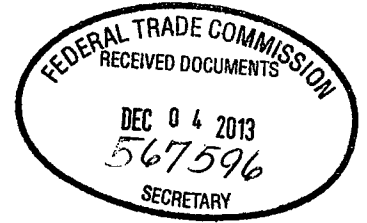


ORIGINAL

PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of

Ardagh Group S.A.,
a public limited liability company, and

Compagnie de Saint-Gobain, a corporation,
and

Saint-Gobain Containers, Inc.,
a corporation.

DOCKET NO. 9356

**COMPLAINT COUNSEL'S MOTION *IN LIMINE* TO EXCLUDE ANY EVIDENCE OF
RESPONDENTS' POSSIBLE DIVESTITURES TO UNDETERMINED BUYERS**

Complaint Counsel respectfully moves *in limine* to exclude any evidence that Respondents may, at some future date divest certain glass container plants to an as-yet—undetermined third-party buyer. Respondents first raised the possibility that a divestiture might cure the anticompetitive effects of Ardagh Group, S.A.'s proposed acquisition of Saint-Gobain Containers, Inc. ("Proposed Acquisition") soon after the Commission voted to issue its Complaint in this case. In September, Respondents informed the United States District Court for the District of Columbia that they intended to sell four plants to a "new competitor" in an effort to eliminate the anticompetitive effects resulting from the Proposed Acquisition. This unilateral proposal came after the close of the federal court's fact discovery and after the Commission's opening brief in the preliminary injunction action. Respondents' gambit was to convince the District Court that other federal courts have held that it is appropriate to evaluate a "restructured

transaction” instead of the “original transaction.”¹ While legally incorrect, the district court did not need to reach this argument. At the pre-trial conference for the preliminary injunction hearing, Judge Barbara J. Rothstein learned there was no “restructured transaction,” since there was no definitive divestiture agreement and no definitive buyer. Judge Rothstein therefore ruled that it would be “premature and precipitous” for her to hear evidence of Respondents’ plan to divest assets and that she would not do so.²

Two months later, Respondents remain in virtually the same position regarding a potential divestiture as they were in when Judge Rothstein rejected evidence of their possible divestiture in federal court. Although they now propose to divest a different group of plants, Respondents have still not identified a buyer, nor have they entered into any agreement to divest any glass container plants. Thus, Respondents’ Proposed Acquisition remains unchanged from the transaction that is the basis of the Commission’s Complaint. Because there is no “restructured transaction” and the facts described in the Complaint remain unchanged, this Court should preclude Respondents from offering evidence at trial relating to their undefined divestiture to an unidentified third party, just as the District Court did.

I. Factual Background

On July 1, 2013, the Commission voted out a Complaint seeking to halt the Proposed Acquisition. The next day, Respondents suggested that a divestiture proposal might mitigate the Proposed Acquisition’s anticompetitive impact. At the same time, Respondents vigorously continued to build their case, engaging in months of discovery, including dozens of depositions of party and third-party witnesses. Over the ensuing five months, Complaint Counsel and

¹ Defendants’ Memorandum of Law in Opposition to F.T.C.’s Motion for a Preliminary Injunction at 39, *F.T.C. v. Ardagh Group, S.A.*, Case No. 13-CV-1021 (BJR) (D.D.C. Sept. 18, 2013), ECF Doc. 83-1.

² Exhibit 1 (Tr. of Prehearing Conference at 27-29, *F.T.C. v. Ardagh Group, S.A.*, 13-CV-1021 (D.D.C. Sept. 24, 2013)).

Respondents have engaged in a dialogue about possible divestitures to replace the competition that will be lost as a result of the Proposed Acquisition. Throughout, Complaint Counsel has encouraged Respondents to identify a buyer who will take responsibility for creating a new competitor from the plants that Respondents may choose to divest. At the pre-trial conference for the preliminary injunction hearing on September 24, 2013, Respondents represented to Judge Rothstein that they were in negotiations with “two to three buyers” and that they recognized that “time was short.”³ Although Respondents have identified a number of possibly interested purchasers, to date, Respondents have not signed any definitive agreement with any buyer. Respondents have made no modifications to their January 17, 2013 Share Purchase Agreement. Thus, the Proposed Acquisition is unchanged and the facts underlying the Commission’s Complaint remain unchanged.

Although fact and expert discovery had long since closed, Respondents’ Final Witness List on November 18, 2013 disclosed their intention to present unspecified “[r]epresentative(s) of the financial buyer of any divested assets” as a witness before this Court.⁴ But as of the date on which this motion was filed – less than two weeks before the final pre-trial hearing and 15 days before the trial is scheduled to commence – Respondents continue to negotiate with multiple potential buyers. Thus, no such “financial buyer” witness can be identified even today.⁵ Moreover, as set forth in greater detail in Complaint Counsel’s Motion In Limine To Exclude Testimony From Witnesses That Respondents Added to Their Final Witness List But Failed to

³ *Id.* at 20-21, 28.

⁴ Exhibit 2 (Respondents’ Final Witness List, dated November 18, 2013).

⁵ Even if Respondents do, at some point in the future, reach an agreement to sell four plants to a defined buyer, any such agreement is unlikely to eliminate the need for the merits trial, and thus, would not moot this Motion. Since the settlement conference held by Your Honor on October 31, 2013, Complaint Counsel has spoken with a broad array of market participants. Based on the feedback received, Complaint Counsel informed Respondents that a divestiture of four glass plants to any buyer is unlikely to resolve the Proposed Transaction’s anticompetitive effects and that Complaint Counsel is therefore unlikely to recommend that the Commission accept the proposed divestitures as part of a consent agreement.

Disclose On Their Preliminary Witness List, Respondents' Final Witness List fails to include the required "brief summary of the testimony of each witness."⁶ Thus, it is unclear whether Respondents propose to elicit testimony about the divestitures or any financial buyer's sufficiency as a potential new competitor to the remaining duopolists.

II. Argument

A. Respondents' Hypothetical Divestiture Plans Are Not Evidence of a Definitive Divestiture Agreement, and are Therefore Inadmissible

Respondents' hypothetical plans to potentially sell some assets to an undefined buyer contrast sharply with evidence of definitive agreements that other courts have admitted when evaluating Section 7 cases. For example, in *FTC v. Arch Coal, Inc.*, the district court admitted evidence related to a definitive agreement to sell an identified coal mine to an identified buyer if the original transaction was permitted to close.⁷ In permitting the introduction of this evidence, the district court noted that the merging parties in that case had signed a definitive agreement to sell the coal mine to the buyer during the pendency of the FTC's investigation and before the FTC issued its complaint.⁸ Similarly, the district court in *FTC v. Libbey, Inc.* considered a signed, amended merger agreement instead of the original merger agreement.⁹ The amended agreement allowed the seller to keep assets in order to remain competitive in the market at issue instead of transferring those assets to the buyer.¹⁰ The merging parties signed the amended agreement a week after the FTC sued and the amended merger agreement was fully vetted in discovery.¹¹ In both cases, there was no ambiguity about which firms would own which assets,

⁶ Exhibit 3 (October 18, 2013 Revised Scheduling Order) at 2; *see also* Exhibit 4 (August 2, 2013 Scheduling Order) at 1 (similarly requiring that the Preliminary Witness List include "a brief summary of the proposed testimony").

⁷ *Arch Coal, Inc.*, Memorandum Opinion at 7-8, Civ. Ac. No. 04-0534 (JDB) (July 7, 2004).

⁸ *See id.* at 4-5.

⁹ 211 F. Supp. 2d 34, 37, 41 (D.D.C. 2002).

¹⁰ *Id.* at 41.

¹¹ *See id.* at 46 (noting that the Commission had also voted to enjoin the amended merger agreement).

and on what terms, if the transaction at issue was permitted to close, and Complaint Counsel had a full opportunity to consider the changes to the transactions in fact and expert discovery.

In contrast, courts have dismissed evidence of non-specific divestiture plans when such offers were undefined or “made in the heat of a hearing.”¹² In *Chemetron Corp. v. Crane Corp.*, the court did not consider evidence of the defendant’s offer to sell its welding fittings business because no contract, and thus, “no specificity attended” the defendant’s hypothetical plan.¹³ In *Consolidated Gold Fields, Inc. v. Newmont Mining Corp.*, the court similarly dismissed divestiture “promises” and “intentions” when the acquiring firm did not yet control one of the mines slated for divestiture.¹⁴

Unlike in *Arch Coal* and *Libbey*, discovery has closed in this case and Respondents have not penned any definitive agreement or defined any buyer. Like the *Chemetron Corp.* and *Consolidated Gold Fields* defendants, Respondents seek to present evidence of mere divestiture aspirations, near the heat of the administrative hearing, and ask this Court to accept its promises and intentions, including those relating to two plants that Ardagh, the acquiring firm, does not yet own. As such, the landscape remains unchanged from two months ago when Judge Rothstein, recognizing the indeterminate nature of the plans, ruled it would be “premature and precipitous” to consider such evidence in the preliminary injunction hearing.¹⁵

More than two months after the district court’s ruling and after the close of discovery in this Court, Respondents still do not have a definitive deal to sell a defined package of glass plants to an identified buyer. In fact, the identity of the four plants that they propose to sell has *changed* in the past two months, further underscoring the nebulous nature of Respondents’ plans.

¹² *Chemetron Corp. v. Crane Co.*, No. 77 C 2800, 1977 WL 1491, at *7 (N.D. Ill. Sept. 8, 1977).

¹³ *Id.*

¹⁴ 698 F. Supp. 487, 502 (S.D.N.Y. 1988), *rev’d in part on other grounds*, 871 F.2d 252 (2d Cir. 1989).

¹⁵ Exhibit 1 (Tr. of Prehearing Conference at 27-29, *F.T.C. v. Ardagh Group, S.A.*, 13-CV-1021 (D.D.C. Sept. 24, 2013)).

There is no reason to admit evidence of this kind when courts have uniformly dismissed such evidence in the past. The time to restructure the Proposed Transaction to alleviate its anticompetitive effects has long since passed.¹⁶ This Court, consistent with Judge Rothstein's ruling, should bar Respondents from introducing any evidence of Respondents' uncertain plans to divest plants to an unidentified buyer.

B. Admitting Evidence of a Proposed Divestiture to an Undisclosed Third Party Would Be Prejudicial to Complaint Counsel

Finally, admitting evidence of a possible divestiture to an undisclosed third party would be prejudicial to Complaint Counsel. Respondents bear the burden of demonstrating to the Court, through fact and expert testimony, that their potential divestitures can be combined to create a new competitor that will replace the competition that would otherwise be lost as a result of the Proposed Acquisition. But the divestitures that Respondents are now proposing were first disclosed after both fact and expert discovery closed. Moreover, Respondents' failure to provide the required "brief summary of the testimony of each witness" leaves unclear what testimony Respondents in fact plan to offer.¹⁷ Accordingly, Complaint Counsel has had no opportunity to take discovery regarding, among other things, the terms of any divestiture agreement, any buyer's financial viability, the buyer's plans for the business, its strength as a competitor, and its projected impact on competition. Respondents' failure to enter into a divestiture agreement or identify a buyer during the discovery period¹⁸ prevented Complaint Counsel from obtaining any of this necessary discovery.

¹⁶ See *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 607 (1957) (the test of a violation of § 7 is "whether, at the time of suit, there is a reasonable probability that the acquisition is likely to result in the condemned restraints.")

¹⁷ Exhibit 3 (October 18, 2013 Revised Scheduling Order at 2); Exhibit 4 (August 2, 2013 Scheduling Order at 1).

¹⁸ Respondents did not reveal their intent to introduce evidence at trial from a proposed financial buyer until submission of their Final Witness List on November 18, 2013, nearly two months after the close of discovery. As discussed *supra*, to this day Respondents *still* have not entered into a divestiture agreement nor have they identified the buyer.

Moreover, Complaint Counsel has been unable to take discovery from third-party customers regarding a potential divestiture. Indeed, without knowing the identity, number, and location of the plants ultimately to be divested, or the buyer's identity, Complaint Counsel could not ask customers during their depositions about the buyer's viability as a glass competitor, its impact on competition, or the customers' ability or willingness to purchase glass from the buyer.¹⁹

Given the severe impediment to Complaint Counsel's ability to effectively brief this Court on the competitive implications of a possible divestiture, this Court should exclude this prejudicial evidence.

III. Conclusion

For the foregoing reasons, Complaint Counsel respectfully requests that the Court exclude any evidence of Respondents' possible divestitures to undetermined third-party buyers.

Dated: December 4, 2013

Respectfully submitted,

s/ Edward D. Hassi

EDWARD D. HASSI
Counsel Supporting the Complaint
Bureau of Competition
Federal Trade Commission
Washington, DC 20580
Telephone: (202) 326-2470
Facsimile: (202) 326-3496
Electronic Mail: ehassi@ftc.gov

¹⁹ Complaint Counsel has taken over 30 third-party depositions of brewers and distillers.

UNITED STATES OF AMERICA
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In the Matter of

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and

Saint-Gobain Containers, Inc.,
a corporation.

DOCKET NO. 9356

(Proposed) ORDER

After reviewing Complaint Counsel's Motion *in Limine* to exclude any evidence of Respondents' Possible Divestitures to Undetermined Buyers, it is ordered that Respondents are precluded from offering evidence of any possible divestitures to undetermined third-party buyers.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: December __, 2013

**UNITED STATES OF AMERICA
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OFFICE OF ADMINISTRATIVE LAW JUDGES**

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DOCKET NO. 9356

STATEMENT REGARDING MEET AND CONFER

Pursuant to Paragraph 4 of the Scheduling Order, Complaint Counsel and Counsel for the Respondents met and conferred in good faith in an effort to resolve by agreement the issues raised in this motion and have been unable to reach such an agreement.

Dated: December 4, 2013

Respectfully submitted,

s/ Edward Hassi

EDWARD D. HASSI
Counsel Supporting the Complaint
Bureau of Competition
Federal Trade Commission
Washington, DC 20580
Telephone: (202) 326-2470
Facsimile: (202) 326-3496
Electronic Mail: ehassi@ftc.gov

EXHIBIT 1

APPEARANCES (Continued):

For the Plaintiff: ANGELIKE ANDRINOPOULOS Mina, ESQUIRE
FEDERAL TRADE COMMISSION
Bureau of Competition
601 New Jersey Avenue, N.W.
Suite 6127
Washington, D.C. 20001
202-326-3119
amina@ftc.gov

For Defendant RICHARD SCHWED, ESQUIRE
Ardagh Group: SHEARMAN & STERLING
599 Lexington Avenue
New York, NY 10022
212-848-4000
rschwed@shearman.com

ALAN S. GOUDISS, ESQUIRE
SHEARMAN & STERLING LLP
599 Lexington Avenue
New York, NY 10022
212-848-4000
agoudiss@shearman.com

HEATHER LAMBERG KAFELE, ESQUIRE
SHEARMAN & STERLING, LLP
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
202-508-8097
202-508-8100 (fax)
hkafele@shearman.com

For Defendant YONATAN EVEN, ESQUIRE
Saint-Gobain CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
212-474-1000
212-474-3700 (fax)
yeven@cravath.com

Court Reporter: THERESA M. SORENSEN, CVR-CM
Official Court Reporter
333 Constitution Avenue, N.W.
Washington, D.C. 20001
202-354-3118
theresams@erols.com

P R O C E E D I N G S

THE DEPUTY CLERK: The matter before the Court,
Civil Action Number 13-1021, the United States Federal Trade
Commission versus Ardagh Group S.A., et al.

Counsel, please come forward and identify
yourselves for the record.

MR. HASSI: Good morning, Your Honor. I'm Ed
Hassi. I'm with the Federal Trade Commission. With me at
counsel table are Brendan McNamara, Cathy Moscatelli, and
Angelike Mina.

THE COURT: Okay, good morning.

MR. SCHWED: Good morning, Your Honor. Richard
Schwed of Shearman & Sterling for the Defendant Ardagh
Group, and with me from Shearman & Sterling are Alan Goudiss
and Heather Kafele.

MR. EVEN: Good morning, Your Honor. Yonatan Even
with Cravath, Swaine & Moore, for Defendant Saint-Gobain.

THE COURT: Well, good morning, counsel.

I don't know if you were prepared to address me,
but why don't we start out by my telling you my concerns,
and then you probably can fill me in on your plans.

I know we're having a hearing in about a month,
and my concern was just the structure of that hearing and
what you anticipate will take place there, and giving you
some idea of what I would expect in terms of the procedures

1 you will use, and my sort of idiosyncrasies in terms of
2 conducting a hearing like this.

3 My first concern would be that all exhibits be
4 pre-marked and pre-admitted. I can't imagine that there
5 would be any dispute about exhibits at a hearing like this,
6 but I could be wrong and you can tell me if I am wrong. I
7 don't want to -- you know, we only have that short period of
8 time, and I know you're intending to fill it. I don't want
9 to fill it with arguments about exhibits.

10 Just a word of caution. If it turns out both
11 sides are using the same exhibit, pick a number, any number.
12 I don't care whose side it is. Just don't use two different
13 numbers. It's only going to confuse me, all right? One
14 number will be enough. If you really can cooperate, you
15 could number them consecutively, and then it will be very
16 easy for the clerk and for me.

17 Are there any exhibits that you would like for me
18 to review in advance that you think might speed things
19 along? Now, let me just give you an idea of where I am
20 coming from. I can't review them really in advance because
21 I'm coming back from a trip just the day before, and I'm not
22 taking them with me, I can tell you that. But like if you
23 have some the night before the next day of the hearing you
24 think it would be good for me to take a look at, keep that
25 in mind. I'm willing to do so that I sort of have a nodding

1 acquaintance with them before a witness takes the stand.

2 That's my next question. Are there going to be
3 witnesses? If so, tell me. Tell me how many, both sides.
4 Will you agree on an order? Will they be here, be ready to
5 go? If you're going to have witnesses and they are kind of
6 experts in their field of some kind, I can read CVs faster
7 than they can tell me what they've done and what they've
8 published, and where they went to school. You can take me
9 as far back as high school as long as you put it in writing
10 because then I can read it really fast.

11 I will throw out an idea, and I assume you're
12 going to say, yes, there are going to be witnesses. One way
13 of speeding things along -- I'm not sure it will work here.
14 I just throw it out to you to think about -- many times in
15 hearings like this it can be helpful to prepare the direct
16 in the form of a statement and then have me read the
17 statement, ask questions if there's something in there I
18 don't understand, and then just proceed with
19 cross-examination. Or with a limited direct if there are
20 charts to show me to help me along. I don't know if that's
21 helpful or not. Sometimes it is, sometimes it isn't.

22 It is helpful if you think that you've asked for
23 three days and then all of a sudden you find you're going
24 five and I don't have those five days, and then directs
25 would be helpful. But if you're staying within your time

1 and you think it would be easier for me to get it with the
2 person here and then being able to -- pros and cons. I will
3 let you decide. I don't feel strongly about it because
4 sometimes my ability to ask questions of the witness, I
5 could do even with a written direct. You decide. It may be
6 acceptable for some witnesses and not others.

7 I'd like to hear from you if you've made any
8 allocation of time. Are you splitting it? FTC is
9 plaintiff, so usually you would get a rebuttal, although I'm
10 not sure rebuttal really applies to something like this.
11 But if you're thinking you want a rebuttal, then let's split
12 the time, and you carefully reserve some time. I think we
13 should try to keep the time in mind.

14 I will try to give you an hourly day so that you
15 know how much time you have. I don't believe in chess
16 clocks. I think they ruin the ambiance of the courtroom,
17 but I do expect that my clerk will keep time. So I think
18 you should be thinking of staying within your time limits.

19 Okay, I've given you my concerns. Who wants to
20 lead off? You look like you're ready to go, counsel.

21 MR. HASSI: Yes, I think I am, Your Honor. Again,
22 Ed Hassi for the Federal Trade Commission.

23 There are some concerns we have and some issues,
24 some of which you have already addressed. I wanted to start
25 out with scheduling. After our discussion with your law

1 clerk, we've had a further discussion about scheduling. We
2 have some minors changes to the scheduling order. They are
3 agreed by all parties. We can send in a revised scheduling
4 order today, and I can walk you through those changes or we
5 can simply send it in, however Your Honor would like to
6 proceed.

7 THE COURT: Tell me now, and also send it in.

8 MR. HASSI: Okay. So the changes -- I'm sorry,
9 I've got a black line here that shows it, which I can hand
10 up if Your Honor would like --

11 THE COURT: Sure.

12 MR. HASSI: -- to the scheduling order.

13 THE COURT: Thank you.

14 MR. HASSI: So the changes don't start until
15 page 6, paragraph 21, and that is as we've -- we just
16 completed expert discovery on Friday. It may be that one or
17 both parties choose to make Daubert motions, and so we've
18 built into the schedule a briefing schedule for potential
19 Daubert motions.

20 THE COURT: But you must know by now whether
21 you're going to bring Daubert motions. It's not the 27th,
22 but you must have a pretty good idea. You guys wouldn't
23 start a brief on the night of the 26th. I know you better.

24 MR. HASSI: Your Honor, I think it's our
25 expectation that we will bring one or more Daubert motions.

1 We, to be fair, are still evaluating that, but, yes, there
2 is someone back at the office working on Daubert motions.

3 THE COURT: Why would I think that might be the
4 case, but let me explore this. You're bringing a Daubert
5 motion to exclude the expert from this hearing?

6 MR. HASSI: To exclude the expert, some of the
7 experts or some of the experts' testimony.

8 THE COURT: Now, you're aware that in order to
9 make that ruling I need to hear from the expert, right?

10 MR. HASSI: Yes, Your Honor. I understand the
11 Catch 22 involved.

12 THE COURT: Yes. You still think that's a
13 worthwhile motion to make? Is it because you don't want me
14 to consider what that expert is saying, is that it?

15 MR. HASSI: I think what our intention is, is to
16 limit -- there are some opinions that are being offered here
17 by, for example, experts in the field that are going to say,
18 "Well, there's a trend, for example, to beer in cans," and
19 at least one of these experts thinks that he knows better
20 than the people that are -- the businesspeople that in the
21 field. It's not based on any methodology, anything
22 testable. It's just, "Gee, I've done this before, and I
23 know better than the people that are running these
24 multimillion dollar businesses."

25 We think that that should be brought to light. I

1 understand it can be brought to light in cross-examination.
2 The concern we really have here is the limited period of
3 time that we have before Your Honor, and we thought that if
4 we could address some of these issues in advance in the form
5 of a motion, it might help speed things along at the trial.

6 THE COURT: Okay. I can tell you right now that I
7 probably will not have time to review those motions. I
8 don't want to -- I don't want to nip in the bud any
9 wonderful briefs that you're doing, but I'm going to hear
10 these witnesses anyway.

11 MR. HASSI: Okay.

12 THE COURT: Well, you can give me the -- I'll hear
13 the witnesses. Just know that I'm not going to be reading
14 those motions before I hear the witnesses, but I will read
15 them, and if it's correct that the testimony I've heard
16 should have been excluded or doesn't qualify as an expert,
17 then I can do that later on. But in terms of your
18 timekeeping, that's what I'm trying to help you with.

19 MR. HASSI: I appreciate that.

20 THE COURT: In terms of the timekeeping, I won't
21 be in a position to exclude anybody before the hearing,
22 okay?

23 MR. HASSI: Okay, Your Honor.

24 THE COURT: So count on the fact that whoever
25 you're objecting to will testify, and if I do any excluding

1 of testimony, it will be later on when I have had a chance
2 to read the briefs. Okay?

3 MR. HASSI: I understand.

4 THE COURT: So it's not going to help you in time,
5 but it may still help. I didn't mean to say that you
6 shouldn't pursue. It's just that in terms of timing, it's
7 not going to happen beforehand, okay?

8 MR. HASSI: Okay. We will keep that in mind in
9 terms of whether we file or don't file, Your Honor.

10 THE COURT: An updated witness list --

11 MR. HASSI: Witness list, and I think taking into
12 account what Your Honor has already said this morning, we
13 have this week to sort of work that out and try to provide
14 each other with clear indications of who will actually be
15 called to testify live at the hearing versus, for example,
16 being submitted by deposition testimony. So that's
17 scheduled to happen on Friday.

18 Some of these changes, for example, paragraph 23,
19 these were made previously. In terms of the briefing
20 schedule, we are just annotating them here. Our brief and
21 reply will be due on September 30th. We propose to exchange
22 exhibit lists, copies of exhibits and deposition
23 designations, instead of on the 30th, on October 2nd, so
24 moving that back by a couple of days.

25 Paragraph 25 goes to oppositions to Daubert

1 motions.

2 Paragraph 26, we propose to exchange objections
3 instead of on -- to exhibits and counter deposition
4 designations, instead of on October 3rd, on October 9th.
5 And then we have reply briefs on any Daubert motions
6 scheduled for October 9th.

7 In the post trial briefing -- in paragraph 31, we
8 corrected the hearing dates and times. And then for the
9 post trial briefing, what we would propose to do is, since
10 the trial will continue into that Monday, instead of having
11 the findings of fact due that Friday, we've pushed them to
12 the following Monday. And then the reply findings of fact,
13 instead of October 30th, to November 1st.

14 So those are the proposed changes. As I
15 mentioned, they are agreed to by all parties.

16 THE COURT: Sounds good to me.

17 MR. HASSI: Okay.

18 THE COURT: I think that is a reasonable schedule,
19 and if it gives you more time to get everything prepared, so
20 much the better.

21 MR. HASSI: The parties will submit a proposed
22 ordered this afternoon.

23 THE COURT: Great. Let me ask you your opinion.
24 Do you think there is going to be any problem with exhibits?

25 MR. HASSI: I hope not, Your Honor. I think for

1 the most part these are going to be business documents out
2 of the companies' files and/or third parties' file, so I
3 hope not.

4 THE COURT: Good.

5 MR. HASSI: I understand with Your Honor's
6 schedule -- we've already talked about the fact that we
7 really need to work this out given when the hearing starts
8 and we don't have -- that this is our opportunity for
9 pretrial, and so we'll try to resolve that as much as
10 possible.

11 THE COURT: Okay. Let me make one suggestion
12 because I've found that's often where the best intentions
13 can flounder.

14 If you are using the demonstrative exhibits,
15 charts, things like that with your experts, and you might
16 because they probably would be helpful to the Court -- if
17 you're not using -- I say charts, and that's a --

18 MR. HASSI: We hope they will be helpful, Your
19 Honor.

20 THE COURT: -- that's a give-away of my
21 generation. If you're using something that you're going to
22 put on the computer since nobody makes charts anymore, show
23 it to the other side so that they don't see it for the first
24 time the morning of and then say, "No, no, that's
25 inaccurate. Can you make a change?" Since it's usually

1 very difficult to make a change at the last minute, include
2 those as exhibits that you talk about, okay, so that --

3 MR. HASSI: Okay.

4 THE COURT: It's just a matter of time, you know.
5 Do you want to waste time saying, no, that should be this
6 percentage and not that percentage?

7 MR. HASSI: Okay.

8 THE COURT: Just a word of advice.

9 MR. HASSI: Okay.

10 THE COURT: It sounds like you have anticipated
11 pretty much everything. Is there anything else we need to
12 talk about?

13 MR. HASSI: There are some housekeeping matters
14 that I think we would like to address. There is also one, I
15 think, fairly significant substantive matter that we wanted
16 to raise with Your Honor as well. I can do those in either
17 order. The substantive matter may be, in some respect, the
18 elephant in the room, and so why don't I do that first?

19 And that is, if Your Honor has read Ardgh's brief
20 that was filed last week, there's an 11th hour suggestion in
21 that brief that they're going to propose a remedy here, to
22 sell off four glass plants. That's news to us. It's news
23 that comes after the close of fact discovery. It comes
24 after our expert reports were in. It comes after our briefs
25 were in.

1 Now, Ardagh has known for months that the Federal
2 Trade Commission has concerns about this transaction.
3 Indeed, they understood that there were antitrust concerns
4 when they entered into the transaction.

5 They decided not to address those concerns when
6 they were in the investigatory stage. They decided not to
7 address those concerns when they came before the Commission,
8 and they decided not to address them in a timely fashion so
9 that we could take fact discovery on that.

10 What they now propose to do is put these plans,
11 hopes, wants, intentions in front of the Court at trial with
12 no discovery whatsoever, and to ask you to evaluate that
13 remedy without us having the opportunity to evaluate it,
14 without us having the opportunity to take discovery on it,
15 and without us having the opportunity to give Your Honor our
16 views on whether that remedy is sufficient. Clearly, at
17 this point it isn't. I mean, at this point it's just an
18 intention to sell.

19 They haven't identified a buyer. They haven't
20 identified how much these are being sold for. They haven't
21 given us a chance to evaluate what they're proposing to do,
22 is to sell four plants, two each from two of the companies.
23 And they say, "Well, that will form a business that will
24 restore competition in this market."

25 We don't know if those four plants can be combined

1 into a business, and so there are a lot of very serious
2 questions we have about that. And we don't think that he
3 gamesmanship that's being played here by waiting until the
4 11th hour should be addressed at this hearing. We don't
5 think that that evidence should come in without us having a
6 chance to have had discovery, and without us having had a
7 chance to evaluate it, and, frankly, until the facts are
8 jelled, if you will. I mean, there's not an agreement for
9 sale here.

10 The parties cite in their briefs three cases in
11 which remedies have been litigated before. The first of
12 those, Arch Coal, was a case that the FTC brought. In fact,
13 it was Ms. Moscatelli's shop that brought it. In that case,
14 the changes to the proposed transaction were two months
15 before the case was first filed by the FTC. So they had a
16 chance to address it in discovery, and they had a chance to
17 consider it, and the Commission had a chance. When I say
18 the "Commission," I mean the commissioners had a chance to
19 evaluate it and vote on it. That hasn't happened here.

20 They cite Franklin Electric. That's a case
21 involving the DOJ. In Franklin Electric, they changed the
22 joint venture one day after the DOJ filed. Again, well
23 before the -- I mean, the discovery period hadn't even
24 started yet, and so the parties had a chance to address it
25 and address it in discovery.

1 The final case they cite is Libby, and in Libby
2 that was the latest of the three. But in Libby, it was one
3 month into -- one month after the complaint was filed they
4 made changes. And when I say "made changes," it's not like
5 here where they're saying, "Gee, we're going to sell these
6 four plants."

7 They said, "Here's what we're going to do. Here's
8 the modified agreement. Here's who's involved," and the
9 parties had a chance to vet that in discovery. Here what
10 they're saying is --

11 THE COURT: Let me ask you something.

12 MR. HASSI: Yes, Your Honor.

13 THE COURT: What are you asking the Court to do?
14 Are you asking the Court to just not allow testimony on this
15 at all?

16 MR. HASSI: Yes, Your Honor. We're asking -- we
17 can do this as a motion in limine, but we don't think that
18 evidence of this 11th hour proposal -- it comes after fact
19 discovery -- should be heard in these proceedings.

20 THE COURT: All right. Let me -- let me play out
21 a scenario here, okay?

22 MR. HASSI: Yes, Your Honor.

23 THE COURT: It is in the Court's interest not to
24 render advisory opinions or opinions that are going to be
25 moot in about a day or two after I render it. Let's say I

1 grant whatever motion, whatever form you're going to bring a
2 motion in, and I exclude all that evidence. Then I give you
3 a ruling one way or the other. Obviously if I rule against
4 the FTC, then the whole thing is moot, but if I rule for the
5 FTC, then I presume they would come back with the excluded
6 information and bring the whole thing all over again, right?

7 MR. HASSI: Well, Your Honor, I think in light of
8 the fact that this is a 13(B) proceeding, and that what
9 we're asking Your Honor to do here is to preserve the status
10 quo pending the trial, before the FTC and before the
11 Commission, I'm not sure that that's correct. In other
12 words, if there is a remedy to be fashioned, the Commission
13 ought to have a chance to fashion that remedy.

14 What we're asking Your Honor to do is to decide
15 are there serious and substantial questions going to this
16 transaction such that I should require the parties -- that
17 Your Honor should require the parties to preserve the status
18 quo, and that's all we're asking here. Whether that remedy,
19 the sale of those four plants and the possible buyer that
20 they may or may not come up with -- and they're just
21 starting to talk to buyers -- whether that remedy suffices
22 can be addressed, if necessary, in a merits trial. And I
23 think that depends on whether they get to a deal and whether
24 they get to a buyer, et cetera. But we don't think that
25 these proceedings should be held up, or that Your Honor

1 should be deciding -- with no evidence, frankly. I mean, if
2 you look at their brief, there's not a footnote, there's not
3 a citation to any evidence. This is just they're going to
4 put somebody on the stand who says either: "Here's what we
5 intend to do," or, "Here's what we've done in the weeks
6 since discovery has closed." We think we're severely
7 prejudiced by that, Your Honor.

8 THE COURT: Okay. Did you want to address --
9 well, I'll tell you what, let's address this now from the
10 other side, and then we'll go into your housekeeping
11 matters.

12 MR. HASSI: Very well, Your Honor.

13 THE COURT: Okay.

14 MR. SCHWED: Thank you, Your Honor. Richard
15 Schwed for Ardagh Group.

16 I think maybe I can start by backing up and
17 explaining the revised transaction that we've proposed, and
18 this isn't something that's a gambit. It's not an 11th hour
19 strategy. Basically, since this case was filed, we've been
20 trying to come up with the FTC to a consensual arrangement.
21 We have not been able to do that. We've discussed a number
22 plants. We have not been able to reach an agreement. We
23 finally decided that there was not going to be time or
24 ability to get that done, and that we would unilaterally
25 agree to divest four of the plants that were going to be

1 part of the combined entity, two that we already own and two
2 that we're purchasing.

3 This is relevant -- I'm not sure how much Your
4 Honor -- since you've been recently reassigned to this
5 case -- has gotten into the -- what the case is all about,
6 but essentially the fundamental question in this case is
7 whether glass bottles compete with other forms of packaging,
8 and, in particular, the most important is cans for beer and
9 plastics for spirits, alcohol. There is a fundamental
10 question that that brings up which is sort of the starting
11 point of all cases, which is what is the product market.

12 We strongly believe that we can win this on the
13 definition of the product market. That's the exact same
14 case that -- the exact same product market issue that was
15 addressed by the Supreme Court in Continental Can 50 years
16 ago, and by this court about 25 years ago in the O-I
17 Brockway case and by the FTC, where both courts have said
18 that cans and glass are in the same product market. It is a
19 rare case when you have a merger case and there's a relevant
20 product market, and there's a Supreme Court case and a
21 binding case that have said that the product market that the
22 FTC is claiming is not the right product market, and, in
23 fact, the FTC Commission itself has found that that is not
24 the right product market.

25 Now, the revised transaction we are proposing is

1 one that addresses the question: Well, what if Your Honor
2 does not agree with us on the product market? Because it is
3 our view that there is not going to be a diminution in
4 competition with this transaction even in the revised
5 product market, even if their product market is correct.
6 But out of an abundance of caution, what we have done is
7 agreed to sell these four plants which we believe
8 100 percent addresses the concerns that have been raised by
9 the Commission.

10 There are three plants that make beer. Those
11 plants combined have -- their beer sales that they have made
12 in this past year are 110 percent of what Ardgh's beer sales
13 were itself. So in other words, we're selling more than our
14 own beer business effectively. And so the combined entity
15 will have less beer business than just one of the two -- the
16 bigger of the two entities had before the transaction.

17 THE COURT: Are you going to do that even if the
18 Court rules with you?

19 MR. SCHWED: Well, we are going to enter into a
20 definitive purchase agreement because we recognize time is
21 short, and we don't have time, necessarily, to wait for the
22 Court to issue a ruling, and, then, if things don't go our
23 way, to circle back and then complete this transaction and
24 get this deal closed by the drop-dead date of mid-January.
25 So what we have decided to do in order to make sure that

1 this can all be done in time, is to enter into binding
2 agreements that are -- obviously they have to be contingent
3 on the transaction closing because we can't sell what we
4 don't own, but the binding agreements -- a single binding
5 agreement with them to buy the four plants, and then
6 immediately upon closing the transaction, those four plants
7 will be transferred to the buyer.

8 THE COURT: So if I rule in your favor about the
9 market question, you will still go ahead with this plan?

10 MR. SCHWED: We will still go ahead with it.
11 That's the situation we've agreed to be in.

12 THE COURT: Don't you think that the FTC should
13 get a crack at what you're planning? You're telling me it's
14 definitive. What I heard from counsel was that they don't
15 even know that you have a binding contract.

16 MR. SCHWED: Well we don't yet have a binding
17 contract. We're in negotiations. They've known for --
18 they've known for two weeks now that we are -- the identity
19 of the four plants we are planning to sell. Since then,
20 they have deposed our CEO and asked him extensively about
21 the plans to sell the four plants. They have deposed our
22 chairman who is running the process and asked him
23 extensively about the plans to sell the plants. It was the
24 primary focus of the deposition. There is nothing else that
25 they have identified to us that they need that prevents them

1 from -- they're saying that we want try this without giving
2 them a chance to put on their case about it, but they've
3 known about -- they have detailed information about each of
4 these four plants that they've had for a long time.

5 THE COURT: Two weeks?

6 MR. SCHWED: No. I'm saying the detailed
7 information about the four plants they've had for months.
8 In other words, we've given them plant by plant detail in
9 the whole discovery process, even before the lawsuit was
10 filed. They have had plant by plant detail, and they have
11 known about the exact contours of the transaction, the exact
12 four plants, for two weeks.

13 Now, two weeks may not sound like a lot, but that
14 ends up putting them about five weeks before the hearing,
15 and a number of the cases that are cited by both sides in
16 this were decided in the entire case, from the date it was
17 filed until the date of the hearing, was between five and
18 eight weeks. So it's not -- in the context of maybe a
19 five-year litigation, something that's five weeks before the
20 actual hearing date may sound like the 11th hour, but in the
21 context of lawsuits that often take five, six, seven, eight
22 weeks, five weeks before the hearing gives them plenty of
23 time to address what is really only one sub-issue of the
24 case. It a doesn't affect the product market analysis, it
25 doesn't affect the geographic market analysis, it only

1 affects the question of the harm to competition and --

2 THE COURT: Only?

3 MR. SCHWED: I'm sorry?

4 THE COURT: Only affects the harm to --

5 MR. SCHWED: Well, just in terms of the amount of
6 analysis. In other words, what I'm saying, Your Honor, is
7 that there have been entire cases, from product market
8 through the end of the case, that have been tried in six
9 weeks.

10 THE COURT: Let me ask you something. Do you
11 think there is a chance that if the commissioners had your
12 current plan in front of them they might come out with a
13 different result?

14 MR. SCHWED: We don't know. The FTC, frankly, has
15 gone radio silent on us. We had originally proposed this as
16 a settlement and never got an answer, so we don't know what
17 the Commission would do. Frankly, I wish we could explore
18 that, but the problem we have here is we have a mid-January
19 drop-dead date. This transaction will terminate, and our
20 ability to purchase the company will end by mid-January. So
21 we don't have the luxury of time to explore that question.

22 THE COURT: Okay. Let me hear from --

23 MR. SCHWED: If I may just add one more point?

24 THE COURT: Yes.

25 MR. SCHWED: The arguments Mr. Hassi made are the

1 exact same arguments that were made in Arch Coal, which was
2 they're trying to fashion their own remedy. They're trying
3 to take the job of the Commission by deciding which plants
4 get sold. They can't change the transaction. And this
5 Court said, "I'm not going to get involved in a fiction.
6 I'm not going to hear a case about a transaction that is no
7 longer the transaction that's being proposed."

8 Thank you.

9 THE COURT: Thank you. Wait, that's what the
10 Court said in Arch Coal?

11 MR. SCHWED: In Arch Coal, yes, Your Honor.

12 THE COURT: Okay.

13 MR. SCHWED: Thank you, Your Honor.

14 THE COURT: Let me hear back from Mr. Hassi.

15 MR. HASSI: Your Honor, I will start with Arch
16 Coal and some of the differences.

17 The difference here for Arch Coal is, the Arch
18 Coal court found it was integral to the deal, and it was
19 done in good faith.

20 And the Libby court -- it cited the Libby court.
21 In its footnote 27 of the Libby court opinion, they talk
22 about the good faith of the parties in an effort to resolve
23 the FTC's concerns.

24 Dropping these facts on us the night before the
25 CEO's deposition, which is already being taken after the

1 close of discovery, that's not in good faith, Your Honor.

2 This isn't a good-faith effort to resolve this.

3 In terms of the questions that the commissioners
4 would have, if -- our website has a whole section on
5 divestitures and what a party has to do to try and satisfy
6 the Commission on divestitures, and one of the main issues
7 is, who is the buyer? How are they funded? Can they make
8 this a go?

9 And then we talked to customers, and I will tell
10 you -- this was announced on Friday to the public -- we've
11 been hearing from customers already. They don't like this.
12 So we haven't had a chance to vet that, and the Commission
13 hasn't had a chance to vet that.

14 THE COURT: All right. I'm going to ask Mr.
15 Schwed the same question. I will probably get a different
16 answer, but I am concerned.

17 Mr. Hassi, do you believe there is still some
18 benefit to be gained from -- let's say I exclude everything
19 about the sale to -- the four different sales or the
20 divestiture, whatever you would call it -- I exclude that
21 and I don't hear any testimony on that, which is quite
22 likely what I'm going to do because it doesn't sound like
23 you are prepared to respond to it. If I did that, is there
24 anything to be gained from going ahead with the rest of the
25 hearing and getting a ruling from me on the market, the

1 geography, the whole thing?

2 MR. HASSI: There absolutely is, Your Honor.

3 THE COURT: Okay.

4 MR. HASSI: We think the product market issue is
5 an important one here. We don't think it's a close call,
6 but we do think if Your Honor takes a hard look at that, it
7 would be helpful to the parties.

8 THE COURT: Okay.

9 What you think, Mr. Schwed?

10 MR. SCHWED: Your Honor, as a --

11 THE COURT: You had better come to the podium.

12 MR. SCHWED: Your Honor, we certainly don't want
13 to put off the hearing because, as I've mentioned, we're
14 basically running up against the clock. From the date of
15 the hearing until the date that this deal must close, we
16 have roughly three months, a little less from the last day
17 of hearings.

18 We recognize that the parties are going to spend a
19 week or so -- a little bit more -- submitting briefs, and
20 then Your Honor has to decide weighty issues and will
21 take -- you know, will need some time in order to do that.
22 These are not things that can be decided on the spot
23 overnight. So we recognize that all of this is going to
24 take time, and, then, potentially, whichever side loses is
25 going to try to take an emergency appeal up to the D.C.

1 Circuit. So we don't have the luxury of putting this off.
2 I guess, in an ideal world, we would say let's delay this
3 hearing, get some more time. But our view is that whatever
4 needs to be done -- so the first answer is, yes, we need to
5 have a hearing. And then so the question is, what can be
6 covered in that hearing. Our view is that, whatever needs
7 to be done in order to have the FTC probe this deal can be
8 done in three weeks.

9 All of this -- in the CCC case, which is the most
10 recent case that was before this court, the entire discovery
11 record took about three weeks, and that was over Christmas.
12 So our view is, there's a minimal amount that needs to be
13 done in order to vet this process. They are in contact with
14 the customers. They can talk to the customers, and there's
15 no reason that this can't be fully teed up by this -- by the
16 start of the hearing.

17 THE COURT: Let me talk to the side that's going
18 to be doing the discovery.

19 Speaking with all due speed -- and don't tell me
20 it's going to take six months because if you tell me it is
21 going to take six months, I won't believe you -- how long
22 would you need to do the discovery on the four transactions
23 they are talking about?

24 MR. HASSI: Your Honor, I'm not sure I can answer
25 that question and the reason is, is because a very important

1 part of what the FTC wants to consider here -- and, again,
2 it's public, it's on our website -- is the identity of the
3 buyer. Who is going to run these plants? How are these
4 four plants going to fit together? Who is going to manage
5 them? How well-capitalized are they?

6 THE COURT: Well, they have binding contracts
7 ready to go, so they could tell you today. Probably as soon
8 as I get out of here, they'll tell you who the buyers are.

9 Right? Am I right, Mr. Schwed?

10 MR. SCHWED: No. We are still negotiating with
11 buyers. We have identified to the FTC who will be managing
12 the plants. Since this is an open courtroom, I won't say
13 who it is, but we have identified to the FTC the type of
14 buyer, that it is somebody who has got industrial experience
15 and exactly who will be running the plants.

16 THE COURT: No, no. But you haven't told them who
17 the buyers are? Please get to the microphone.

18 MR. SCHWED: Yes, Your Honor. We're still
19 negotiating with two to three buyers.

20 THE COURT: Then they can't do their discovery in
21 three weeks. You don't even have a definitive name for them
22 to do discovery from or ask about. That's not reasonable,
23 is it?

24 MR. SCHWED: Well, Your Honor, I think if you look
25 at what discovery needs to be done, I think, frankly, the

1 identity of the buyer is a bit of a red herring here in the
2 sense that the key question is: Do the divestiture of these
3 plants satisfy their concerns about the power in the market
4 that they are claiming that Ardagh will have? So we are now
5 saying that Ardagh is going to have a new company that has
6 less beer business than VNA had before. It's going to have
7 a capacity in spirits that -- or it's giving away enough
8 capacity that they basically will be a competitor that
9 replaces Ardagh in the market.

10 THE COURT: Let me tell you right now, I do not
11 believe that that can be thoroughly investigated in the
12 three weeks between now and my hearing. I just don't see
13 it. I just don't think the negotiations are far enough
14 along the line, and I don't think it's fair to the other
15 side to ask them to do that.

16 So given what I have heard today, I would not be
17 considering that factor in my decision. I just do not
18 believe that you would both be in a position to present to
19 me -- I don't think the FTC would be in a position in three
20 weeks to present their side or their opinion about whether
21 this really is an adequate cure to their concern about
22 competition.

23 My sole question at this point, given that I don't
24 think I am going into -- I can't go into that. I think it
25 would be premature and precipitous for me to even look at

1 that.

2 My question to both of you is -- look, I would
3 love to have the hearing, set the days aside, sounds very
4 interesting. I've got nothing else to do those three days.
5 I'm all yours. On the other hand, as I sort of led into
6 this, if this is going possibly to be a remedy that would
7 resolve the situation, why am I going through all this about
8 market, and geography, and all of this if, indeed, the
9 divestiture would solve the problem of the competitive
10 concerns that the FTC has? As I say, it is an interesting
11 question, and I'm sure I'll enjoy good briefing, but, you
12 know, I do have other cases that I probably could be
13 attending to in those three days.

14 I'm just concerned that we're going to go through
15 all of this, you'll get a ruling from me, and then you are
16 going to have to go through this anyway. You are going to
17 have to go through it. I mean, you already have a plan that
18 you think, at least based on what I have heard today, would
19 satisfy there concerns. Why not give them a crack at taking
20 a look at it?

21 MR. SCHWED: Well, Your Honor, we would be more
22 than happy to have the Commission agree that this satisfies
23 their concerns and to make this all go away. Obviously,
24 we're willing to do that deal. We've come out publicly and
25 said it. We've said it to this Court.

1 The problem is that it's been a good two weeks
2 since we proposed those four plants to the FTC staff, and we
3 have not heard one way or the other whether they view those
4 four plants as being sufficient. And so we just can't,
5 frankly -- in my client's interest, I can't just sit back
6 and say we're going to wait forever for the FTC to decide
7 whether this is enough because their time is going to come
8 and go.

9 THE COURT: Okay.

10 Mr. Hassi, let me ask you this.

11 MR. HASSI: Yes, Your Honor.

12 THE COURT: I'm not buying into the fact that two
13 weeks is enough for you to give a decision about whether the
14 FTC is satisfied or not satisfied. I think I can tell what
15 your answer is going to be, which is that you need more
16 information, you need to do some discovery, and you need to
17 know more facts surrounding the divestiture plans.

18 What do you need and how long would it take you to
19 come up with a list of what you need for them to give it to
20 you? I mean, you can't just sit there and say, no, we're
21 going to go ahead with this hearing because we just heard
22 about this yesterday. I understand your frustration and
23 your concern, but let's move on from the fact that you just
24 heard about it. I've already told you I'm not going to go
25 into this at the hearing, so you're safe on that point,

1 okay?

2 MR. HASSI: Yes, Your Honor.

3 THE COURT: So now you can just sit back and say,
4 "Okay, how long, what do I need, and how will that timing
5 mesh with the hearing?"

6 I have already said I don't think you can do
7 everything in three weeks. I don't think you can. But if
8 you made a list and they gave you -- I mean, they really
9 want to accelerate this, and so it's in their interest to
10 give accelerated discovery. If you give them a list of what
11 you need, I think what Mr. Schwed is saying is that he will
12 do everything to get you the information that you need.
13 Now, that doesn't mean you can look at the information, get
14 the commissioners to look at it, do the whole thing. But at
15 least you could get the information.

16 Can you guys work on that in the three weeks and
17 give me an idea of timing and how it would mesh with the
18 hearing? I mean, if you're talking about a timing where
19 another week or two would make a difference, that is
20 important for me to know because then we could have a
21 hearing on the whole thing, or maybe have no hearing at all
22 is what I am saying.

23 I'm reluctant to put the hearing over because I
24 have a tight schedule and these are your three days. On the
25 other hand, I'm also reluctant to have a hearing -- I

1 suppose I could just have the hearing, listen to everything,
2 not give you a decision, and then you can tell me that it
3 was a nice three days but we've worked it out. I don't mind
4 that, but if putting the hearing over, if it were at all
5 possible -- I'll look at my calendar. What do you think?
6 How much more time would you need? I understand three weeks
7 isn't enough, and I understand that two weeks wasn't enough,
8 but what are we looking at?

9 MR. HASSI: I think the problem is the starting
10 date, and that is, we need to start from a definitive
11 agreement, an identified buyer and a contract with that
12 buyer. There are a ton of questions. You know, I'm tempted
13 to bring Dan Ducore up. He's the head of our Compliance
14 Section, and he's the one -- he and his team vet these
15 things. So if you want to have an extended discussion about
16 that, I can ask Dan to come up.

17 But there are a lot of unanswered questions here
18 that can't be answered until we've got a contract. I mean,
19 the idea that they've got somebody identified to manage the
20 plants but they don't have a buyer yet, what makes anybody
21 think that that buyer is going to accept that manager?
22 Those questions have to be answered first, and then we can
23 look at the discovery. Whether it is a matter of weeks or
24 months, I don't know, but we need to have a definitive
25 agreement to work from. We need to know what it is we're

1 shooting at.

2 THE COURT: Mr. Schwed, what are we dealing with
3 in terms of a definitive agreement here?

4 MR. SCHWED: We are working diligently to
5 negotiate. I mean, let me just make this one point. The
6 management team, or the lead manager -- it's not somebody
7 we're imposing on the buyer, it's somebody who the buyer
8 wants to work with and that person wants to work with the
9 buyer. This isn't just some fantasy.

10 But my understanding is that the FTC fashions
11 consent decrees all the time where there is -- and
12 negotiates consent decrees without there being a definitive
13 agreement. They don't go up to somebody who is considering
14 divesting some plants and say, "I'm not even going to
15 consider your divestiture proposal until you have a
16 definitive agreement," and they're supposed to sign a
17 definitive agreement and then they hand it over, and then
18 FTC says, "No, this isn't a good plan. I'd rather have it
19 be different."

20 They are able to when they want to, when it's in
21 their interest, they're able to figure out what is good and
22 bad for competition without a definitive agreement. When
23 they don't want to, all of a sudden they need a definitive
24 agreement. So I think it's a little bit of an unfair
25 standard to say they can't even start thinking about this

1 without a definitive agreement. They know what the plants
2 are. They can make an assumption that it will be sold to a
3 well-capitalized buyer who is reputable. And I think the --
4 the analysis doesn't really change based on which
5 well-capitalized, reputable person, who is not in the
6 industry, has no competitive concerns -- it's not
7 somebody -- it's somebody with industrial experience, but
8 not somebody who, you know, is in the rigid packaging
9 industry, owns a can company or anything like that. So they
10 can assess this --

11 THE COURT: Well, you have already disclosed a lot
12 about the buyer. You may not have given the name, but you
13 have already given them a lot to work with.

14 What I am concerned about is -- I will tell you
15 what -- I mean, obviously, you guys are going back and forth
16 in what is turning out to be a discovery dispute. I
17 recognize one when I see it. I think the most I can do at
18 this point is say we will go ahead with the hearing as
19 scheduled. It will concern the issues that I understood it
20 to concern before I came out here today, i.e., we will not
21 be discussing any divestiture of plants that one side sort
22 of knows about and the other side doesn't. It's not going
23 to be fruitful for me to hear any testimony on that.

24 What I would urge you to do, and I'm not sure my
25 sitting up here and going through this any further today

1 will be a help to you, but what I would urge you to do -- if
2 necessary, I would -- if there were a way I could order you
3 to do it, I would -- is to sit down and talk about this in
4 the coming three weeks. I think the FTC needs to express a
5 willingness to examine the plans. I think the defendants
6 need an opportunity to put those plans in as much detail as
7 they can so that they are presenting something -- I use the
8 word "definitive" in a sort of sliding scale here -- but
9 enough for them to be able to do some evaluating of what
10 you're suggesting. I think it's very important that you
11 discuss this because you are going to be spending three
12 days, and you may get a ruling that turns out to be an
13 advisory opinion because, in fact, this is all going to go
14 away if you like the divestiture plans.

15 I'm going to leave the hearing as scheduled. If
16 the FTC hears enough to make them think that a week or two
17 would help, then you should call my chambers and see what
18 the alternatives are.

19 I'm trying to be realistic in the fact that you
20 have witnesses scheduled, many of whom, you know, you have
21 prepared for these three days. I don't know how flexible
22 these people are. I realized there is an end line to this
23 whole thing, but, frankly, it would do you more good than
24 harm if the end result were that the whole thing went away
25 and the divestiture plan was approved, and then the January

1 date would be fine. But right now I am going to leave the
2 hearing date as scheduled, but I made a ruling on what we
3 are going to hear at the hearing date, and I really urge
4 counsel to -- I mean, I don't know if I need to set a date
5 for you both -- both -- everybody else here -- to meet. I
6 don't think I need to do that. You all know what is at
7 stake here. I just urge you to get together, talk about the
8 new plan.

9 Forget about the fact that it was sprung on you at
10 the last moment, Mr. Hassi. Forget -- I mean, I realize to
11 a litigator that's a bad thing, but right now you've got
12 your hearing date and you've got your limited ruling. Now
13 is the time to switch gears and see if this thing -- if
14 there is a chance this can go away.

15 If you are working something out, the first call
16 you need to make is to my chambers so that we don't spend
17 time on this, okay? But otherwise, I will see you here in a
18 month, or three weeks, or whatever we've got.

19 Now, housekeeping.

20 MR. HASSI: Housekeeping, and, Your Honor, I
21 didn't mean to suggest that -- I mean, this was sprung on us
22 at the last minute. We have had constructive discussions
23 and we will continue to do that.

24 THE COURT: Okay.

25 MR. HASSI: The way this was approached, we think,

1 was the wrong way to approach it.

2 THE COURT: Okay.

3 MR. HASSI: But housekeeping issues. The first
4 question I had, Your Honor mentioned concerns before you
5 came out here this morning, that we have a limited amount of
6 time before Your Honor. If there are specific issues you
7 would like us to address -- I mean, it's true we've lined up
8 certain witnesses to come, and we have our own conception of
9 what we think is important for you to hear. If there are
10 specific questions you want answered, or things you want
11 addressed, we would be happy to try and address those in the
12 limited time we have before Your Honor.

13 THE COURT: I think you both hit on the issues
14 that are going to be the important ones, and that's market,
15 the production market and that geographic market, though I
16 think one is probably of more concern than the other. I
17 think it is what -- what effect aluminum cans have on this,
18 and plastic.

19 MR. HASSI: We thought that might be one of your
20 questions, your Honor.

21 In terms of the hearing dates themselves, do you
22 want openings and closings, or do you want to jump right in
23 with testimony? We didn't know if you had a preference. We
24 think it would be helpful, before putting a witness on the
25 stand, to give you sort of an overview of what we're going

1 to try to present over the two-and-a-half days.

2 THE COURT: I think it be would very helpful, but
3 how much time do you need? Half-hour each, would that do
4 it?

5 MR. HASSI: Could we say 45 minutes?

6 THE COURT: Forty-five minutes. Well, let me ask
7 you, could you do that in writing, or do you think it would
8 be more helpful to -- would you be using demonstratives?

9 MR. HASSI: We would be using demonstratives, and
10 I think it would be more helpful to walk through some
11 exhibits.

12 THE COURT: Okay, 45 minutes.

13 MR. HASSI: Forty-five minutes is fine. Thank
14 you, Your Honor.

15 In terms of closing, sometimes those are done at
16 the end of the hearing dates, and sometimes they are done
17 after the findings of fact. Our end, do you have a --

18 THE COURT: Why don't we wait and I'll let you
19 know. Why don't we wait. First of all, let's see the
20 timing; and, second of all, it may be useful after I get the
21 findings of fact to have the closings.

22 MR. HASSI: Okay.

23 THE COURT: All right.

24 MR. HASSI: One of the questions we had was the
25 courtroom technology. I assume we will be in this courtroom

1 and there's somebody that we can liaise with in your absence
2 to --

3 THE COURT: You're looking at her right now.

4 MR. HASSI: Okay. We'll be in touch with her.

5 THE COURT: She will help you, and both of you
6 should make an appointment to come see her and arrange
7 things.

8 MR. HASSI: We will do that, Your Honor.

9 Confidentiality issues, there -- because this is
10 dealing with on-going business, customers, contracts,
11 prices -- there are a lot -- we will try to do as much as we
12 can to sort of sanitize the presentation so that we're not
13 discussing that kind of thing, but I'm not certain that we
14 can remove all of it. Does Your Honor have a preference in
15 terms of the way you handle information that parties, and in
16 particular third parties witnesses, care about maintaining
17 confidentiality over?

18 THE COURT: Well, testimony is a little more
19 difficult. I don't see a problem with exhibits because you
20 can use sanitized exhibits here, and then have a separate
21 set that you give to either the clerk or my law clerk that
22 you want us to see in chambers. Testimony, we'll have to
23 play it as it goes. We'll see how we can handle that.

24 MR. HASSI: Yes, Your Honor.

25 THE COURT: I don't know how much testimony there

1 is going to be that really will be touching on this. I
2 can't tell yet, but you will let me know and we will work it
3 out.

4 MR. HASSI: Okay, Your Honor. Then, finally, if
5 Your Honor has a preference in terms of filings, things on
6 paper, things on three-ring binders, that sort of thing. If
7 Your Honor wants to let us know, we'll --

8 THE COURT: Three-ring binders is my preference
9 because I still like paper.

10 MR. HASSI: I do, too, Your Honor.

11 THE COURT: And if you could give us a set each,
12 you know, plaintiff's set and defendant's set, and I don't
13 know if the defendants are going to have a joint set.

14 I would assume you will have one set, right?

15 MR. SCHWED: Yes, Your Honor.

16 THE COURT: That really will keep things a lot
17 more simple. So let's just call it the defendants' set, and
18 just number yours consecutively, and plaintiff's set. I
19 think that's probably the easiest way. Just have them for
20 me and I can flip through them. Or if they're going to be
21 on here, it may be easier.

22 MR. HASSI: We'll try to do a lot of it
23 electronically, but if -- I was also thinking of exhibits to
24 the brief. I know we provided a three-ring binder, but that
25 was -- we had asked Judge Collyer what she wanted, and I

1 just want to make sure that we are providing what is most
2 useful to you.

3 THE COURT: Okay.

4 MR. HASSI: Those are all of the questions I had,
5 your Honor. Unless you have anything else --

6 THE COURT: Did you have any housekeeping matters?

7 MR. SCHWED: Only one quick thing, Your Honor.
8 I'm just trying to get a -- so we can plan out our
9 witnesses, just how long is a trial day, just in terms of
10 what time you start, what time you end?

11 THE COURT: I knew you were going to ask me that.
12 I'm trying to -- I'm looking at the person on whom it is the
13 hardest, which is our court reporter.

14 I am perfectly willing to start out -- well, what
15 time are we starting on Thursday? Is it 2:00?

16 THE DEPUTY CLERK: Yes, Your Honor.

17 THE COURT: So let's go 2:00 to 5:00 on Thursday.
18 Let's start with 9:00 to 4:30 on Friday. Monday would be, I
19 guess, 9:00 to 4:30, too. I would like to take an hour and
20 a-half for lunch, but that's not really necessary. You
21 know, I will be asking you all how we're doing. We can cut
22 the lunch hour to an hour. I'm just thinking back to my
23 trial days. It's easy for me to set up something like, you
24 know, 9:00 to 5:00 and an hour for lunch and, you know, 15
25 minutes. You guys are the ones who have to go back and do

1 some work in the evenings, and maybe even need a lunch hour
2 to talk -- a longer lunch hour to talk to your witnesses and
3 things. So you tell me, would you prefer an hour and a-half
4 for lunch?

5 MR. SCHWED: Personally, I think, given that we
6 are on a very compressed schedule, I would suggest that we
7 assume an hour, but we can see how the time is going as we
8 progress.

9 THE COURT: Okay.

10 MR. HASSI: I agree.

11 MR. SCHWED: But this is very helpful, at least,
12 just to give us -- as Your Honor mentioned, this can be
13 flexible, but this at least gives us some guideposts for how
14 much time we have.

15 THE COURT: Yes. I mean, we can stretch from 4:30
16 to 5:00, and we can -- but let's start out thinking that
17 we'll end at 4:30. We'll start at 9:00 and we'll have an
18 hour for lunch.

19 Does that fit? I mean, do you think you can fit
20 within that? But the first day we will go from 2:00 to 5:00
21 because we're starting late, okay?

22 MR. HASSI: Yes, Your Honor.

23 THE COURT: Okay. See you back here unless, of
24 course, you work it all out. Just don't work it out after I
25 give you a decision and go through all that trouble. Work

1 it out sometime in between, okay?

2 MR. SCHWED: Thank you, Your Honor.

3 MR. HASSI: Thank you, Your Honor.

4 (Whereupon, the proceedings in the above-entitled
5 matter were concluded at 10:59 a.m.)
6
7

8 **CERTIFICATE OF REPORTER**

9 I certify that the foregoing is a correct
10 transcript from the record of proceedings in the
11 above-entitled matter.
12
13

14 _____
15 Theresa M. Sorensen, CVR-CM
16 Official Court Reporter
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EXHIBIT 2

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

In the Matter of

**Ardagh Group S.A.,
a public limited liability company, and**

**Saint-Gobain Containers, Inc.,
a corporation, and**

**Compagnie de Saint-Gobain,
a corporation.**

Docket No. 9356

RESPONDENTS' FINAL WITNESS LIST

This list designates the witnesses whom Ardagh Group S.A. ("Ardagh"), Compagnie de Saint-Gobain, and Saint-Gobain Containers, Inc. (collectively, the "Respondents") currently contemplate as potential witnesses to testify in the above-captioned matter, either orally as live witnesses or by deposition and/or investigational hearing transcript or declaration, based on the information available on the undersigned date. Subject to the limitations in the Scheduling Order entered in this matter, Respondents reserve the right:

- A. To present testimony, orally by live witness or by deposition transcript or declaration, from any person who has been or may be identified by Complaint Counsel as a potential witness in this matter.
- B. To call the custodian of records of any non-Party from whom documents or records have been obtained – including but not limited to those non-Parties listed below – to the extent necessary to authenticate documents in the event a stipulation cannot be reached concerning the authentication of non-Party documents.
- C. Not to call at the hearing any of the witnesses listed below.
- D. To call any of these or other witnesses for rebuttal testimony.

Subject to these reservations of rights, Respondents' final witness list is as follows:

PARTY WITNESS LIST

1. Reiner Brand – Sales Director for European Operations of Ardagh. Mr. Brand is involved in negotiating sales contracts with glass bottle customers.
2. Paul Coulson – Chairman of the Board of Ardagh. Mr. Coulson is responsible for overseeing Ardagh's management.
3. James Fredlake – President of Ardagh Glass Americas. Until approximately November 2013, Mr. Fredlake was responsible for managing Ardagh Glass Americas.
4. Robert Ganter – General Manager and Senior Vice President of the Beer Sector of Activity for Saint-Gobain Containers, Inc. Mr. Ganter is responsible for beer container manufacturing and sales at Saint-Gobain Containers, Inc.
5. Joseph Grewe – President and Chief Executive Officer of Saint-Gobain Containers, Inc. Mr. Grewe is responsible for managing Saint-Gobain Containers, Inc.
6. Michael Leahy – Operational Excellence Director of Ardagh. Mr. Leahy is responsible for overseeing Ardagh's program to improve operational metrics.
7. Jarrell A. Reeves – Vice President of Sales of Saint-Gobain Containers, Inc. Mr. Reeves is responsible for food, beverage, and spirits sales at Saint-Gobain Containers, Inc.
8. J. Steven Rhea – Senior Vice President, Strategic Development, of Saint-Gobain Containers, Inc. Mr. Rhea is responsible for purchasing, distribution, marketing, and corporate quality at Saint-Gobain Containers, Inc.
9. John Riordan – Finance Director of Ardagh. Mr. Riordan is responsible for the financial management of Ardagh.
10. Niall Wall – Chief Executive Officer of Ardagh. Mr. Wall is responsible for managing Ardagh.
11. Kenneth Wilkes – Chief Financial Officer of Ardagh Glass Americas. Until approximately November 2013, Mr. Wilkes was responsible for the financial management of Ardagh Glass Americas.

EXPERT WITNESS LIST

12. Dr. Chetan Sanghvi – Senior Vice President at NERA Economic Consulting. Respondents expect that Dr. Sanghvi will testify about the relevant markets, market structure, competitive effects, barriers to entry, and efficiencies of the Proposed Transaction.
13. Michael Kallenberger – consultant with First Key Consulting Inc., a brewery consultancy. Respondents expect that Mr. Kallenberger will testify about trends involving glass and non-glass beer containers.
14. Dr. Raymond Bourque – President of RAY-PAK, Inc., a packaging innovation and technology consultancy. Respondents expect that Dr. Bourque will testify about trends involving glass and non-glass spirits containers.
15. Robert Wallace – Managing Partner of Wallace Church Inc., a global brand identity strategy and package design consultancy. Respondents expect that Mr. Wallace will testify about trends involving glass and non-glass beer and spirits containers.

THIRD PARTY WITNESS LIST

16. 21st Amendment Brewery (“21st Amendment”) – Ryan Frank, Brewery Production Manager of 21st Amendment, and/or a representative of 21st Amendment knowledgeable regarding 21st Amendment’s strategy and practices related to beer containers.
17. Abita Brewing Company (“Abita”) – David Blossman, President of Abita, and/or a representative of Abita knowledgeable regarding Abita’s strategy and practices related to beer containers.
18. Amcor Rigid Plastics (“Amcor”) – Frederick Piercy Jr., Business Director at Amcor, and/or a representative of Amcor knowledgeable regarding Amcor’s strategy and practices related to beer and spirits containers.
19. Anchor Hocking Company (“Anchor Hocking”) – Umberto Filice, Senior Vice President of Anchor Hocking, and/or a representative of Anchor Hocking knowledgeable regarding Anchor Hocking’s strategy and practices related to spirits containers.
20. Anheuser-Busch InBev North America (“ABI”) – Lee Keathley, Vice President of Procurement at ABI, and/or a representative of ABI knowledgeable regarding ABI’s strategy and practices related to beer containers.
21. August Schell Brewing Company (“August Schell”) – Theadore Marti, President of August Schell, and/or a representative of August Schell knowledgeable regarding August Schell’s strategy and practices related to beer containers.

22. Ball Corporation ("Ball") – Bruce Doelling, Director of Sales North America, and/or a representative of Ball knowledgeable regarding Ball's strategy and practices related to beer containers.
23. Beam Inc. ("Beam") – Kenneth Edwards, Vice President and Chief Procurement Officer, and/or a representative of Beam knowledgeable regarding Beam's strategy and practices related to spirits containers.
24. Big Sky Brewing Company ("Big Sky") – Kevin Keeter, Purchasing Manager for Big Sky, and/or a representative of Big Sky knowledgeable regarding Big Sky's strategy and practices related to beer containers.
25. The Boston Beer Company ("Boston Beer") – Judy Embree, Senior Director of Procurement at Boston Beer, Corey Lewis, Director of Strategy, Research, and Business Support at Boston Beer, and/or a representative of Boston Beer knowledgeable regarding Boston Beer's strategy and practices related to beer containers.
26. Boulevard Brewing Company ("Boulevard") – Jeffery Krum, Chief Financial Officer at Boulevard, and/or a representative of Boulevard knowledgeable regarding Boulevard's strategy and practices related to beer containers.
27. Brown-Forman Corporation ("Brown-Forman") – Tim Nall, Vice President at Brown-Forman, and/or a representative of Brown-Forman knowledgeable regarding Brown-Forman's strategy and practices related to spirits containers.
28. Bruni Glass ("Bruni") – Ray Kor, Chief Financial Officer, and/or a representative of Bruni knowledgeable regarding Bruni's strategy and practices related to spirits containers.
29. Cigar City Brewing ("Cigar City") – Joey Redner, Founder and Chief Executive Officer of Cigar City, and/or a representative of Cigar City knowledgeable regarding Cigar City's strategy and practices related to beer containers.
30. Constellation Brands, Inc. ("Constellation") – Peter Lijewski, Vice President of Procurement at Constellation, and/or a representative of Constellation knowledgeable regarding Constellation's strategy and practices related to spirits containers.
31. Diageo North America, Inc. ("Diageo") – Rick Thielen, Senior Vice President of Procurement, and/or a representative of Diageo knowledgeable regarding Diageo's strategy and practices related to spirits containers.
32. Founders Brewing Company ("Founders") – Brad Stevenson, Vice President of Operations at Founders, and/or a representative of Founders knowledgeable regarding Founders's strategy and practices related to beer containers.

33. F.X. Matt Brewing Company ("Matt Brewing") – Fred Matt, President of Matt Brewing, and/or a representative of Matt Brewing knowledgeable regarding Matt Brewing's strategy and practices related to beer containers.
34. Gamer Packaging, Inc. ("Gamer") – Kenneth Gamer, President of Gamer, and/or a representative of Gamer knowledgeable regarding Gamer's strategy and practices relating to beer and spirits containers.
35. The Gambrinus Company ("Gambrinus") – John Horan, Director of Tax and Assistant Treasurer at Gambrinus, and/or a representative of Gambrinus knowledgeable regarding Gambrinus's strategy and practices related to beer containers.
36. Glass Packaging Institute – Lynn Bragg, President of the Glass Packaging Institute regarding historical performance and trends in the glass packaging industry and the use, or non-use, of glass for food and beverage containers.
37. Harpoon Brewery ("Harpoon") – Daniel Kenary, President of Harpoon, Warren Dibble, Vice President and Chief Financial Officer of Harpoon, and/or a representative of Harpoon knowledgeable regarding Harpoon's strategy and practices related to beer containers.
38. Heaven Hill Distilleries ("Heaven Hill") – Max Shapira, President of Heaven Hill, and/or a representative of Heaven Hill knowledgeable regarding Heaven Hill's strategy and practices related to spirits containers.
39. The Lagunitas Brewing Company ("Lagunitas") – Leon Sharyon, Chief Financial Officer of Lagunitas, and/or a representative of Lagunitas knowledgeable regarding Lagunitas's strategy and practices related to beer containers.
40. MillerCoors, LLC ("MillerCoors") – Jim Sheehy, Vice President of Procurement at MillerCoors, David Kroll, Vice President of Innovation and Insights at MillerCoors, and/or a representative of MillerCoors knowledgeable regarding MillerCoors's strategy and practices related to beer containers.
41. Moosehead Breweries Limited ("Moosehead") – Andrew Oland, President of Moosehead, and/or a representative of Moosehead knowledgeable regarding Moosehead's strategy and practices related to beer containers.
42. New Belgium Brewing Company ("New Belgium") – David Larsen, Packaging and Materials Buyer at New Belgium, and/or a representative of New Belgium knowledgeable regarding New Belgium's strategy and practices related to beer containers.
43. Oskar Blues Brewing Company ("Oskar Blues") – Daniel O'Connor, Chief Financial Officer of Oskar Blues, and/or a representative of Oskar Blues knowledgeable regarding Oskar Blues' strategy and practices related to beer containers.

44. Owens-Illinois, Inc. ("Owens-Illinois") – Anthony Caracciolo, Vice President of Global Sales at Owens-Illinois, and/or a representative of Owens-Illinois knowledgeable regarding Owens-Illinois's strategy and practices related to beer and spirits containers.
45. Pernod Ricard ("Pernod") – Adam Gelles, Vice President of New Product Development and Purchasing at Pernod, and/or a representative of Pernod knowledgeable regarding Pernod's strategy and practices related to spirits containers.
46. Representative(s) of the financial buyer of any divested assets knowledgeable regarding the financial buyer's business plan with respect to any divested assets.
47. Sazerac Company ("Sazarec") – Philip Cissell, Vice President of Purchasing at Sazerac, Steven Wyant, Vice President of Sales and Marketing at Sazerac, and/or a representative of Sazerac most knowledgeable regarding Sazerac's strategy and practices related to spirits containers.
48. Sierra Nevada Brewing Company ("Sierra Nevada") – Albert Spinelli, Director of Operations at Sierra Nevada, and/or a representative of Sierra Nevada knowledgeable regarding Sierra Nevada's strategy and practices related to beer containers.
49. United States Distilled Products ("U.S.D.P.") – Patricia Pelzer, Chief Financial Officer of U.S.D.P., and/or a representative of U.S.D.P. knowledgeable regarding U.S.D.P.'s strategy and practices related to spirits containers.
50. Vitro Packaging, LLC ("Vitro") – John Shaddox, President of FIC Exports, and/or a representative of Vitro knowledgeable regarding Vitro's strategy and practices related to beer and spirits containers.
51. Whole Foods Markets, Inc. ("Whole Foods") – Doug Bell, Global Beverage Buyer at Whole Foods, and/or a representative of Whole Foods knowledgeable regarding Whole Foods' strategy for buying, marketing, and selling beer and spirits.
52. Yuengling Beer Company ("Yuengling") – Dick Yuengling, Jr., President of Yuengling, David Casinelli, Chief Operating Officer of Yuengling, and/or a representative of Yuengling knowledgeable regarding Yuengling's strategy and practices related to beer containers.

Dated: New York, New York
November 18, 2013

SHEARMAN & STERLING LLP

By: /s/ Richard F. Schwed

Richard F. Schwed
Alan S. Goudiss
Wayne Dale Collins
Lisl Joanne Dunlop
SHEARMAN & STERLING LLP
599 Lexington Avenue
New York, NY 10022
Telephone: (212) 848 4000
Facsimile: (212) 848 4173
agoudiss@shearman.com
rschwed@shearman.com
wcollins@shearman.com
ldunlop@shearman.com

Heather L. Kafele
SHEARMAN & STERLING LLP
801 Pennsylvania Avenue N.W.
Washington, DC 20004
Telephone: (202) 508 8000
Facsimile: (202) 508 8100
hkafele@shearman.com

*Counsel for Respondent Ardagh Group
S.A.*

CRAVATH, SWAINE & MOORE LLP,

by

/s/ Christine A. Varney

Christine A. Varney
Sandra C. Goldstein
Yonatan Even
Members of the Firm

Attorney for Defendants
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000
cvarney@cravath.com

*Counsel for Respondents Compagnie
de Saint-Gobain and Saint-Gobain
Containers, Inc.*

I, Jason M. Swergold, an associate at Shearman & Sterling LLP, hereby certify that on November 18, 2013, I caused the foregoing document to be served by electronic mail on:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW, Rm. H-110
Washington, DC 20580

I further certify that on November 18, 2013, I caused the foregoing document to be served by electronic mail on the persons listed below.

Edward D. Hassi
Catharine M. Moscatelli
Brendan J. McNamara
Sebastian Lorigo
Victoria Lippincott
Meredith Robinson
Devon Kelly
James Abell
Teresa Martin
Amanda Hamilton
U.S. Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
ehassi@ftc.gov
cmoscatelli@ftc.gov
bmcnamara@ftc.gov
slorgio@ftc.gov
vlippincott@ftc.gov
mrobinson@ftc.gov
dkelly2@ftc.gov
jabell@ftc.gov
tmartin@ftc.gov
ahamilton1@ftc.gov

Complaint Counsel

November 18, 2013

By: /s/ Jason M. Swergold
Jason M. Swergold

EXHIBIT 3

In the Matter of)
)
)
Ardagh Group S.A.,)
a public limited liability company, and) DOCKET NO. 9356
)
Saint-Gobain Containers, Inc.,)
a corporation, and)
)
Compagnie de Saint-Gobain,)
a corporation,)
Respondents.)
)

In accordance with the September 30, 2013 Commission Order and due to the partial shutdown of the federal government from October 1-16, 2013, the remaining dates in the August 2, 2013 Scheduling Order are hereby revised as follows:

- October 29, 2013 - Deadline for Complaint Counsel to provide expert witness reports.

- November 1, 2013 - Complaint Counsel provides to Respondents' Counsel its final proposed witness and exhibit lists, including depositions or designated portions thereof, copies of all exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), Complaint Counsel's basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness.

Complaint Counsel serves courtesy copies on ALJ of its final proposed witness and exhibit lists, its basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including its expert witnesses.

- November 15, 2013 - Deadline for Respondents' Counsel to provide expert witness reports. Respondents' expert report shall include (without

- limitation) rebuttal, if any, to Complaint Counsel's expert witness report(s).
- November 18, 2013 - Respondents' Counsel provides to Complaint Counsel its final proposed witness and exhibit lists, including depositions or designated portions thereof, copies of all exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), Respondents' basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness.
- Respondents' Counsel serves courtesy copies on ALJ its final proposed witness and exhibit lists, its basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including its expert witnesses.
- November 19, 2013 - Parties that intend to offer confidential materials of an opposing party or non-party as evidence at the hearing must provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b). *See* Additional Provision 7.
- November 25, 2013 - Exchange deposition transcript counter-designations.
- November 26, 2013 - Complaint Counsel to identify rebuttal expert(s) and provide rebuttal expert report(s). Any such reports are to be limited to rebuttal of matters set forth in Respondents' expert reports. If material outside the scope of fair rebuttal is presented, Respondents will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal expert reports or seeking leave to submit surrebuttal expert reports on behalf of Respondents).
- November 26, 2013 - Deadline for filing motions for *in camera* treatment of proposed trial exhibits.
- December 3, 2013 - Deadline for depositions of experts (including rebuttal experts) and exchange of expert related exhibits.
- December 4, 2013 - Deadline for filing motions *in limine* to preclude admission of evidence. *See* Additional Provision 9.
- December 4, 2013 - Deadline for filing responses to motions for *in camera* treatment of proposed trial exhibits.
- December 5, 2013 - Deadline for filing motions for *in camera* treatment of proposed expert related exhibits.

- December 11, 2013 - Deadline for filing responses to motions *in limine* to preclude admissions of evidence.
- December 11, 2013 - Exchange and serve courtesy copy on ALJ objections to final proposed witness lists and exhibit lists.
- December 11, 2013 - Exchange objections to the designated testimony to be presented by deposition and counter-designations.
- December 12, 2013 - Deadline for filing responses to motions for *in camera* treatment of proposed expert related exhibits.
- December 12, 2013 - Complaint Counsel files pretrial brief supported by legal authority.
- December 12, 2013 - Exchange proposed stipulations of law, facts, and authenticity.
- December 13, 2013 - Respondents' Counsel files pretrial brief supported by legal authority.
- December 16, 2013 - File final stipulations of law, facts, and authenticity. Any subsequent stipulations may be offered as agreed by the parties.
- December 17, 2013 - Final prehearing conference to begin at 10:00 a.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

The parties are to meet and confer prior to the conference regarding trial logistics and proposed stipulations of law, facts, and authenticity of exhibits and any designated deposition testimony. To the extent the parties stipulate to certain issues, the parties shall prepare a Joint Exhibit which lists the agreed stipulations.

Counsel may present any objections to the final proposed witness lists and exhibits, including to any designated deposition testimony. Trial exhibits will be admitted or excluded to the extent practicable. To the extent the parties agree to the admission of each other's exhibits, the parties shall prepare a Joint Exhibit which lists the exhibits to which neither side objects. Any Joint Exhibit will be signed by each party with no signature for the judge required.

- December 19, 2013 - Commencement of Hearing, to begin at 10:00 a.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

All Additional Provisions to the August 2, 2013 Scheduling Order remain in effect.

ORDERED:

Dm Chappell
D. Michael Chappell
Chief Administrative Law Judge

Date: October 18, 2013

EXHIBIT 4

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

In the Matter of)

Ardagh Group S.A.,)
a public limited liability company, and)

Saint-Gobain Containers, Inc.,)
a corporation, and)

Compagnie de Saint-Gobain,)
a corporation,)
Respondents.)

DOCKET NO. 9356

SCHEDULING ORDER

- August 9, 2013 - Complaint Counsel provides preliminary witness list (not including experts) with a brief summary of the proposed testimony.
- August 16, 2013 - Respondents' Counsel provides preliminary witness lists (not including experts) with a brief summary of the proposed testimony.
- August 20, 2013 - Complaint Counsel provides expert witness list.
- August 23, 2013 - Deadline for issuing document requests, interrogatories and subpoenas *duces tecum*, except for discovery for purposes of authenticity and admissibility of exhibits.
- August 30, 2013 - Respondents' Counsel provides expert witness list.
- September 6, 2013 - Deadline for issuing requests for admissions, except for requests for admissions for purposes of authenticity and admissibility of exhibits.
- September 23, 2013 - Close of discovery, other than discovery permitted under Rule 3.24(a)(4), depositions of experts, and discovery for purposes of authenticity and admissibility of exhibits.
- September 23, 2013 - Deadline for filing "[m]otions to dismiss filed before the

evidentiary hearing, motions to strike, and motions for summary decision” pursuant to Rule 3.22(a).

- October 4, 2013 - Deadline for Complaint Counsel to provide expert witness reports.
- October 7, 2013 - Complaint Counsel provides to Respondents’ Counsel its final proposed witness and exhibit lists, including depositions or designated portions thereof, copies of all exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), Complaint Counsel’s basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness.

Complaint Counsel serves courtesy copies on ALJ of its final proposed witness and exhibit lists, its basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including its expert witnesses.
- October 21, 2013 - Deadline for Respondents’ Counsel to provide expert witness reports. Respondents’ expert report shall include (without limitation) rebuttal, if any, to Complaint Counsel’s expert witness report(s).
- October 23, 2013 - Respondents’ Counsel provides to Complaint Counsel its final proposed witness and exhibit lists, including depositions or designated portions thereof, copies of all exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), Respondents’ basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness.

Respondents’ Counsel serves courtesy copies on ALJ its final proposed witness and exhibit lists, its basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including its expert witnesses.
- October 24, 2013 - Parties that intend to offer confidential materials of an opposing party or non-party as evidence at the hearing must provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b). See Additional Provision 7.
- October 28, 2013 - Exchange deposition transcript counter-designations.
- October 31, 2013 - Complaint Counsel to identify rebuttal expert(s) and provide rebuttal expert report(s). Any such reports are to be limited to rebuttal of matters set forth in Respondents’ expert reports. If material outside the scope of fair rebuttal is presented,

Respondents will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal expert reports or seeking leave to submit surrebuttal expert reports on behalf of Respondents).

- October 31, 2013 - Deadline for filing motions for *in camera* treatment of proposed trial exhibits.
- November 6, 2013 - Deadline for depositions of experts (including rebuttal experts) and exchange of expert related exhibits.
- November 7, 2013 - Deadline for filing motions *in limine* to preclude admission of evidence. *See* Additional Provision 9.
- November 7, 2013 - Deadline for filing responses to motions for *in camera* treatment of proposed trial exhibits.
- November 8, 2013 - Deadline for filing motions for *in camera* treatment of proposed expert related exhibits.
- November 14, 2013 - Deadline for filing responses to motions *in limine* to preclude admissions of evidence.
- November 14, 2013 - Exchange and serve courtesy copy on ALJ objections to final proposed witness lists and exhibit lists.
- November 14, 2013 - Exchange objections to the designated testimony to be presented by deposition and counter-designations.
- November 15, 2013 - Deadline for filing responses to motions for *in camera* treatment of proposed expert related exhibits.
- November 15, 2013 - Complaint Counsel files pretrial brief supported by legal authority.
- November 15, 2013 - Exchange proposed stipulations of law, facts, and authenticity.
- November 19, 2013 - Respondents' Counsel files pretrial brief supported by legal authority.
- November 20, 2013 - File final stipulations of law, facts, and authenticity. Any subsequent stipulations may be offered as agreed by the parties.
- November 21, 2013 - Final prehearing conference to begin at 10:00 a.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

The parties are to meet and confer prior to the conference regarding trial logistics and proposed stipulations of law, facts, and authenticity of exhibits and any designated deposition testimony. To the extent the parties stipulate to certain issues, the parties shall prepare a Joint Exhibit which lists the agreed stipulations.

Counsel may present any objections to the final proposed witness lists and exhibits, including to any designated deposition testimony. Trial exhibits will be admitted or excluded to the extent practicable. To the extent the parties agree to the admission of each other's exhibits, the parties shall prepare a Joint Exhibit which lists the exhibits to which neither side objects. Any Joint Exhibit will be signed by each party with no signature for the judge required.

December 2, 2013 - Commencement of Hearing, to begin at 10:00 a.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

ADDITIONAL PROVISIONS

1. For all papers that are required to be filed with the Office of the Secretary, the parties shall serve a courtesy copy on the Administrative Law Judge by electronic mail to the following email address: oalj@ftc.gov. The courtesy copy should be transmitted at or shortly after the time of any electronic filing with the Office of the Secretary. The oalj@ftc.gov email account is to be used only for courtesy copies of pleadings filed with the Office of the Secretary and for documents specifically requested of the parties by the Office of Administrative Law Judges. Certificates of service for any pleading shall not include the OALJ email address, or the email address of any OALJ personnel, including the Chief ALJ, but rather shall designate only 600 Pennsylvania Ave., NW, Rm. H-110 as the place of service. The subject line of all electronic submissions to oalj@ftc.gov shall set forth only the Docket Number and the title of the submission. Service by email shall be followed promptly by delivery of one hard copy by the next business day. In any instance in which a courtesy copy of a pleading for the Administrative Law Judge cannot be effectuated by electronic mail, counsel shall hand deliver a hard copy to the Office of Administrative Law Judges. Discovery requests and discovery responses shall not be submitted to the Office of Administrative Law Judges. The parties are reminded that all filings with the Office of the Secretary, including electronic filings, are governed by the provisions of Commission Rule 4.3(d), which states: "Documents must be received in the Office of the Secretary of the Commission by 5:00 p.m. Eastern time to be deemed filed that day. Any documents received by the agency after 5:00 p.m. will be deemed filed the following business day."

2. The parties shall serve each other by electronic mail and shall include "Docket 9356" in the re line and all attached documents in .pdf format. Complaint Counsel and Respondents' Counsel agree to waive their rights to Service under 16 C.F.R. § 4.4(a)-(b).

3. Each pleading that cites to unpublished opinions or opinions not available on LEXIS or WESTLAW shall include such copies as exhibits.

4. Each motion (other than a motion to dismiss or a motion for summary decision) shall be accompanied by a separate signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement. In addition, pursuant to Rule 3.22(g), for each motion to quash filed pursuant to § 3.34(c), each motion to compel or determine sufficiency pursuant to § 3.38(a), or each motion for sanctions pursuant to § 3.38(b), the required signed statement must also "recite the date, time, and place of each . . . conference between counsel, and the names of all parties participating in each such conference." Motions that fail to include such separate statement may be denied on that ground.

5. Rule 3.22(c) states:

All written motions shall state the particular order, ruling, or action desired and the grounds therefor. Memoranda in support of, or in opposition to, any dispositive motion shall not exceed 10,000 words. Memoranda in support of, or in opposition to, any other motion shall not exceed 2,500 words. Any reply in support of a dispositive motion shall not exceed 5,000 words and any reply in support of any other motion authorized by the Administrative Law Judge or the Commission shall not exceed 1,250 words.

If a party chooses to submit a motion without a separate memorandum, the word count limits of 3.22(c) apply to the motion. If a party chooses to submit a motion with a separate memorandum, absent prior approval of the ALJ, the motion shall be limited to 750 words, and the word count limits of 3.22(c) apply to the memorandum in support of the motion. This provision applies to all motions filed with the Administrative Law Judge, including those filed under Rule 3.38.

6. If papers filed with the Office of the Secretary contain *in camera* or confidential material, the filing party shall mark any such material in the complete version of their submission with **{bold font and braces}**. 16 C.F.R. § 3.45(e). Parties shall be aware of the rules for filings containing such information, including 16 C.F.R. § 4.2.

7. If a party intends to offer confidential materials of an opposing party or non-party as evidence at the hearing, in providing notice to such non-party, the parties are required to inform each non-party of the strict standards for motions for *in camera* treatment for evidence to be introduced at trial set forth in 16 C.F.R. § 3.45, explained in *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 (Dec. 23, 1999); *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 157 (Nov. 22, 2000) and 2000 FTC LEXIS 138 (Sept. 19, 2000); *In re Basic Research, Inc.*, 2006 FTC LEXIS 14 (Jan. 25, 2006), and summarized herein. Motions also must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the documents. *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (April 23, 2004). Each party or non-party that files a motion for *in camera* treatment shall provide one copy of the documents for which *in camera* treatment is sought to the Administrative Law Judge.

8. If the expert reports prepared for either party contain confidential information that has been granted *in camera* treatment, the party shall prepare two versions of its expert report(s) in accordance with Provision 6 of this Scheduling Order and 16 C.F.R. § 3.45(e).

9. Motions *in limine* are discouraged. Motion *in limine* refers “to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered.” *In re Daniel Chapter One*, 2009 FTC LEXIS 85, *18-20 (April 20, 2009) (citing *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984)). Evidence should be excluded in advance of trial on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds. *Id.* (citing *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); *Sec. Exch. Comm’n v. U.S. Environmental, Inc.*, 2002 U.S. Dist. LEXIS 19701, at *5-6 (S.D.N.Y. Oct. 16, 2002)). Moreover, the risk of prejudice from giving undue weight to marginally relevant evidence is minimal in a bench trial such as this where the judge is capable of assigning appropriate weight to evidence.

10. Compliance with the scheduled end of discovery requires that the parties serve subpoenas and discovery requests sufficiently in advance of the discovery cut-off and that all responses and objections will be due on or before that date, unless otherwise noted. Any motion to compel responses to discovery requests shall be filed within 30 days of service of the responses and/or objections to the discovery requests or within 20 days after the close of discovery, whichever first occurs.

11. Each party is limited to 50 document requests, including all discrete subparts; 25 interrogatories, including all discrete subparts; and 50 requests for admissions including all discrete subparts except that there shall be no limit on the number of requests for admission for authentication and admissibility of exhibits. Any single interrogatory inquiring as to a request for admissions response may address only a single such response. There is no limit to the number of sets of discovery requests the parties may issue, so long as the total number of each type of discovery request, including all subparts, does not exceed these limits. Within seven days of service of a document request, the parties shall confer about the format for the production of electronically stored information. All discovery taken in connection with *FTC v. Ardagh Group, S.A.*, Case No. 13-CV-1021 (RMC) (D.D.C.) (the “Federal Action”) can be used in this action and vice versa. However, document requests, interrogatories and requests for admissions served by the parties in connection with the Federal Action will count not against the limits noted above.

12. No fact witness that has been deposed in the Federal Action may be deposed again in this action. The deposition of any person may be recorded by videotape, provided that the deposing party notifies the deponent and all parties of its intention to record the deposition by videotape at least five days in advance of the deposition. No deposition, whether recorded by videotape or otherwise, may exceed a single, seven-hour day, unless otherwise agreed to by the parties or ordered by the Administrative Law Judge.

13. The parties shall serve upon one another, at the time of issuance, copies of all subpoenas *duces tecum* and subpoenas *ad testificandum*. For subpoenas *ad testificandum*, the party seeking the deposition shall consult with the other parties before the deposition date is

scheduled. The parties need not separately notice the deposition of a third party noticed by an opposing party. At the request of any party, the time and allocation for a third party deposition shall be divided evenly between them, but the noticing party may use any additional time not used by the opposing party. If no party makes such a request, cross-examination of the witness will be limited to one hour.

14. Non-parties shall provide copies or make available for inspection and copying of documents requested by subpoena to the party issuing the subpoena. The party that has requested documents from non-parties shall provide copies of the documents received from non-parties to the opposing party within three business days of receiving the documents. No deposition of a non-party shall be scheduled between the time a non-party provides documents in response to a subpoena *duces tecum* to a party, and 3 days after the party provides those documents to the other party, unless a shorter time is required by unforeseen logistical issues in scheduling the deposition, or a non-party produces those documents at the time of the deposition as agreed to by all parties involved.

15. The final witness lists shall represent counsels' good faith designation of all potential witnesses who counsel reasonably expect may be called in their case-in-chief. Parties shall notify the opposing party promptly of changes in witness lists to facilitate completion of discovery within the dates of the scheduling order. The final proposed witness list may not include additional witnesses not listed in the preliminary witness lists previously exchanged unless by consent of all parties, or, if the parties do not consent, by an order of the Administrative Law Judge upon a showing of good cause.

16. The final exhibit lists shall represent counsels' good faith designation of all trial exhibits other than demonstrative, illustrative, or summary exhibits. Additional exhibits may be added after the submission of the final lists only by consent of all parties, or, if the parties do not consent, by an order of the Administrative Law Judge upon a showing of good cause.

17. Witnesses shall not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. F.R.E. 602.

18. Witnesses not properly designated as expert witnesses shall not provide opinions beyond what is allowed in F.R.E. 701.

19. The parties are required to comply with Rule 3.31A and with the following:

(a) At the time an expert is first listed as a witness by a party, that party shall provide to the other party:

(i) materials fully describing or identifying the background and qualifications of the expert, all publications authored by the expert within the preceding ten years, and all prior cases in which the expert has testified or has been deposed within the preceding four years; and

(ii) transcripts of such testimony in the possession, custody, or control of the producing party or the expert. Notwithstanding the foregoing, transcripts subject to protective orders preventing their disclosure in this action need not be produced if the governing protective orders are produced to the other parties, unless, upon motion of any party and for good cause shown, the court that issued the protective order orders their production.

(b) At the time an expert report is produced, the producing party shall provide to the other party all documents and other written materials relied upon by the expert in formulating an opinion in this case. Unless otherwise agreed by the parties, the experts' notes and drafts of expert reports need not be produced. Likewise, communications between experts and with counsel or consultants need not be produced unless relied upon by the expert in formulating an opinion in this case.

(c) It shall be the responsibility of a party designating an expert witness to ensure that the expert witness is reasonably available for deposition in keeping with this Scheduling Order. Unless otherwise agreed to by the parties or ordered by the Administrative Law Judge, expert witnesses shall be deposed only once and each expert deposition shall be limited to one day for seven hours. Experts who have been deposed in the Federal Action will not be deposed again in this action. Notwithstanding the foregoing, in the event an expert submits in this action an expert report that is different from the expert report that expert has submitted in the Federal Action, that expert may be deposed a second time regarding such differences between the two reports.

(d) Each expert report shall include a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the expert in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the expert; and the compensation to be paid for the study and testimony.

(e) A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of this litigation or preparation for hearing and who is not designated by a party as a testifying witness.

(f) At the time of service of the expert reports, a party shall provide opposing counsel (i) a list of all commercially-available computer programs used by the expert in the preparation of the report; (ii) a copy of all data sets used by the expert, in native file format and processed data file format; and (iii) all customized computer programs used by the expert in the preparation of the report or necessary to replicate the findings on which the expert report is based.

20. Properly admitted deposition testimony and properly admitted investigational hearing transcripts are part of the record and need not be read in open court. Videotape deposition excerpts that have been admitted in evidence may be presented in open court only upon prior approval by the Administrative Law Judge.

21. The parties shall provide one another, and the Administrative Law Judge, no later than 48 hours in advance, not including weekends and holidays, a list of all witnesses to be called on each day of hearing, subject to possible delays or other unforeseen circumstances.

22. The parties shall provide one another with copies of any demonstrative, illustrative or summary exhibits (other than those prepared for cross-examination) 24 hours before they are used with a witness.

23. Complaint Counsel's exhibits shall bear the designation CX and Respondents' exhibits shall bear the designation RX or some other appropriate designation. Complaint Counsel's demonstrative exhibits shall bear the designation CXD and Respondents' demonstrative exhibits shall bear the designation RXD or some other appropriate designation. Both sides shall number the first page of each exhibit with a single series of consecutive numbers. When an exhibit consists of more than one piece of paper, each page of the exhibit must bear a consecutive control number or some other consecutive page number. Additionally, parties must account for all their respective exhibit numbers. Any number not actually used at the hearing shall be designated "intentionally not used."

24. At the final prehearing conference, counsel will be required to introduce all exhibits they intend to introduce at trial. The parties shall confer and shall eliminate duplicative exhibits in advance of the final prehearing conference and, if necessary, during trial. For example, if RX 100 and CX 200 are different copies of the same document, only one of those documents shall be offered into evidence. In addition, the parties shall confer in advance of the final prehearing conference to prepare a Joint Stipulation that lists the proposed exhibits to which neither party has an objection to admissibility. Additional exhibits may be added after the final prehearing conference only by order of the Administrative Law Judge upon a showing of good cause. Counsel shall contact the court reporter regarding submission of exhibits.

ORDERED:

Dm Chappell
D. Michael Chappell
Chief Administrative Law Judge

Date: August 2, 2013

CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2013, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

I also certify that I delivered via electronic mail and hand delivery a copy of the foregoing document to:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I further certify that I delivered via electronic mail a copy of the foregoing document to:

Alan Goudiss
Dale Collins
Richard Schwed
Lisl Dunlop
Shearman & Sterling LLP
599 Lexington Avenue
New York, NY 10022
(202) 848-4906
agoudiss@shearman.com
wcollins@shearman.com
rschwed@shearman.com
ldunlop@shearman.com

Counsel for Respondent Ardagh Group S.A.

Christine Varney
Yonatan Even
Athena Cheng
Cravath, Swaine & Moore LLP
825 Eighth Avenue
New York, NY 10019
(212) 474-1140
cvarney@cravath.com

yeven@cravath.com
acheng@cravath.com

Counsel for Respondent Saint-Gobain Containers, Inc.

CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

December 4, 2013

By: /s/ Edward D. Hassi
Attorney