IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,	)	
	)	
Plaintiff,	)	
v.	)	Civ. No. 1:02CV00060 RBW
	)	
LIBBEY, INC., *et al.*,	)	**REDACTED PUBLIC VERSION**
	)	
Defendants.	)	

PLAINTIFF=S MEMORANDUM IN OPPOSITION TO DEFENDANTS= MOTION TO VACATE THIS COURT=S PRELIMINARY INJUNCTION ORDER

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Introduction and Summary

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

The Court recognized that Libbey=s acquisition of all of Anchor, including its food service business, likely would violate the antitrust laws, Mem. Op. 24 (Apr. 22, 2002) (AOp.@), and that defendants= amended merger agreement was likely to have substantially the same anticompetitive effect as the abandoned merger agreement on the food service glassware market, *id.* at 23. The Court noted

[1] Section 13(b) of the FTC Act requires that the FTC issue an administrative complaint within 20 days of the grant of a preliminary injunction, or the injunction is dissolved. 15 U.S.C. ' 53(b). The FTC voted unanimously to issue its administrative complaint on May 9, 2002. PX 857 (new). That complaint alleges that Libbey=s acquisition of Anchor Hocking is anticompetitive despite defendants= most recent changes to their merger plans. *Id.* & 30.

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

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

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

[2] Defendants miss at least half of the point of the Court=s (and the FTC=s) concern regarding key employees. Not only was Newell not keeping those key employees; Newell had an employee who expected to be working for Libbey negotiate a supply agreement B the terms of which are still in effect (except as to price) B with Libbey=s former parent on behalf of Libbey=s purported competitor. PFF 604. Until this motion, defendants never acknowledged (but never disputed) that Mr. Nenninger expected to become a Libbey employee. PFF 542, 604; *see* Def. Mem. 5. In its motion to seal certain documents, Newell acknowledges that knowledge of the terms of its Peldar supply agreement would give competitors Aan unfair competitive advantage in the marketplace.@ Newell Motion to Continue Under Seal 2 (May 10, 2002).

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

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

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

[3] *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 726 (D.C. Cir. 2001); *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1506-07 (D.C. Cir. 1986); *FTC v. Weyerhaueser Co.*, 665 F.2d 1072, 1085 (D.C. Cir. 1981). Defendants= efforts to justify their Aconsent injunction@ fail to discuss *any* of these controlling authorities. Def. Mem. 7-8.

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

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

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

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

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

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

<u>Argument</u>

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

In granting the preliminary injunction, the Court concluded that it should assess whether the FTC had shown a likelihood of success on a claim that defendants= amended merger agreement was likely to be anticompetitive, Op. at 16; that an amended merger agreement that purports to create or maintain a competitor should be examined by reference to whether it impaired the surviving competitors= ability to compete, *id*. at 23; and that, if the amended merger agreement would likely impair the surviving competitor (by, for example, raising its cost of goods), the Court should examine the merger as if the competitor was eliminated, *i.e.*, Athat the impact on the market that might occur as a result of the

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[5] AThe FTC remains capable of vetting the amended agreement, and in fact, in response to the Court's March 29th Order, the Commission submitted a statement indicating that it had indeed voted to enjoin the amended merger agreement.@ Op. at 16; *cf*. *id*. at 22 (A>determination of a likelihood of success must be made under time pressure and on incomplete evidence,=@ *quoting Weyerhaueser*, 665 F.2d at 1083).

amended agreement may be substantially identical to the impact the original agreement would have had on the market.@ *Id*. Defendants, who essentially sought this standard, *see* Def. Mem. 16-17 (Feb. 8, 2002); DCL 200-202, generally do not challenge it on this motion.[6]

Defendants make their motion under Rule 59(e), Fed. R. Civ. P. That rule is *not* Aa vehicle by which a party may introduce new facts or arguments not previously raised. Alteration or amendment of a prior decision pursuant to Rule 59(e) is appropriate ›only where controlling law has changed, new evidence is available, and/or clear error must be corrected or manifest injustice prevented.=@ *Building Service 32B-J Pension Fund v. Vanderveer Estates Holding, LLC*, 127 F. Supp. 2d 490, 492

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[6] Defendants again contend, incorrectly and without support, that A[u]nder ample precedent in this Circuit, it is not sufficient to make a *prima facie* case for the FTC merely to raise plausible concerns, serious questions or doubt about RCP=s viability.@ Def. Mem. 6 n.3; *see* DCL 206-207. The Court recognized that this Circuit, like other circuits, defines Alikelihood of success@ as Arais[ing] questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals.@ Op. at 12, *quoting Heinz*, 246 F.3d at 714-15; *see* Pl.=s Supp. Findings of Fact at 2 n.2 (Feb. 27, 2002) (citing cases). If defendants mean to distinguish the issue of Newell=s competitive viability from other issues that go to the FTC=s likelihood of success on the merits on its claim, they offer no support for that distinction. Having urged that Newell=s competitive viability goes to the merits of defendants= new deal, defendants must subject that issue to the settled standard of proof for likelihood of success on the merits, *i.e.*, Aserious questions.@

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

A. <u>Defendants Have Not Materially Improved Newell=s Cost Disadvantage</u>

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

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

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[7] **[Redacted]**

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

Nor have defendants addressed tariff costs. Defendants claim that under the supply contract *Peldar* will bear those costs, Def. Mem. 6 n.2, failing to mention that the same contract (Aall other terms of [which] have remained unchanged,@ Def. Mem. 4) provides that the imposition of tariffs would be an occasion of *force majeure*, excusing performance by Peldar. DX 186 ' 6.1; *see* PFF 582. Congress still has not renewed the Andean Tariff Protection Act, so goods from Colombia are subject to duties of as much as 24%. PFF 561. On May 6, 2002, the Customs Bureau announced that it will begin collecting duties on May 16, 2002. PX 863 (new); *see also* PFF 582. As a result, Peldar has no obligation to supply Newell with glassware at the prices defendants state in their motion, or at any other prices. If Newell wants Peldar to make and ship glassware notwithstanding the imposition of tariffs, Newell may need to compensate Peldar for the tariffs, adding 24% to the cost of glassware.

The depreciation expense (without even including the cost of moving and installing the equipment in Colombia) adds **[Redacted]** to Newell=s costs, thereby putting Newell=s costs *above* Anchor=s current standard costs. *See* PX 867 (new). Under Peldar=s new pricing, the cost penalty increases to **[Redacted]**, the annual depreciation expense, divided by **[Redacted]**, the anticipated annual purchases under the Peldar contract, DX 207 **&** 5 (Jordan)). PX 867 (new).

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

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[9] Def. Mem. 6 n.2. Defendants rely solely on one of Dr. Addanki=s several declarations, DX 187 (Feb. 22, 2002), which addressed the FTC=s submissions of February 18, 2002. The FTC at oral argument withdrew that calculation, Tr. 41-42, and corrected it. PX 849; *see* PFF 607-609. Defendants have never addressed PX 849, although they sought leave of Court to do so. *See* Pl. Mem. 4 n.5 (Mar. 1, 2002).

Newell=s *incremental* inventory carrying cost would be **[Redacted]** of Newell=s cost of goods, based on a **[Redacted]** hurdle rate.[10] Newell=s cost of goods under the Peldar contract would still be *at least* **[Redacted]** higher than Anchor=s cost *even including* Peldar=s price cut (and also including the cost of rim tempering equipment). If Newell pays the tariffs, the cost could be **[Redacted]** higher than Anchor=s cost. Defendants have not changed the essential fact: A[T]he increase in production costs would, in the end, potentially have the same anticompetitive effect that the initial merger agreement would have had on the market.@ Op. at 31-32.

[10] At a **[Redacted]** hurdle rate, and based on Peldar=s latest prices, Newell would incur an inventory carrying cost penalty of **[Redacted]**; if a **[Redacted]** hurdle rate was used, the penalty would be **[Redacted]**. PX 858 (new). Defendants assert that the Aappropriate@ hurdle rate is **[Redacted]**, DX 203 at 5 n.9, although Newell=s CEO testified that he uses a **[Redacted]** hurdle rate. PX 703 at 23. Newell=s expert, Dr. Addanki, claimed an **[Redacted]** hurdle rate would be Aappropriate,@ but offered no support for that claim. DX 187 at 2 (Addanki). At an **[Redacted]** hurdle rate, the inventory cost penalty would be **[Redacted]**. That penalty, together with the **[Redacted]** depreciation cost of rim tempering equipment and minus the **[Redacted]** cost advantage claimed by defendants, would make Peldar-manufactured glass **[Redacted]** more costly than Anchor-manufactured glass, even with Peldar=s latest price cut.

B. Defendants Have Made No Effort to Resolve
<u>Other Significant Problems with their Purported Fix.</u>

1. *The Situation in Colombia Remains Desperate.*

Defendants have done nothing to overcome the fact that Newell will receive tumblers from Colombia, one of the most unstable and dangerous environments in the world. *See* PFF 591-599. Peldar will produce glassware in the middle of what Colombia's President has declared to be a "war zone." PFF 619. Rebel bombing attacks continued in April. PX 861 (new), 862 (new). On May 2, over 100 civilians were killed in Bellavista, when rebels fired homemade mortars into a church where the civilians were seeking shelter. PX 860 (new). Bellavista is approximately 100 miles from Buga, the location of Peldar's glassware plant. PX 864 (new).

2. *Newell Still Has No Stemware Supply*.

Defendants' motion does not mention that Newell still lacks a stemware supply, even though it has had five months to find one.[11] Newell's proposed supply agreement with Peldar **[Redacted]** requires significant investment and is difficult to make, PFF 254, 460, and is essential for competition in food service, PFF 55. Anchor had recently invested **[Redacted]** million in stemware manufacturing equipment. PFF 254. **[Redacted]**

[11] **[Redacted]**
Did they suspend their efforts after the oral argument on February 25, when there was no longer any need to tell the Court about Newell's supply arrangements? Has this search for supply been solely for the Court's benefit, rather than for Newell's business purposes?

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

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

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

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

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

Court. Newell=s lack of interest in what it was paying for glassware,[14] its lack of interest in pursuing a stemware supply, and its lack of any interest in devising a business plan all confirm that conclusion.

4. *Newell Has No Obligation to Buy Any Food Service Glassware.*

The Peldar supply agreement allows either party to avoid performance without any penalty. Although defendants claim to have lowered Peldar=s prices, Newell has still not made any genuine commitment to the food service glassware business.

Instead, Newell negotiated the Peldar supply agreement to *avoid* any obligations.

[Redacted]

C. Defendants= Purported Fix Still Eliminates Anchor as a Formidable Competitor

The Court found that Anchor is ALibbey=s most formidable competitor in the food service glassware market,@ Op. at 3, and that the loss of Anchor through the amended merger agreement will likely have an anticompetitive effect. *Id.* at 17-18, 22, 28. Anchor has been providing formidable competition against Libbey for over 20 years, by providing food service customers with the industry=s largest array of Libbey look-alike glassware at prices 10-20% below Libbey=s prices. *Id.* at 4-5, 18. As a result, Anchor has been able to capture sales from Libbey customers and, prior to the merger agreement, had plans to compete aggressively to take more sales from Libbey. *Id.* at 18 & n.28.

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[14] **[Redacted]**

Anchor's unique competitive advantage against Libbey is that, by having its own factories, Anchor is a "lower cost manufacturer, so we can go to [the] market with a slightly lower price." Op. at 27; *see* PFF 243, 539, 603. Anchor offers lower prices on food service glassware **[Redacted]** Anchor has made investments to lower its production costs (especially for food service glassware, including stemware), and, prior to the merger agreement, planned to continue making such investments to drive down its manufacturing costs. PFF 254-257. Tweaking the Peldar supply contract will not preserve the incentives and ability that Anchor has today to be a lower cost manufacturer that can compete effectively against Libbey.[15]

* * *

Thus, defendants have failed to resolve most of the issues that rightly troubled the Court. They still propose to divide Anchor between Libbey and Newell, and leave Newell without glassware factories. Defendants' scheme thus bears no relation to *White v. Whirlpool*, where defendants proposed to *divest a factory*, as well as other operating assets — and the court still found viability concerns and enjoined the merger.[16]

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[15] Anchor food service glassware customers likely would not purchase foreign-sourced glassware from Newell, because the prices likely will be higher than Anchor's prices. PX 724 ¶ 7-8 (Autenreith); PX 723 ¶ 8 (Desatnick). Those witnesses expressed that view *before* Newell's market test demonstrated that indeed Newell could not lower its costs by outsourcing.

[16] *White Consol. Indus., Inc. v. Whirlpool Corp.*, 612 F. Supp. 1009, 1012 (N.D. Ohio), *preliminary injunction vacated*, 619 F. Supp. 1022, 1028 (N.D. Ohio 1985), *aff'd*, 781 F.2d 1224 (6th Cir. 1986). The district court vacated the preliminary injunction order only after the defendants agreed to *all* of the court's concerns. 619 F. Supp. at 1023-24. In *U.S. v. Atlantic Richfield Co.*, the preliminary injunction order was vacated because the Government had agreed to do so after the defendants agreed to divest gasoline assets in the geographic area of anticompetitive concern. 297 F. Supp. 1075 (S.D.N.Y. 1969). Neither case was brought under Section 13(b) of the FTC Act, 15

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

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

Defendants also propose to enter into a Aconsent injunction@ that they claim would Aeliminate any concern that >unscrambling the eggs after the fact may not be a realistic option.=@ Def. Mem. 7 (quoting Op. at 30, internal quotations omitted). Defendants have shown neither a change in the balance of the equities nor that their proposed order would preserve the FTC=s ultimate remedy B both of which are plainly required under the law of this Circuit, as articulated by then-Circuit Judge, now Supreme Court Justice Ginsburg:

> [O]nce the FTC has shown a likelihood of success, a preliminary injunction stopping the merger should issue unless three countervailing features mark the particular case: significant equities favor the transaction and the less drastic restraint of a hold separate order realistically can be expected (a) to safeguard adequate eventual relief if the merger is ultimately found unlawful, and (b) to check interim anticompetitive harm.

Weyerhaeuser, 665 F.2d at 1085. The Court of Appeals has twice reaffirmed this standard:

> [H]aving found that the acquisition was almost certainly illegal, the district court faced a difficult task in justifying anything less than a full stop injunction. *Weyerhaeuser* is the law of this circuit and we must follow its rationale and apply the presumption it establishes. . . . *Weyerhaeuser* kept intact the presumption in favor of a preliminary injunction when the Commission establishes a strong likelihood of success on the merits.

PPG, 798 F.2d at 1506; *accord Heinz*, 246 F.3d at 725. Defendants have not shown any change in the balance of equities (in fact, they now tip more to the FTC), nor have they shown any reason to believe their proposed order would check interim harm. They claim their proposed order would safeguard eventual relief, but their order falls far short of the order *reversed* by the Court of Appeals in *PPG*, and indeed would allow the very risk to eventual relief identified by the FTC and the Court: Defendants still propose that Newell ship the food service molds to Colombia, and to be excused from safeguarding them should they need to be reunited with Anchor=s factories. *See* pp. 15-17 below.

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

In urging that the equities favored allowing the merger, defendants argued that their transaction would perish with their financing on April 30, 2002. Libbey=s chairman so attested to the Court, DX 2 **&** 17 (Meier) (after April 30, **[Redacted]**, and defendants told the Court at oral argument that Aat the end of this financing, this deal is dead. This deal is dead **B** if an injunction issues, this deal is dead. . . . [a]nd if it is not done in time, the deal is dead.@ Tr. 144.

When talking to investors rather than the Court, however, Libbey told quite a different story. On April 24, 2002, Libbey=s chairman told investors that financing could be obtained at any time: A[w]hile it is true that our acquisition financing has a time line of April 30th, it is also true that banks are banks and they are in the business of lending money to good credit opportunities; and we qualify. As noted, our financial condition is strong and our results are improving. I am quite confident that financing will be available.@[17] Defendants now tell the Court that ALibbey has requested additional short-term financing in order to pursue this reconsideration.@[18] Defendants= changing stories about their financing do not tip the equities in their

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[17] Audio file of Libbey Quarterly Earnings Conference Call, hosted by PRNewswire.com (Apr. 24, 2002) (visited May 7, 2002) <http://www.videonewswire. com/event.asp?id=4567>.

[18] Def. Mem. 8. Defendants do not say how short-term, just too short-term for the Congressional scheme to be followed. Libbey=s chairman told an Ohio newspaper that Libbey had extended financing Athrough mid-June@ for the acquisition. PX 866 (new).

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

In any event, as the Court has already found (and defendants have not addressed), financing B or even Apreserving the transaction@ B is not an equity entitled to any significant weight. Op. at 31, *quoting Heinz*, 246 F.3d at 727; *accord PPG*, 798 F.2d at 1507; *Heinz*, 2000-2 Trade Cas. & 73,090 (D.C. Cir. 2000) (granting FTC motion for injunction pending appeal) (even if the injunction pending appeal killed the transaction, Athe evidence does not establish that the efficiencies the appellees urge could not be reclaimed by a renewed transaction following success on appeal@).

B. Defendants= Proposed Order Would Not Preserve the FTC=s
<u>Final Remedy, Much Less Prevent Interim Competitive Harm.</u>

Defendants= proposed Aconsent injunction@ would not maintain the *status quo ante* or prevent scrambling of the eggs. To the contrary, under defendants= proposed order, Anchor would indeed be scrambled B factories and 90% of the business to Libbey, food service business to Newell, and food service molds to Peldar in Colombia. Defendants= proposed order does nothing to preserve Anchor=s food service *business*; it only purports to preserve Anchor=s food service *assets* (the factories and the molds), but it does not accomplish that end either.

Defendants are fully aware that sending the molds to Colombia B beyond the jurisdiction of the Court and the FTC, into the control of a third party, and in the middle of a war zone B presents an unacceptable risk that Newell will be unable to recover the molds should the FTC order it to do so. Defendants therefore seek an order that *explicitly* transfers risk of loss of the molds from Newell to the FTC:

> Libbey or Newell Rubbermaid shall not be in contempt of this Order if its failure to meet the terms of this Order is caused by conditions beyond its control including, but not limited to, Acts

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

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

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

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

held:

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

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

Conclusion

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

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