers to tempt sellers to shade any agreed-upon price in order to obtain a big bloc of business"); *Tenet Health Care Corp.*, 186 F.3d at 1054 ("[T]he evidence shows that large, sophisticated third-party buyers can do [sic] resist price increases, especially where consolidation results in cost savings to the merging entities.").

[85] DX254 (Defendants' Largest Beer Customers in 2012); DX255 (Defendants' Largest Spirits Customers in 2012).

plant near Houston, in which it recently invested $40 million to expand by 8.5%;[86] (2) ABI acquired four more glass beer bottle plants in Mexico in June 2013, including a brand new one on the Texas border;[87] (3) [redacted];[88] and (4) ABI operates its own can manufacturing plant in Arnold, MO, and recently spent $70 to $80 million to expand it.[89] In these circumstances, the possibility of ABI investing in additional packaging capacity is a serious threat to Defendants.[90] [redacted]

Not only do Defendants' major customers exert market power when negotiating contracts—they continue to exert power during the course of their contracts. [redacted] and Defendants' other major customers all have successfully contracted for provisions allowing them, in essence, to audit Defendants' costs during the life of a contract.[91] This level of transparency and policing power (which presumably Defendants would not have agreed to had they truly had the market power the FTC claims) effectively ensures that Defendants are unable to charge supracompetitive prices. But once again, the FTC ignores these facts entirely.

86 [redacted] Similarly, on the liquor side, [redacted] operates its own PET plastic bottle production facility. [redacted]

87 [redacted]

88 [redacted]

89 [redacted]

90 [redacted]

91 [redacted] Ardagh IH [redacted] ("[M]ost of our contracts provide audit rights, so they can come in and look to see what's going on with . . . costs."); [redacted], Ardagh IH [redacted] ("There are certain contracts where the customer has a right to audit."); [redacted] draft Heads of Agreement between [redacted] and Ardagh identifying [redacted] audit right); [redacted]

C. Defendants' Business is Primarily Conducted through Long-Term Contracts, Which Further Constrain Ability to Manipulate Price or Output

The fact that Defendants' business is primarily conducted through long-term contracts[92] further indicates that the likelihood that the merger would cause anticompetitive effects is low. *See, e.g.*, *United States v. General Dynamics Corp.*, 415 U.S. 486, 501-04 (1974) ("The bulk of the coal produced is delivered under long-term requirements contracts, and such sales thus do not represent the exercise of competitive power but rather the obligation to fulfill previously negotiated contracts at a previously fixed price"). For example, [redacted] have recently negotiated tentative contracts with [redacted] that will last until 2020, 2023, and 2019, respectively.[93] And [redacted] is on the verge of signing a 10-year supply agreement with [redacted][94] Similarly, as part of its restructured transaction, Ardagh is extending similar assurances to all of its craft beer customers. In other words, a substantial majority of Defendants' bottle production business for beer and liquor customers is protected from price increases for at least seven years.

D. The Transaction Will Not Increase the Likelihood of Coordinated Effects Because the Characteristics of the Industry Make Tacit Collusion Highly Unlikely

The FTC alleges that Ardagh's acquisition of VNA likely will result in "coordinated" anticompetitive effects. FTC Br. at 36-39. The idea is that as the number of rivals in the market decreases, the likelihood increases that they will be able to tacitly coordinate their behavior to

[92] [redacted] Ardagh IH [redacted] ("[T]he vast majority of our business is under long-term contracts"); [redacted] (5-year contract); [redacted] (5-year contract); [redacted] (5-year contract); [redacted] (4-year contract); [redacted] (4-year contract); [redacted] (3-year contract); [redacted] (3-year contract).

[93] [redacted]

[94] [redacted]

raise prices above competitive levels. But the characteristics of the glass container industry make tacit coordination highly unlikely.[95]

First, the parties must reach terms of agreement. But the vast majority of Ardagh's and VNA's production is sold pursuant to complicated multiyear supply agreements and there is little transparency on contract prices or price adjustment formulas (PAFs) among glass manufacturers, and even less transparency on why a given glass manufacturer is charging a given price.[96] There cannot be a tacit agreement if none of the glass manufacturers knows the prices that the other producers are bidding or what their costs are.[97]

Second, coordination must be more profitable to each of the participating firms than uncoordinated conduct. Here, even if there was transparency on prices and PAFs, there would be little incentive for glass container producers to coordinate their actions given the differences in their plant locations, what each plant can produce, and the commitments they each have under their respective long-term supply agreements.

Third, glass producers have no economic incentive to abide by a collusive scheme. Glass producers are each individually subject to periodic and disruptive "shocks" as customers switch to nonglass containers. This creates excess capacity, which manufacturers have strong incentives to fill given the high fixed cost/low variable cost economics of glass container plants. Filling this

[95] Dr. Sanghvi, in a detailed analysis, concludes that Ardagh's acquisition of VNA will not increase the risk of tacit coordination. Sanghvi Rpt. ¶¶ 271-278.

[96] PAFs adjust the base price over the term of the contract depending on changes in the cost of raw materials and entry. PAFs are individually negotiated and are not standardized, and can vary depending on which materials are covered, how cost changes are measured, and what percentage of a cost change will be passed on to the customer.

[97] Sanghvi Rpt. ¶ 273. Citing a handful of documents, the FTC contends that the glass container industry is very transparent. FTC Br. at 37. That is wrong. Because of the complexity of every contract, and the limits on each manufacturer's capacity, full pricing terms are almost impossible for a competing firm to learn, let alone evaluate. That is an additional reason that glass manufacturers generally set their prices according to their costs. *See supra* n. 3, 8, 9.

excess capacity will require lowering prices and thus cheating on the collusive scheme.[98] This incentive not only destabilizes any collusive scheme but also creates an impediment to reaching terms of agreement in the first instance.[99]

Fourth, collusive schemes require a mechanism to detect and punish cheating. But, because of the lack of transparency, there is no way for a producer to determine whether a customer's switch to a rival is because of cheating or some other reason.[100] Moreover, even if deviations could be detected, there is little a participant can do to punish deviations, due to spatial and plant differentiation and lack of excess capacity.[101] Finally, large sophisticated customers can disrupt any tacitly coordinated scheme.

Significantly, despite the FTC's theory that all of the conditions are ripe today for tacit collusion in the glass container industry, there is no evidence that any collusion has occurred. The FTC cites a handful of documents in an effort to show that the glass companies were following some anticompetitive "price over volume" scheme, FTC Br. at 38, but all those documents actually show is a fundamental unilateral concern that prices not go below the level necessary to cover total costs and ensure margins sufficient to make the investments necessary to keep the companies' plants running. Tellingly, Anchor has gone into bankruptcy three times; OI's stock price over the last five years has dropped 40% while the Dow Jones Industrial Average has risen 20%; and both Anchor and VNA struggled for years to find willing buyers.

[98] Sanghvi Rpt. ¶ 274.

[99] *Id*.

[100] *Id*. ¶ 276.

[101] *Id*. ¶ 277.

And even now, Defendants earn low margins compared to their costs. That alone rebuts the FTC's suggestion that Defendants have (or are abusing) market power.[102]

IV. The Restructured Transaction Further Forecloses Any Finding of Anticompetitive Effects

The restructuring of the transaction further negates any finding of anticompetitive effects in any relevant product or geographic market. As mentioned above, the restructuring, which is contingent upon Ardagh closing the transaction, includes 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 each Ardagh and VNA craft beer customer an option to extend its existing supply contracts through 2023, locking in their premerger pricing terms (in the customer's discretion) for up to ten years.[103] Courts have uniformly held that when the parties restructure a transaction to eliminate the alleged reduction in competition supposedly resulting from the original transaction, the court will evaluate the probable effects of the restructured transaction, not the original transaction. *See* Mem. Op. at 6–8, *FTC v. Arch Coal, Inc.*, No. 04-0534 (JDB) (D.D.C. July 7, 2004); *FTC v. Libbey Inc.*, 211 F. Supp. 2d 34, 46 (D.D.C. 2002); Order at 2-3, *United States v. Franklin Elec. Co.*, No. 00-C-0334-C (W.D. Wis. July 19, 2000).

[102] The FTC argues that the stability of relationships between the major customer and their respective glass container suppliers is symptomatic of tacit collusion. (FTC Br. at 38.) But these long-term relationships result from the willingness of the supplier to invest in what the customer wants, coupled with good customer service, low prices, and often a near-by glass container plant. And the FTC has no basis to suggest that Ardagh's [redacted] supply contracts only in the [redacted] was the result of any tacit collusion, *id*., when Anchor had decided on this policy as it emerged from bankruptcy after 2007 as a means of not taking contracts that did not cover its costs and had consistently bid only on [redacted] contracts since that time.

[103] In addition, each craft brewer will have the option to terminate the contract during the extension period upon advance notice to Ardagh. This will provide flexibility to craft brewers to exit the contract if for any reason they wish to switch to another supplier, including aluminum cans.

The FTC repeatedly stresses its view that the instant transaction is a merger to duopoly (a "3 to 2" merger) in glass beer and spirits containers, FTC Br. at 1, 4, 14, 36, 37, 39, as evidence the merger will negatively impact competition. However, the restructured transaction creates a new and significant competitor in the markets for both beer and liquor containers. As a result, the market retains at least three significant bidders for glass beer and spirits containers.

In beer, the divestiture transfers three beer plants to the new competitor: Ardagh's plants in Jacksonville, FL and Warner Robins, GA, and VNA's plant in Wilson, NC. These three plants, which make beer bottles for both mass breweries and craft breweries, have sales equal to 109% of Ardagh's total beer container sales in 2012, so that the merger will actually *reduce* concentration in the sale of beer containers compared to what exists today. In addition, Ardagh is offering craft beer customers an option to extend their existing supply contract through 2023, locking in their premerger pricing terms (in their discretion) for up to ten years. Thus, the restructured transaction ensures at least three competitors for craft beer and eliminates any risk of increased prices for ten years postclosing (except for increases resulting from standard price adjustment formulae in the existing contracts). And the sale of the Dolton plant to a viable third competitor in the restructured transaction eliminates any possibility of anticompetitive effects in spirits. Dolton has the capacity to supply 125% of VNA's liquor container shipments in 2012. As a result, the new competitor will have more than enough capacity to compete for spirits business.

In sum, the restructured transaction eliminates any concern that the merger could substantially harm competition even under the FTC's erroneous theory of anticompetitive harm.

V. The Proposed Transaction Will Lead to Substantial Procompetitive Synergies

It is well-settled that "a defendant may rebut the government's prima *facie case* with evidence showing that the intended merger would create significant efficiencies in the relevant market." *FTC v. CCC Holdings*, 605 F. Supp. 2d 26, 72 (D.D.C. 2009) (quotation omitted). "[A] primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products." 2010 MERGER GUIDELINES § 10.[104] Ardagh expects that the acquisition will lead to at least $95 million in synergies per year, which has a discounted present value of well over [redacted].[105] Thus, even if there were a likelihood of anticompetitive effects here, the synergies here would be sufficient to outweigh them.[106]

The FTC incorrectly contends, in conclusory fashion, that these synergies are "unverifiable" and "non-merger-specific." FTC Br. at 44. But a close reading shows that the FTC, contrary to its own merger guidelines, employs tortured definitions of these terms, so that verifiable means "absolutely certain" and "merger specific" means "theoretically impossible to accomplish in the absence of the merger." In fact, all that is needed is that the preponderance of the evidence show that the estimated value of the synergies will be achieved and that the

[104] Indeed, "even where evidence of efficiencies in the relevant market will not support an outright defense to an anticompetitive merger, such evidence is relevant to the competitive effects analysis of the market required to determine whether the proposed transaction will substantially lessen competition." *Arch Coal*, 329 F. Supp. 2d at 151 (citing *Tenet Health Care Corp*., 186 F.3d at 1054).

[105] [redacted] Notably, these synergies were calculated prior to Ardagh's decision to restructure the transaction, including the decision to sell four plants. The decision to sell these plants will lower, modestly, the projected synergies to be achieved from the merger, but does not impact the central importance that the expected synergies play in Ardagh's decision-making process.

[106] *See FTC v. Butterworth Health Corp*., 946 F. Supp. 1285, 1300-01 (W.D. Mich. 1996) (concluding defendants had rebutted FTC's *prima facie* case in highly concentrated market by showing efficiencies in excess of $100 million); *see also CCC Holdings*, 605 F. Supp. 2d at 76 (identifying cost savings exceeding 20% of defendants' combined cost base as extraordinary); *United States v. Long Island Jewish Med. Ctr*., 983 F. Supp. 121, 146-48 (E.D.N.Y. 1997) (finding that sum of $25 to $30 million per year in savings was "significant" in denying government's request for a preliminary injunction).

synergies will not be achieved in the absence of the transaction.[107] This standard is easily satisfied in this case.

Ardagh has identified four quantifiable categories of synergies it expects to achieve: (1) consolidation and reduction of selling, general and administrative expenses ("SG&A") of at least [redacted] annually; (2) manufacturing synergies from optimizing the combined firm's manufacturing footprint to produce the combined firm's product mix more efficiently of at least [redacted] annually; (3) pack-to-melt improvements from applying Ardagh's know-how by improving the yield in the production process of the VNA plants of at least [redacted] annually; (4) soda ash reduction from applying Ardagh's know-how to adjust the batch mix of inputs used to manufacture glass in VNA's plants of at least [redacted] annually.[108] In addition, Ardagh expects other synergies from economies of scale, such as the enhanced purchasing power a combined entity will have when negotiating the purchase of inputs or freight, but Ardagh lacks the necessary information to quantify them. Ardagh relied on these synergies in deciding to enter into the acquisition[109] and released the estimates to investors so that they may rely upon them.[110] The evidence will convincingly show that the synergies estimates are both verifiable and merger-specific.[111]

[107] This standard is consistent with that articulated in the FTC's Merger Guidelines: "The Agencies credit only those efficiencies *likely* to be accomplished with the proposed merger and *unlikely* to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects. These are termed merger-specific efficiencies." *See* 2010 MERGER GUIDELINES § 10 (emphasis added).

[108] [redacted]

[109] [redacted]

[110] [redacted]

[111] [redacted]

If anything, the synergies are conservative and are likely to be far surpassed in practice.[112] Over the last 15 years, Ardagh has engaged in 12 acquisitions, and has consistently achieved or exceeded its projected synergies.[113] Given this track record, there is no reason to doubt Ardagh's ability to make the anticipated gains here.[114] *See Staples*, 970 F. Supp. at 1089 ("[T]he Court recognizes a difference between efficiencies which are merely speculative and those which are based on a prediction backed by sound business judgment."). [redacted]

VI. The Balance of Equities Strongly Weigh Against Granting a Preliminary Injunction

Even if the FTC could make a showing of likelihood of success on the merits (which, as discussed above, it cannot), the preliminary injunction should be denied on a balancing of the equities. There are four equities to consider: (1) the likelihood that a preliminary injunction will deprive Ardagh of the opportunity to litigate to a conclusion on the merits; (2) the very substantial synergies that will benefit both customers and the combined company if the transaction closes but will be lost otherwise; (3) the small amount of competition that could possibly be at risk if the transaction is allowed to close, especially given the further reduction of

[112] [redacted] Ardagh IH [redacted] ("And as a macro, where these synergies are concerned, these synergies, we put down the minimum. And the reason we put conservative numbers down is for the simple reason that we don't want to over promise to our investors. So our philosophy has always been to over achieve. And these, this transaction is deeply attractive from the extraction of these synergies. So we're very confident and given our experience and history of extracting value-added acquisitions, we are very happy that this is the minimum we would achieve.").

[113] *See* 2010 MERGER GUIDELINES § 10 ("[E]fficiency claims substantiated by analogous past experience are those most likely to be credited."). For example, in the years after Ardagh purchased the Rexam UK glass business in 2005 and the glass division of Rexam Europe in 2007, it was able to extract precisely the same types of productivity gains it anticipates here. [redacted] Similarly, in less than one year following Ardagh's purchase of the Bridgeton New Jersey plant in 2012, it was able to improve the plant's pack-to-melt ratio from [redacted], resulting in huge savings. [redacted]

[114] [redacted]

that risk by Ardagh's restructuring of the transaction, and (4) the ability of the FTC to order full and effective relief if, at the conclusion of the administrative proceeding, it finds that the restructured transaction violates Section 7. The balancing of these equities strongly favors denial of a preliminary injunction.

First, although Ardagh is committed to defending the transaction to a final resolution on the merits, the merger agreement terminates if the merger is not consummated by mid-January, 2014. The administrative proceeding will not conclude by then. If the merger is enjoined and the merger agreement terminates, Ardagh will not have the ability to pursue the case to its administrative conclusion.[115] Only if Ardagh is allowed to close the transaction before mid-January can it be assured that it will be able to continue the litigation. The fact that granting FTC's motion may well doom the transaction weighs heavily against granting an injunction.

Second, as discussed previously, this transaction will generate at least $95 million in cost reductions and other synergies. This is an extraordinary level of synergies, and will enable the combined company to better compete with nonglass packaging (which will inure to the benefit of customers of all types of packaging) while ensuring the long-term ability of the combined company to survive.

Third, even accepting the FTC's theory, little meaningful competition is at risk during the pendency of the administrative litigation. Almost 60% of the revenues of the restructured combined firm come from glass containers for end-uses *not* challenged under the FTC's theory. And in the remaining 40% of the business, as shown in Section III.A, there is limited competition between Ardagh and VNA. What is more, in the restructured transaction, Ardagh

[115] The FTC makes much of the fact that, during the initial conference in the administrative proceeding, counsel for Ardagh affirmed that, regardless of the outcome in this preliminary injunction action, Ardagh plans to litigate the administrative complaint. (*See* FTC Br., at 13, 15, 45.) But merely because Ardagh *intends* and *desires* to litigate through trial does not mean that it will, in fact, have that opportunity.

will sell to a capable and well-financed third party two of its own beer plants and one VNA beer plant, which together produce the equivalent of almost 110% of Ardagh's 2012 beer container sales, as well as a plant capable of providing 125% of VNA's 2012 liquor container sales. If there is any competition left to protect between Ardagh and VNA, the public risk is dwarfed by the benefits of closing the transaction now, introducing a new competitor into the marketplace, providing craft brewers the option to extend their existing contracts to 2023, and continuing to litigate the merits in the administrative proceeding.

Finally, if the Court denies the preliminary injunction and allows the deal to close, and if at the end of the administrative litigation the FTC concludes that the transaction violates Section 7, it will be straightforward to fashion an effective administrative remedy at that time. The restructured transaction already will have sold off four of the plants at the time of the closing, and any postmerger remedy will involve ordering the sale of only one or two additional plants at most. In the meantime, most customers will have been protected from any anticompetitive effect by their exiting long-term contracts, or for craft beer customers, their options to extend their contracts at premerger terms. Thus, even assuming that the FTC can establish a likelihood of success on the merits—which the evidence will show it cannot—the Court should deny the preliminary injunction.

CONCLUSION

For the foregoing reasons, the Court should deny the Federal Trade Commission's Motion for a Preliminary Injunction.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served via electronic mail and that true and accurate copies of its accompanying exhibits were served via hand delivery, this 18th day of September 2013, upon the following:

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