IN THE MATTER OF

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

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND SECTION 7 OF THE CLAYTON ACT

Docket No. 9356; File No. 131 0087
Complaint, June 28, 2013 – Decision, June 17, 2014

This consent order addresses the $1.7 billion acquisition by Ardagh Group S.A. of Saint-Gobain Containers, Inc. from Compagnie de Saint-Gobain. The complaint alleges that the acquisition, if consummated, may substantially lessen competition in the markets for the manufacture and sale of glass containers to brewers and distillers in the United States in violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. Under the order, Ardagh must divest six of its nine United States glass container manufacturing plants to an acquirer approved by the Commission.

Participants

For the *Commission*: *Angelike Andrinopoulos Mina, Josh Goodman*, and *Monica van Panhuys.*

For the *Respondents*: *Michael Antalics* and *Richard Parker, O'Melveny & Myers LLP*; *Dale Collins, Lisl Dunlop*, and *Richard Schwed, Shearman & Sterling LLP*; and *Yonatan Even* and *Christine Varney, Cravath, Swaine & Moore LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission (the "Commission"), having reason to believe that Respondent Ardagh Group S.A. ("Ardagh") and Respondent Compagnie de Saint-Gobain have executed an agreement and plan of merger in violation of Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45, and which if consummated would violate Section 7 of the Clayton

Act, as amended, 15 U.S.C. § 18, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), stating its charges as follows:

I.

NATURE OF THE CASE

1. Each year, Americans use more than 18 billion glass beer and spirits containers. Three manufacturers produce the overwhelming majority of these glass containers: Ardagh, Saint-Gobain Containers, Inc. ("Saint-Gobain"), and Owens-Illinois, Inc. ("O-I"). Together, these "Three Majors" dominate the approximately $5 billion U.S. glass container industry.

2. Ardagh's proposed $1.7 billion acquisition of Saint-Gobain (the "Acquisition") would combine the second- and third-largest U.S. glass container manufacturers, resulting in an effective duopoly. Ardagh and O-I would control the lion's share of the markets for glass containers sold to beer and glass containers sold to spirits customers. The merging parties' own business documents suggest that the Acquisition would result in a duopoly controlling more than of the sales of glass containers to beer customers ("Brewers") and spirits customers ("Distillers") in the United States. The market shares presented in these relevant markets easily exceed the market concentration levels presumed likely to result in anticompetitive effects under the Federal Trade Commission and U.S. Department of Justice Horizontal Merger Guidelines ("Merger Guidelines") and under the case law.

3. The Acquisition would substantially lessen competition by dramatically increasing the ease and likelihood of coordination between the only two remaining major glass container manufacturers and by eliminating head-to-head competition between Ardagh and Saint-Gobain that to date has helped lower prices for customers. The result will be higher prices, lower availability, and less innovation.

4. New entry into the relevant markets will not prevent the Acquisition's anticompetitive effects. Glass container plants are expensive to build, costing at least $150 million. Construction is also time-consuming and subject to significant regulatory hurdles. Expansion by fringe manufacturers is also difficult and unlikely because the remaining firms in the marketplace are substantially smaller than the major manufacturers, with no fringe firm operating more than one dedicated glass container plant. Finally, Respondents cannot show cognizable efficiencies that would outweigh the competitive harm that the Acquisition will cause.

II.

JURISDICTION

5. Respondents Ardagh, Compagnie de Saint-Gobain, and Saint-Gobain are, and at all relevant times have been, engaged in commerce or in activities affecting commerce, within the meaning of the Clayton Act. The Acquisition constitutes an acquisition under Section 7 of the Clayton Act.

III.

RESPONDENTS

6. Respondent Ardagh is a corporation existing and doing business under and by virtue of the laws of Luxembourg, with its office and principal place of business located at 56, rue Charles Martel, Luxembourg. Ardagh is a global leader in glass and metal packaging solutions with global sales of approximately $4.8 billion. Ardagh owns nine glass container plants located in seven U.S. states. In 2012, Ardagh achieved U.S. glass container sales of of these sales were made to Brewers and were made to Distillers. Presently, Ardagh is the third-largest glass container manufacturer in the United States overall, the third-largest glass container manufacturer for Brewers, and the second-largest for Distillers.

7. Respondent Compagnie de Saint-Gobain is a corporation existing and doing business under and by virtue of the laws of France, with its office and principal place of business located at

"Les Miroirs," 18 avenue d'Alsace, Courbevoie, France. Compagnie de Saint-Gobain operates a number of industrial manufacturing businesses, including manufacturing glass containers. Its U.S. glass container business, Saint-Gobain, operates under the name "Verallia North America" or "VNA." Saint-Gobain operates 13 glass container plants in 11 U.S. states. In 2012, Saint-Gobain achieved U.S. sales of of these sales were made to Brewers and were made to Distillers. Presently, Saint-Gobain is the second-largest glass container manufacturer in the United States overall, the second-largest glass container manufacturer to Brewers, and the third-largest to Distillers.

IV.

THE ACQUISITION

8. Pursuant to a Share Purchase Agreement entered into between Ardagh and Compagnie de Saint-Gobain on January 17, 2013, Ardagh proposes to acquire all the voting securities of Saint-Gobain for approximately $1.7 billion.

V.

BACKGROUND

A.

Glass Containers

9. Glass container manufacturers produce beverage and food containers in a variety of shapes and sizes for beer, spirits, non-alcoholic beverages, ready-to-drink alcoholic beverages, and various food products. In 2011, sales to Brewers represented approximately 58% of U.S. glass container shipments and sales to Distillers represented approximately 4%.

10. Glass containers have certain attributes that are prized by Brewers and Distillers who package their products in glass. Among other features, glass:

- Protects beer and spirits by guarding against oxygen invasion for a longer shelf life;

- Maintains the true taste of the beer or spirits;

- Is chemically inert and does not leach chemicals into the beer and spirits;

- Is 100% recyclable;

- Promotes a premium or distinctive brand image; and

- Enables Brewers and Distillers to associate the quality appearance of the glass with their product identity.

11. Other categories of glass, such as flat window glass, table glass (*e.g.*, drinking glasses and kitchenware), and specialty pharmaceutical or industrial glass are manufactured differently than glass containers. Respondents do not make or sell these other types of glass.

B.

Market Structure

12. The approximately $5 billion glass container industry in the United States is dominated by the Three Majors: O-I, Saint-Gobain, and Ardagh. Presently, O-I is the largest U.S. producer of glass containers, operating 17 plants in the country, plus two in Canada. Saint-Gobain is the second-largest glass container producer with 13 plants, and Ardagh is the third-largest with 9 plants.

13. Ardagh entered the U.S. glass container industry in 2012 with two acquisitions. First, Ardagh bought Leone Industries, a small, single-plant glass container producer in Bridgeton, New

Jersey. Shortly thereafter, it bought Anchor Glass Container Corporation ("Anchor"), the longstanding, third-largest glass container producer in the United States. Ardagh's proposed acquisition of Saint-Gobain would be its third glass container acquisition in the United States in less than two years, and, in its own words, will make Ardagh the largest glass producer in the country.

14. Beyond the Three Majors, there is a fringe of glass manufacturers each with only a single-plant dedicated to glass containers in the United States, including the independent glass-makers Arkansas Glass, Piramal, Anchor Hocking, Bennu Glass, and Gerresheimer Glass. Of these, only three make glass containers for Distillers and only two make any type of glass containers for Brewers. These sales are extremely limited.

15. Three beverage companies, E. & J. Gallo Winery (through Gallo Glass Company), Anheuser-Busch InBev (through Longhorn Glass Corporation), and MillerCoors (through Rocky Mountain Bottle Company, a joint venture with O-I) operate single-plant glass container manufacturing facilities. Gallo manufactures mostly wine bottles and a small number of glass containers for its own spirits products. Brewers Anheuser-Busch InBev and MillerCoors do not have any external sales of the glass containers that they produce.

16. Two Mexican manufacturers, Vitro and Fevisa, currently export a small amount of glass containers to the United States. The U.S. fringe, self-suppliers, and Mexican firms have a limited impact on competition in the relevant markets, servicing limited regions and portions of demand from Brewers and Distillers.

VI.

INDUSTRY BACKGROUND: MARKET CONSOLIDATION

17. The U.S. glass container industry has changed dramatically over the past thirty years, as manufacturers have consolidated and shed excess capacity. In 1983, there were approximately 121 glass container plants run by 23 different

manufacturers, 19 of which operated more than one plant in the United States. During the 1980s and 1990s, a series of mergers reduced the number of competitors. Today, there are only 47 glass container plants, and only the Three Majors operate more than one dedicated glass container plant.

Consolidation in Glass Container Industry (U.S. & Canada)

[Note: Anchor Glass is now Ardagh and Glenshaw is now Kelman and is not currently operational].

18. In the years past, mainly before the mid-2000s, when there was excess capacity in the market, the Three Majors competed particularly vigorously against each other. To keep their plants fully loaded, the Three Majors prioritized glass container sales volume over prices. The Respondents refer to this period as one of or Their efforts to fill excess capacity and the resulting price competition led to lower margins for the Three Majors and lower prices for their customers.

19. Beginning in the mid-2000s, the Three Majors

The Three Majors began pursuing a "price over volume" strategy (also referred to as "value over volume" or "margin before volume"). The Three Majors recognized that this shared approach would help keep industry capacity in close

balance with demand, help maintain pricing policies, and ensure more profitable returns. As a presentation to Ardagh's top executives explains,

20. While rationalizing capacity and announcing a focus on profitability, the Three Majors began demanding cost pass-through provisions in their contracts and implementing surcharges to protect themselves from cost increases. Meanwhile, the Three Majors successfully shielded themselves from increases in raw materials, energy, labor, natural gas, and fuel costs, which were passed on to customers. At the same time, the Three Majors recognized the advantages of keeping industry supply tight, which maximized their own leverage with customers. To avoid excess capacity, they closed down glass container plants and idled furnaces. As demonstrated in this chart prepared in 2012 for Ardagh contemplating this very Acquisition, the combination of these two strategies led to higher margins for glass container manufacturers and higher prices for customers.

Confidential
Proprietary Graphic
Redacted

21. Despite the Three Majors' recognition of mutually beneficial behavior, glass container buyers continue to pit O-I, Saint-Gobain, and Ardagh against each other to obtain better prices. For example, in 2013, a Saint-Gobain distributor reported that it was a when one of its major Brewers switched to Ardagh in response to a % price increase, and warned Saint-Gobain to Similarly, in August 2011, the CEO of Anchor (now President of Ardagh Glass North America) wrote that it after one of Ardagh's liquor customers obtained a lower price quote from O-I.

VII.

THE RELEVANT PRODUCT MARKETS

22. The relevant product markets in which to analyze the Acquisition's effects are: (1) the manufacture and sale of glass containers to Brewers; and (2) the manufacture and sale of glass containers to Distillers. This is appropriate because, as described in the Merger Guidelines, prices are individually negotiated in this industry and customers cannot engage in arbitrage.

23. Together, beer and spirits are an important driver for U.S. glass container demand and represent more than 60% of the glass container usage in this country. Brewers purchase over $2 billion in glass containers annually to meet consumer demand for beer in glass bottles. Non-glass packaging materials, such as aluminum cans or plastic containers, are not in this relevant product market because not enough Brewers would switch to such products to make a small but significant and non-transitory increase in the price ("SSNIP") of glass containers to Brewers unprofitable for a hypothetical monopolist.

24. Brewers and Distillers do not view other packaging materials as interchangeable for glass containers because of commercial constraints, such as consumer preferences and brand identity. The existence of other packaging materials has not prevented the Three Majors from shifting cost increases to Brewers and Distillers and raising prices in recent years. Indeed, glass container prices have increased substantially more than plastic containers and aluminum cans.

25. Aluminum cans and plastic containers are already significantly less expensive than size-equivalent glass containers, yet Brewers continue to purchase glass containers. Many Brewers sell beer in both aluminum cans and glass bottles, and view these two forms of packaging as complementary to each other, not as substitutes. Despite the presence of aluminum cans, Respondents forecast demand for glass bottles for beer as stable for the two largest Brewers and growing for craft Brewers.

26. Distillers purchase more than $500 million in glass containers to package and promote their spirits products. Non-glass packaging materials, such as plastic containers, are not in this relevant product market because not enough spirits customers would switch to non-glass packaging materials to make a SSNIP in glass containers to spirits customers unprofitable for a hypothetical monopolist.

27. Distillers who package their products in glass containers rely on competition among glass container manufacturers, not plastic suppliers, to obtain favorable pricing. In instances where spirits manufacturers decide to package their products in plastic – mainly in the sub-premium brands, small container sizes, and bulk sizes – there is little that glass manufacturers can do to prevent these customers from switching to plastic containers. In other words, a customer's decision to convert spirits products from glass packaging to plastic packaging are not typically driven by price competition. Moreover, once a customer converts to plastic, they very rarely return to packaging in glass.

28. Head-to-head competition between glass containers and other types of packaging is rare. Brewers and Distillers compete glass container manufacturers against each other to obtain favorable pricing and commercial terms. While other packaging materials can functionally be used to package beer and spirits, these other packaging materials, primarily aluminum cans for beer and plastic for spirits, lack a close price relationship with glass containers. Quite simply, other types of packaging do not constrain Ardagh and Saint-Gobain to the same degree as glass container competition. Indeed, as Ardagh itself described in its bond offering memorandum raising money to acquire Anchor: "We are subject to intense competition from other glass container producers against whom we compete on the basis of price, quality, customer service, reliability of delivery and marketing." Ardagh distinguished this direct competition with its glass-making rivals by describing that it competes "indirectly" with other forms of rigid packaging, such as plastic and metal. The absence of plastic and metal competition is particularly acute in the relevant product markets.

29. The Respondents' own assessment of competition shows why products other than glass containers are not in the relevant markets. In their business documents, Saint-Gobain and Ardagh routinely identify each other and O-I as their most consistent and direct competitive constraints. Respondents' own documents focus on competition from each other and O-I when analyzing sales to Brewers and Distillers. Respondents identify their competition as the other glass container manufacturers and discuss business strategies for glass container sales. Ardagh and Saint-Gobain calculate their sales volumes and revenues relative to each other and O-I. For example, in a recent presentation to , Ardagh explained its "North American Glass Expansion" would make Ardagh the "#1 Player [with a] 49% Market Share."

VIII.

THE RELEVANT GEOGRAPHIC MARKET

30. The relevant geographic market in which to analyze the competitive effects of this Acquisition is no broader than the United States. All Three Majors have manufacturing plants throughout the United States that enable them to compete on a nationwide basis. There are limited imports of glass containers to the United States, because of high freight costs, logistical and supply chain risks, and customer perceptions of inferior quality. Imports are thus unlikely to defeat a small but significant and non-transitory increase in price by a hypothetical monopolist of glass containers manufactured and sold to Brewers and Distillers in the United States.

IX.

MARKET CONCENTRATION AND THE ACQUISITION'S PRESUMPTIVE ILLEGALITY

31. The glass container industry in the United States will be highly concentrated after the Acquisition. The Merger Guidelines measure concentration using the Herfindahl-Hirschman Index ("HHI"). Under that test, a merger is presumed likely to create or enhance market power (and presumptively illegal) when the post-

merger HHI exceeds 2,500 and the merger increases the HHI by more than 200 points. Here, both markets' post-merger HHI well exceeds 2,500, and the Acquisition increases concentration in the sale of glass containers sold to Brewers by 781 points, and 1,069.3 for the sale of glass containers to Distillers.

Glass Containers Sold to Distillers Market				
Company	Pre-Merger		Post-Merger	
	Share (%)	HHI	Share (%)	HHI
O-I				
Ardagh				
Saint-Gobain				
Vitro				
Anchor Hocking				
Gallo				
Piramal				
Gerresheimer Glass				
Total	**Pre-Merger HHI = 2,179.8** **Post-Merger HHI = 3,249.1** **Increase = 1,069.3**			

Glass Containers Sold to Brewers Market				
Company	Pre-Merger		Post-Merger	
	Share (%)	HHI	Share (%)	HHI
O-I				
Saint-Gobain				
Ardagh				
Rocky Mtn. Bottle				
Fevisa				
Longhorn				
Gerresheimer Glass				
Vitro				
Imports				
Total	**Pre-Merger HHI = 2,884.8** **Post-Merger HHI = 3,665.8** **Increase = 781**			

X.

ANTICOMPETITIVE EFFECTS

A.

The Acquisition Will Likely Lead To Anticompetitive Coordination.

32. The glass container markets for beer and spirits have many features that increase the likelihood of post-Acquisition coordination, including low demand growth, tight capacity, stable market shares, and high barriers to entry. The Three Majors already obtain a wealth of information about the markets and each other, including plant-by-plant production capabilities, profitability, the identities of each other's customers, and details regarding each other's contracts and negotiations with customers. Customers, industry analysts, public statements, and distributors all serve as conduits for market information.

33. After the Acquisition, with only two major glass container manufacturers left, it will become substantially easier for the remaining two majors to coordinate with one another on price and non-price terms to achieve supracompetitive prices or other anticompetitive outcomes.

34. All Three Majors recognize their mutual interdependence and aligned incentives today. They have reduced capacity, either by closing plants or idling furnaces, to rationalize industry supply so as not to exceed customer demand. The Three Majors share an and have embraced a "price over volume" or "margin over volume" strategy of cutting capacity, boosting price, and shifting input cost volatility to the customers. Indeed, Saint-Gobain repeatedly referred to its strategy of "margin over volume" as its O-I is the only one of the Three Majors that is publicly traded and Ardagh and Saint-Gobain closely follow O-I's financial reports and public strategy statements.

35. Not only do the Three Majors pay close attention to each other's public statements but their executives often obtain non-

public information through third parties. For example, in 2009, Anchor requested a call with a key industry analyst. After the call, in which Anchor's CEO, CFO, and a board member participated, the industry analyst wrote back, "I will let you know what I hear back from St. Gobain when I hear from them." Three days later, Anchor's CEO responded:

> We hope that our view confirms your thoughts regarding the industry leader's efforts on enhanced performance. We continue to desire to play the role as the rational #3 glass provider in NA, support customers where there is a strong geographic alignment logistically, and focus our assets to support improved value rather than just volume.
>
> We believe our curtailment efforts on capacity and balancing capacity/demand/ inventory are very consistent with what has been pursued by the leader as well.

The industry analyst later responded with information he had learned from discussions with O-I:

> I was chatting with OI recently and they are optimistic about the outlook for a recovery in glass volumes, but probably not until 2010 . . . In the US, they anticipate achieving some price success with their 2 big customers at the end of this year, but they seemed (in my opinion) to have backed off a bit of the bullishness they had a few quarters ago regarding timing and absolute level of increase. They do feel that supply/demand is being well managed in the US, but given the volume trends thus far in 2009 they seem a little concerned (in my view) on whether they will be able to get the big step up in price they (and investors) wanted . . . Reading between the lines a little, it seems to me they are a little concerned about losing some volume to competitors.

36. This merger to duopoly would greatly increase the likelihood and risk of coordination. For example, prior to quoting on craft Brewer business, Saint-Gobain advised its sales committee to

B.

The Acquisition Will Eliminate Direct Competition Between Ardagh and Saint-Gobain.

37. The Acquisition would eliminate head-to-head competition between the second- and third-largest U.S. glass container manufacturers in the relevant product markets. Brewers and Distillers have reaped substantial benefits from Respondents' rivalry, which would be immediately extinguished by The Acquisition.

38. Direct competition between Ardagh and Saint-Gobain has led to lower prices for customers. For example, in 2012, Anchor lowered its prices to in response to competition from Saint-Gobain. Another craft brewer, was able to obtain more favorable pricing by competing Saint-Gobain and Anchor off each other. A spirits customer, also used the threat of switching from Saint-Gobain to Anchor to get better prices on its glass bottles.

Respondents' ordinary-course business documents confirm that they understand competition from each other to constrain price increases. For example, in a 2011 email, the Vice President of Sales for Anchor wrote about price increases through its glass distributor for beer customers: In a 2012 email, the other Vice President of Sales for Anchor wrote about Saint-Gobain's pricing at another beer customer:

40. Ardagh and Saint-Gobain have also competed directly to offer customers more innovative products and better service. For example, in 2012, a customer invited Ardagh and Saint-Gobain to submit prototypes for an innovative glass beer bottle. Both firms submitted proposals before Saint-Gobain won the business. At another Brewer, competition from Saint-Gobain prompted Ardagh to offer lighter weight glass bottles.

41. The Acquisition is also likely to lead to output reductions.

In an industry where capacity is tight, and utilization rates are nearly at maximum capacity, such plant closures or idling furnaces are likely to result in overall output reductions.

XI.

ENTRY BARRIERS

42. Effective entry or expansion into the relevant markets would neither be timely, likely, or sufficient to counteract the Acquisition's likely anticompetitive effects. The barriers facing potential entrants include the large capital investment necessary to build a glass plant, the need to obtain environmental permits, the high fixed costs of operating a glass plant, existing long-term contracts that foreclose much of the market, the need for specific manufacturing knowledge that is not easily transferred from other industries, and the molding technologies and extensive mold libraries already in place at existing manufacturers.

XII.

EFFICIENCIES

43. Extraordinarily great merger-specific efficiencies would be necessary to justify the Acquisition in light of its vast potential to harm competition. Nearly all of Ardagh's alleged efficiencies are either speculative, unverifiable, or not merger-specific.

Respondents cannot show cognizable efficiencies that would outweigh the competitive harm that the Acquisition will cause.

VIOLATIONS

Count I: Illegal Agreement

44. The allegations contained in Paragraphs 1-43 are incorporated by reference as though fully set forth.

45. The agreement and plan of merger constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

Count II: Illegal Acquisition

46. The allegations contained in Paragraphs 1-43 are incorporated by reference as though fully set forth.

47. The Acquisition, if consummated, may substantially lessen competition in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and is an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

NOTICE

Notice is hereby given to the Respondents that the second day of December, 2013, at 10:00 a.m. is hereby fixed as the time, and the Federal Trade Commission offices at 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580, as the place when and where an evidentiary hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act and the Clayton Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the

fourteenth (14th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions, and a final order disposing of the proceeding.

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after the Respondents file their answers. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the pre-hearing scheduling conference (but in any event no later than five (5) days after the Respondents file their answers). Rule 3.31 (b) obligates counsel for each party, within five (5) days of receiving the Respondents’ answers, to make certain initial disclosures without awaiting a discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Acquisition challenged in this proceeding violates Section 7 of the Clayton Act, as amended, or Section 5 of the FTC Act, as amended, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. If the Acquisition is consummated, divestiture or reconstitution of all associated and necessary assets, in a manner that restores two or more distinct and separate, viable and independent businesses in the relevant markets, with the ability to offer such products and services as Ardagh and Saint-Gobain were offering and planning to offer prior to the Acquisition.

2. A prohibition against any transaction between Ardagh and Saint-Gobain that combines their businesses in the relevant markets, except as may be approved by the Commission.

3. A requirement that, for a period of time, respondents provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the relevant markets with any other company operating in the relevant markets.

4. A requirement to file periodic compliance reports with the Commission.

5. Any other relief appropriate to correct or remedy the anticompetitive effects of the transaction or restore Saint-Gobain as a viable, independent competitor in the relevant markets.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its

official seal to be hereto affixed, at Washington, D.C., this twenty-eighth day of June, 2013.

By the Commission, Commissioner Wright dissenting.

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS [Public Record Version]

The Federal Trade Commission ("Commission"), having heretofore issued its Complaint charging Ardagh Group, S.A. ("Respondent Ardagh" or "Respondent"), Saint-Gobain Containers, Inc. (also known as Verallia North America ("VNA"), and Compagnie de Saint-Gobain ("CSG"), with a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Respondents having been served with a copy of that Complaint, together with a notice of contemplated relief and having filed their answers denying said charges; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter withdrawn the matter from adjudication in accordance with Commission Rule 3.25(c), 16 C.F.R. § 3.25(c); and the Commission having thereafter considered the matter and having thereupon accepted the executed Consent Agreement and placed such agreement on the public record for the receipt of public comments pursuant to

Commission Rule 2.34, 16 C.F.R. § 2.34, now in conformity with the procedure prescribed in Commission Rule 3.25(f), 16 C.F.R. § 3.25(f), the Commission hereby makes the following jurisdictional findings and factual findings and issues the following Order to Hold Separate and Maintain Assets ("Hold Separate Order"):

1. Respondent Ardagh Group, S.A., is a limited liability corporation organized, existing, and doing business under, and by virtue of, the laws of Luxembourg with its office and principal place of business at 56, rue Charles Martel, Luxembourg, and operates its glass container business in the United States through its subsidiary Ardagh Glass, Inc., which has its office and principal place of business located at 401 E. Jackson Street, Suite 2800, Tampa, FL 33602.

2. Respondent Saint-Gobain Containers, Inc., is a corporation organized, existing, and doing business under, and by virtue of, the laws of the state of Delaware with its principal place of business located at 1509 S. Macedonia Ave, Muncie, IN 47302.

3. Respondent Compagnie de Saint-Gobain is a corporation organized, existing, and doing business under, and by virtue of, the laws of France with its office and principal place of business located at "Les Miroirs," 18 avenue d'Alsace, Courbevoie, France, and its United States office and principal place of business located at 750 E. Swedesford Rd, Valley Forge, PA 19482.

4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents and the proceeding is in the public interest.

I.

IT IS HEREBY ORDERED that, as used in this Hold Separate Order, the following definitions, and all other definitions

used in the Consent Agreement and the Decision and Order, shall apply:

A. "Ardagh Retained Employees" means employees of Respondent Ardagh who are not Anchor Glass Designated Employees.

B. "Ardagh Retained Business" means the assets and businesses of Respondent Ardagh other than the Anchor Glass Business.

C. "Hold Separate Manager" means the Person appointed pursuant to Paragraph IV of this Hold Separate Order to be the manager of the Anchor Glass Business.

D. "Hold Separate Monitor" means the Person appointed pursuant to Paragraph III of this Hold Separate Order to oversee the Hold Separate Manager and the Anchor Glass Business.

E. "Hold Separate Period" means the period during which the Anchor Glass Business shall be held separate from the Ardagh Retained Business under this Hold Separate Order, which shall begin on the Acquisition Date and terminate on the Divestiture Date.

F. "Hold Separate Services" means those services provided by the Anchor Glass Business to the Ardagh Retained Business as described in Non-public Appendix B, and any other services as agreed to by Respondent Ardagh, the Hold Separate Manager, the Hold Separate Monitor, and Commission staff.

G. "Orders" means the Decision and Order in this matter and this Hold Separate Order.

II.

IT IS FURTHER ORDERED that:

A. With respect to the Anchor Glass Business during the Hold Separate Period:

1. Respondent Ardagh shall hold the Anchor Glass Business separate, apart, and independent of Respondent Ardagh's other businesses and assets as required by this Hold Separate Order and shall vest the Anchor Glass Business with all rights, powers, and authority necessary to conduct business in a manner consistent with the Orders. *Provided, however,* that the Anchor Glass Business shall be allowed to provide Hold Separate Services to Respondent Ardagh.

2. Respondent Ardagh shall not exercise direction or control over, or influence directly or indirectly, the Anchor Glass Business or any of its operations, the Hold Separate Monitor, or the Hold Separate Manager, except to the extent that Respondent Ardagh must exercise direction and control over the Anchor Glass Business as is necessary to assure compliance with the Consent Agreement, the Orders, and all applicable laws and regulations, including, in consultation with the Hold Separate Monitor, continued oversight of compliance of the Anchor Glass Business with policies and standards concerning safety, health, and environmental aspects of its operations and the integrity of its financial and operational controls. Respondent Ardagh shall have the right in consultation with the Hold Separate Monitor to defend any legal claims, investigations, or enforcement actions threatened or brought against the Anchor Glass Business;

3. Respondent Ardagh shall take all actions necessary to maintain and assure the continued viability, marketability, and competitiveness of the Anchor

Glass Business (including, but not limited to, taking such actions as the Hold Separate Monitor in consultation with Commission staff requests or directs that are reasonably necessary to maintain and assure the continued viability, marketability, and competitiveness of the Anchor Glass Business), prevent the destruction, removal, wasting, deterioration, or impairment of the Anchor Glass Business, except for ordinary wear and tear, and enable the Anchor Glass Business to operate in the regular and ordinary course of business as provided for in this Hold Separate Order.

4. Respondent Ardagh shall not sell, transfer, encumber, or otherwise impair the Anchor Glass Business (except as directed by the Hold Separate Monitor or required by the Order or the Hold Separate Order);

5. Respondent Ardagh shall provide the Anchor Glass Business with sufficient funding and financial resources necessary to maintain the full economic viability, marketability, and competitiveness of the Anchor Glass Business, including, but not limited to, all funding and financing necessary to: (i) operate the Anchor Glass Business in a manner consistent with how it has been operated, and is currently operated, in the normal course of business, and consistent with business, capital and strategic plans and operating budgets as of January 1, 2014; (ii) carry out any planned or existing capital projects and physical improvements; (iii) perform maintenance, replacement, or remodeling of assets in the ordinary course of business; and (iv) provide capital, working capital, and reimbursement for any operating expenses, losses, capital losses, or other losses.

B. The purpose of this Hold Separate Order is to: (1) maintain and preserve the Anchor Glass Business as

viable, marketable, competitive, and ongoing businesses independent of Respondent Ardagh until the divestiture required by the Decision and Order is achieved; (2) ensure that no Confidential Business Information is exchanged between Respondent Ardagh and the Anchor Glass Business, except in accordance with the provisions of the Orders; (3) prevent interim harm to competition pending the divestiture and other relief; and (4) remedy any anticompetitive effects of the Acquisition.

III.

IT IS FURTHER ORDERED that:

A. Mr. Edward C. White shall serve as Hold Separate Monitor to monitor and supervise the management of the Anchor Glass Business and ensure that Respondent Ardagh complies with its obligations under the Orders.

B. Respondent Ardagh shall enter into the Hold Separate Monitor Agreement with the Hold Separate Monitor that is attached as Appendix A. The compensation for the Hold Separate Monitor is attached as Non-Public Appendix A-1. The Hold Separate Monitor Agreement shall become effective on the date this Hold Separate Order becomes final. The Hold Separate Monitor Agreement shall transfer to and confer upon the Hold Separate Monitor all rights, powers, and authority necessary to permit the Hold Separate Monitor to perform his duties and responsibilities pursuant to this Hold Separate Order in a manner consistent with the purposes of the Orders and in consultation with Commission staff, and shall require that the Hold Separate Monitor act in a fiduciary capacity for the benefit of the Commission. Further, the Hold Separate Monitor Agreement shall provide that:

1. The Hold Separate Monitor shall have the responsibility for monitoring the organization of

the Anchor Glass Business; supervising the management of the Anchor Glass Business by the Hold Separate Manager; maintaining the independence of the Anchor Glass Business; supervising and approving Hold Separate Services; ensuring continued and adequate funding of the Anchor Glass Business and its operation in the ordinary course of business as provided for in this Hold Separate Order; and monitoring Respondent Ardagh's compliance with its obligations pursuant to the Orders.

2. The Hold Separate Monitor shall act in a fiduciary capacity for the benefit of the Commission.

3. The Hold Separate Monitor shall have full and complete access to all of Respondent Ardagh's facilities, personnel, and books and records relating to the Anchor Glass Business as may be necessary for or relate to the performance of the Hold Separate Monitor's duties under the Orders and the Hold Separate Monitor Agreement. The books and records to which the Hold Separate Monitor shall have access include, but are not limited to, any and all:

   a. Data and databases, including, but not limited to, databases with financial information relating to the Anchor Glass Business;

   b. Regularly-prepared reports relating to the Anchor Glass Business, including, but not limited to, financial, revenue, customer or operating statements or reports prepared daily, weekly, monthly, or on some other regular interval;

   c. Regularly-prepared or periodic reports prepared and filed with any Governmental Agency;

d. Reports or summaries of marketing and promotional activities by Respondent Ardagh that relate to the Anchor Glass Business;

e. Reports, summaries, records, or documents from the past operations of the Anchor Glass Business sufficient to allow the Hold Separate Monitor to evaluate the performance of the Anchor Glass Business during the Hold Separate Period in comparison to the past performance of the Anchor Glass Business;

f. Other relevant reports, summaries, records documents, or information relating to the Anchor Glass Business as the Hold Separate Monitor may request; and

g. Financial summaries or reports, or other information, reports, or summaries relating to the Anchor Glass Business as the Hold Separate Monitor may request Respondent Ardagh to locate, collect, organize, and develop for the Hold Separate Monitor.

4. The Hold Separate Monitor shall have the authority to employ, at the cost and expense of Respondent Ardagh, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Hold Separate Monitor's duties and responsibilities.

5. The Hold Separate Monitor shall serve, without bond or other security, at the cost and expense of Respondent Ardagh, on reasonable and customary terms commensurate with the person's experience and responsibilities. Respondent Ardagh shall provide compensation to the Hold Separate Monitor, and pay the Hold Separate Monitor's costs and expenses (including, but not limited to, those related to consultants, accountants, attorneys,

and other representatives and assistants) on a monthly or other reasonable periodic basis.

6. Respondent Ardagh shall indemnify the Hold Separate Monitor and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Hold Separate Monitor's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from the Hold Separate Monitor's gross negligence, willful or wanton acts, or bad faith. For purposes of this Paragraph III.B.6., the term "Hold Separate Monitor" shall include all persons retained by the Hold Separate Monitor pursuant to Paragraph III.B.4. of this Hold Separate Order.

7. The Commission may require the Hold Separate Monitor and each of the Hold Separate Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to materials and information received from the Commission in connection with performance of the Hold Separate Monitor's duties.

8. Respondent Ardagh may require the Hold Separate Monitor and each of the Hold Separate Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement. *Provided, however,* that such agreement shall not restrict the Hold Separate Monitor from providing any information to the Commission.

9. Thirty (30) days after the Hold Separate Order becomes final, and every thirty (30) days thereafter

until the Hold Separate Order terminates, and as requested by the Commission or staff, the Hold Separate Monitor shall report in writing to the Commission concerning Respondent Ardagh's efforts to comply with the terms of the Hold Separate Order. Each report shall include, but not be limited to, the Hold Separate Monitor's assessment of the extent to which the Anchor Glass Business is meeting (or exceeding or failing to meet) its projected goals as reflected in business planning documents, budgets, projections, or any other regularly prepared financial statements.

10. Respondent Ardagh shall comply with all terms of the Monitor Agreement, and any breach by Respondent Ardagh of any term of the Monitor Agreement shall constitute a violation of this Hold Separate Order. Notwithstanding any paragraph, section, or other provision of the Monitor Agreement, any modification of the Monitor Agreement, without the prior approval of the Commission, shall constitute a failure to comply with the Orders.

C. If the Hold Separate Monitor ceases to act or fails to act diligently and consistently with the purposes of this Hold Separate Order, the Commission may appoint a substitute Hold Separate Monitor, subject to the consent of Respondent Ardagh, which consent shall not be unreasonably withheld, as follows:

1. If Respondent Ardagh has not opposed in writing, including the reasons for opposing, the selection of the proposed substitute Hold Separate Monitor within five (5) business days after notice by the staff of the Commission to Respondent Ardagh of the identity of the proposed substitute Hold Separate Monitor, then Respondent Ardagh shall be deemed to have consented to the selection of the proposed substitute Monitor.

2. Respondent Ardagh shall, no later than five (5) business days after the Commission appoints a substitute Hold Separate Monitor, enter into an agreement with the substitute Hold Separate Monitor that, subject to the prior approval of the Commission, confers on the substitute Hold Separate Monitor all the rights, powers, and authority necessary to permit the substitute Hold Separate Monitor to perform his or her duties and responsibilities on the same terms and conditions as provided in Paragraph III of this Hold Separate Order.

D. The Hold Separate Monitor shall serve through the Hold Separate Period; *provided, however,* that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

E. The Commission may on its own initiative or at the request of the Hold Separate Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Hold Separate Order.

IV.

IT IS FURTHER ORDERED that:

A. Effective on the Acquisition Date, Respondent Ardagh shall appoint James Fredlake as the Hold Separate Manager to manage and maintain the operations of the Anchor Glass Business in the regular and ordinary course of business beginning on the Acquisition Date.

B. Respondent Ardagh shall transfer all rights, powers, and authority necessary to permit the Hold Separate Manager to perform his duties and responsibilities pursuant to this Hold Separate Order to manage the Anchor Glass Business:

1. The Hold Separate Manager shall be responsible for managing the operations of the Anchor Glass Business through the Hold Separate Period, and shall report directly and exclusively to the Hold Separate Monitor and shall manage the Anchor Glass Business independently of the management of Respondent Ardagh and its other businesses;

2. The Hold Separate Manager, with the approval of the Hold Separate Monitor, shall have the authority to employ such persons as are reasonably necessary to assist the Hold Separate Manager in managing the Anchor Glass Business, including, without limitation, consultants, accountants, attorneys, and other representatives, assistants, and employees.

3. Respondent Ardagh shall provide the Hold Separate Manager with reasonable financial incentives to undertake these positions. Such incentives shall include a continuation of all employee benefits, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to assure the continuation, and prevent any diminution, of the viability, marketability, and competitiveness of the Anchor Glass Business, and as may otherwise be necessary to secure the Hold Separate Manager's agreement to achieve the purposes of this Hold Separate Order.

4. The Hold Separate Manager shall serve, without bond or other security, at the cost and expense of Respondent Ardagh, on reasonable and customary terms commensurate with the person's experience and responsibilities, and with any financial incentives that may be reasonable or necessary as described in this Paragraph IV. Respondent Ardagh shall pay the Hold Separate Manager's costs and expenses (including, but not limited to,

those related to consultants, accountants, attorneys, and other representatives and assistants) on a monthly or other reasonable periodic basis.

5. Respondent Ardagh shall indemnify the Hold Separate Manager and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Manager's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from the Manager's gross negligence, willful or wanton acts, or bad faith. For purposes of this Paragraph IV.B.5., the term "Hold Separate Manager" shall include all persons retained by the Hold Separate Manager pursuant to Paragraph IV.B.2. of this Hold Separate Order.

6. Nothing contained herein shall preclude the Hold Separate Manager from contacting or communicating directly with the staff of the Commission, either at the request of the staff of the Commission or the Hold Separate Monitor, or in the discretion of the Hold Separate Manager.

7. The Hold Separate Manager shall have the authority, in consultation with the Hold Separate Monitor, to staff the Anchor Glass Business with sufficient employees to maintain the viability and competitiveness of the Anchor Glass Business, including:

    a. Replacing any departing or departed Anchor Glass Business employee with a person who has similar experience and expertise or determine not to replace such departing or departed employee;

b. Removing any Anchor Glass Business employee who ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate Order, and replacing or not replacing such employee with another person of similar experience or skills;

c. Ensuring that no Anchor Glass Business employee shall be (i) involved in any way in the operations of Ardagh Retained Business, or (ii) receive or have access to, or use or continue to use, any confidential information relating to the Ardagh Retained Business, unless allowed or required under the Orders.

d. Providing each Anchor Glass Business employee with reasonable financial incentives, including continuation of all salaries, employee benefits, and regularly scheduled raises and bonuses, to continue in his or her position during the Hold Separate Period.

C. The Hold Separate Manager may be removed for cause by the Hold Separate Monitor, in consultation with the Commission staff. If the Hold Separate Manager is removed, resigns, or otherwise ceases to act as Hold Separate Manager, the Hold Separate Monitor shall, within three (3) business days of such action, subject to the prior approval of Commission staff, appoint a substitute Hold Separate Manager, and Respondent Ardagh shall enter into an agreement with the substitute Hold Separate Manager on the same terms and conditions as provided in this Hold Separate Order.

V.

IT IS FURTHER ORDERED that:

A. Respondent Ardagh shall cooperate with, and take no action to interfere with or impede the ability of: (i) the

Hold Separate Monitor: (ii) the Hold Separate Manager; or (iii) any Anchor Glass Designated Employee, to perform his or her duties and responsibilities consistent with the terms of the Orders.

B. Respondent Ardagh shall continue to offer and provide any support services and goods (directly or through third-party contracts) to the Anchor Glass Business.

1. For support services and goods that Respondent Ardagh provides to the Anchor Glass Business, Respondent Ardagh may charge no more than the same price, if any, charged by Respondent Ardagh for such support services and goods as of the Acquisition Date.

2. Ardagh Retained Employees who provide support to the Anchor Glass Business:

   a. shall retain and maintain all Confidential Business Information of the Anchor Glass Business on a confidential basis;

   b. shall not provide, discuss, exchange, circulate, or otherwise furnish any such information to or with any Person or any Ardagh Retained Employee whose employment involves any of Respondent Ardagh's businesses, other than the Anchor Glass Business, except as is permitted by the Orders; and

   c. shall also execute confidentiality agreements prohibiting the disclosure of any Confidential Business Information of the Anchor Glass Business.

3. The services and goods that Respondent Ardagh shall offer the Anchor Glass Business, at the Anchor Glass Business's option, shall include, but not be limited to, the following:

a. Environmental health and safety services, which are used to ensure compliance with federal and state regulations and corporate policies;

b. Legal, licensing, and audit services;

c. Federal and state regulatory compliance;

d. Maintenance and oversight of all information technology systems and databases, including, but not limited to, all hardware, software, electronic mail, word processing, document retention, enterprise management systems, financial management systems and databases, and customer databases;

e. Procurement and renewal of insurance and related services; and

f. Technical support for implementation of the batch reformulation project.

4. Notwithstanding the above, the Anchor Glass Business shall have, at the option of the Hold Separate Manager and with the approval of the Hold Separate Monitor following consultation with Commission staff, the right to acquire support services from third parties unaffiliated with Respondent Ardagh.

C. Respondent Ardagh shall not permit:

1. Any of its employees, officers, agents, or directors, other than: (i) the Hold Separate Monitor; (ii) the Hold Separate Managers; and (iii) any Anchor Glass Business employee, to be involved in the operations of the Anchor Glass Business, except to the extent otherwise provided in this Hold Separate Order; and

2. The Hold Separate Manager or any Anchor Glass Designated Employee to be involved in the operations of the Ardagh Retained Business, except for the provision of Hold Separate Services, as provided for in this Hold Separate Order.

D. Respondent Ardagh shall provide the Anchor Glass Business with sufficient financial and other resources as are appropriate in the judgment of the Hold Separate Monitor, consistent with his obligations and responsibilities in this Hold Separate Order, to:

1. Operate the Anchor Glass Business at least as it is currently operated (including efforts to generate new business, renew current customers, and complete development, furnace rebuilding and maintenance, and construction projects) consistent with the practices of the Anchor Glass Business, and Respondent Ardagh's business, capital, and strategic plans, in place as of January 1, 2014. Additionally, Respondent Ardagh shall provide sufficient capital expenditures for furnace rebuilds, if the Hold Separate Manager and Hold Separate Monitor, after consultation with the Commission staff, believe it is necessary to do so.

2. Provide each Anchor Glass Designated Employee with reasonable financial incentives to continue in his or her position consistent with past practices and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Anchor Glass Business pending divestiture. Such incentives shall include a continuation of all salaries, employee benefits, including funding of regularly scheduled raises and bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to assure the continuation, and prevent any diminution, of the viability, marketability, and competitiveness of the Anchor Glass Business during the Hold Separate Period, and as may otherwise be

necessary to achieve the purposes of this Hold Separate Order;

3. Perform all maintenance to, and replacements or remodeling of, the assets of the Anchor Glass Business in the ordinary course of business, in accordance with past practice, and Respondent Ardagh's business, capital, and strategic plans in place as of January 1, 2014.

4. Carry on such capital projects, physical plant improvements, and business plans as are already under way or planned, including, but not limited to, existing or planned renovation, remodeling, and expansion projects, all in accordance with Respondent Ardagh's business, capital, and strategic plans in place as of January 1, 2014; and

5. Maintain the viability, competitiveness, and marketability of the Anchor Glass Business.

Such financial resources to be provided to the Anchor Glass Business shall include, but shall not be limited to: (i) general funds; (ii) capital; (iii) working capital; and (iv) reimbursement for any operating expenses, losses, capital losses, or other losses, *Provided, however* that, consistent with the purposes of the Decision and Order and this Hold Separate Order, the Hold Separate Monitor may, after consultation with Commission staff and Hold Separate Manager, substitute any capital or development project for another of like cost.

E. No later than two (2) business days after the Acquisition Date, Respondent Ardagh shall establish and implement written procedures, subject to the approval of the Hold Separate Monitor and in consultation with Commission staff, regarding the operational independence of the Anchor Glass Business and the independent management by the

Hold Separate Monitor and Hold Separate Manager, consistent with the provisions of the Orders.

VI.

IT IS FURTHER ORDERED that:

A. During the Hold Separate Period, Respondent Ardagh shall:

1. Not provide, disclose, or otherwise make available any Confidential Business Information to any Person except as required or permitted by the Orders; and

2. Not use any Confidential Business Information for any reason or purpose other than as required or permitted by the Orders.

Provided, however, that nothing in this Paragraph VI shall prevent Respondent Ardagh from using any tangible or intangible property that Respondent Ardagh retains the right to use pursuant to the Orders. *Provided, further, however*, that to the extent that the use of such property involves disclosure of Confidential Business Information to another Person, Respondent Ardagh shall require such Person to maintain the confidentiality of such Confidential Business Information under terms no less restrictive than Respondent Ardagh's obligations under the Orders.

B. Ardagh Retained Employees shall not receive, have access to, use or continue to use, or disclose any Confidential Business Information pertaining to the Anchor Glass Business. *Provided, however,* that Respondent Ardagh is permitted to retain a copy of any Business Records used by, necessary for, or relating to the Ardagh Retained Business, or necessary for the provision of the Hold Separate Services, or as otherwise permitted pursuant to the Orders, and may

use Confidential Business Information, or disclose Confidential Business Information to Ardagh Retained Employees:

1. For the purpose of performing Respondent Ardagh's obligations under the Orders, or the Divestiture Agreements;

2. To ensure compliance with legal and regulatory requirements, as reasonably determined by Respondent Ardgah;

3. To provide accounting, information technology, and credit-underwriting services;

4. To provide legal services associated with actual or potential litigation and transactions;

5. As is necessary to receive Hold Separate Services; and

6. To monitor and ensure compliance with financial, tax reporting, governmental, environmental, health, and safety requirements.

C. If access to or disclosure of Confidential Business Information of the Anchor Glass Business to Ardagh Retained Employees and Respondent Ardagh's agents is necessary and permitted under Paragraph VI.B. of this Hold Separate Order, Respondent Ardagh shall:

1. Implement and maintain processes and procedures, as approved by the Hold Separate Monitor and in consultation with Commission staff, pursuant to which Confidential Business Information of the Anchor Glass Business may be disclosed or used by Ardagh Retained Employees and Respondent Ardagh's agents;

2. Limit disclosure or use by Ardagh Retained Employees and Respondent Ardagh's agents to

those who require access to such Confidential Business Information for uses permitted by the Orders;

3. Maintain and make available for inspection and copying by the Hold Separate Monitor and Commission staff records of Ardagh Retained Employees and Respondent Ardagh's agents who have accessed or used Confidential Business Information, a reasonable description of the Confidential Business Information to which they had access or used, and the dates upon which they accessed or used such information;

4. Require Ardagh Retained Employees and Respondent Ardagh's agents to sign, and maintain and make available for inspection and copying by the Hold Separate Monitor and Commission staff, appropriate written agreements to maintain the confidentiality of such information and to use such information only as permitted by the Orders; and,

5. Enforce the terms of this Paragraph VI as to any of Ardagh Retained Employees and Respondent Ardagh's agents and take such action as is necessary to cause each such employee or agent to comply with the terms of this Paragraph VI, including:

    a. Training of Ardagh Retained Employees and Respondent Ardagh's agents who are permitted access to and use of Confidential Business Information;

    b. Appropriate discipline of Ardagh Retained Employees and Respondent Ardagh's agents who fail to comply with processes and procedures established by Respondent Ardagh pursuant to this Paragraph VI or any confidentiality agreement; and

c. All other actions that Respondent Ardagh would take to protect its own trade secrets, proprietary, and other non-public information.

D. Respondent Ardagh shall implement and maintain in operation a system, approved by the Hold Separate Monitor and in consultation with Commission staff, of written procedures covering access and data controls to prevent unauthorized access to, or dissemination or use of, Confidential Business Information of the Anchor Glass Business, including, but not limited to, the opportunity by the Hold Separate Monitor to audit Respondent Ardagh's networks and systems to verify compliance with Respondent Ardagh's system and the Orders.

E. Neither the Hold Separate Manager nor any Anchor Glass Designated Employee shall receive or have access to, or use or continue to use, any confidential information relating to the Ardagh Retained Business, Saint-Gobain Containers, Inc., or Compagnie de Saint Gobain, except and only for the time such information is necessary to maintain and operate the Anchor Glass Business, to provide Hold Separate Services, or as otherwise permitted pursuant to the Orders.

F. Respondent Ardagh shall enforce the terms of this Paragraph VI as to any Person other than a proposed Acquirer of the Anchor Glass Business and take such action as is necessary to cause each such Person to comply with the terms of this Paragraph VI, including training of employees and all other actions that Respondent Ardagh would take to protect its own trade secrets and proprietary information.

VII.

IT IS FURTHER ORDERED that:

A. Respondent Ardagh shall cooperate with and assist any proposed Acquirer of the Anchor Glass Business to

evaluate independently and retain any of the Anchor Glass Designated Employees, such cooperation to include at least to implement the provisions of the Decision and Order relating to employee interviewing and hiring.

B. During the Hold Separate Period, Respondent Ardagh shall waive any corporate policy, rules, and regulations, and waive any written or oral agreement or understanding, that might prevent or limit any Hold Separate Monitor, Hold Separate Manager, or Anchor Glass Designated Employee from performing any services, engaging in any activities, or other conduct reasonably related to achieving the purposes of the Orders.

VIII.

IT IS FURTHER ORDERED that, within thirty (30) days after this Hold Separate Order becomes final, and every thirty (30) days thereafter until this Hold Separate Order terminates, Respondent Ardagh shall submit to the Commission, with a copy to the Hold Separate Monitor, a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with all provisions of this Hold Separate Order. Respondent Ardagh shall include in its reports, among other things that are required from time to time:

A. A description in reasonable detail of any claim (whether Respondent Ardagh agrees or disagrees with the claim) by any person (including, but not limited to, any of Respondent Ardagh's employees or agents) that Respondent Ardagh has failed to comply fully with the Orders, and the name, address, phone number, and email address of such person; and

B. A description in reasonable detail of any information in Respondent Ardagh's possession, custody, or control (including, but not limited to, information obtained from Respondent Ardagh's monitoring of the compliance of its employees and agents with

processes, procedures, and agreements intended to secure Respondent Ardagh's compliance with its obligations under the Orders) relevant to any failure by Respondent Ardagh, its employees, or its agents to comply fully with Respondent Ardagh's obligations under the Orders; and

C. A full description of the efforts being made to comply with the Decision and Order's divestiture obligation including a description of all substantive contacts or negotiations relating to the divestiture and approval, and the identities of all parties contacted. Respondent Ardagh shall include in its compliance reports copies, other than of privileged materials, of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestiture.

IX.

IT IS FURTHER ORDERED that Respondent Ardagh shall notify the Commission at least thirty (30) days prior to:

A. any proposed dissolution of Respondent Ardagh;

B. any proposed acquisition, merger, or consolidation of Respondent Ardagh; or

C. any other change in the Respondent Ardagh, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

X.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent Ardagh, with respect to any matter contained in this Order, Respondent Ardagh shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all non-privileged books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondent Ardagh related to compliance with the Consent Agreement and/or this Order and the Hold Separate Order, which copying services shall be provided by Respondent Ardagh at the request of the authorized representative of the Commission and at the expense of Respondent Ardagh;

B. Upon five (5) days' notice to Respondent Ardagh and without restraint or interference from them, to interview officers, directors, or employees of Respondent Ardagh, who may have counsel present.

XI.

IT IS FURTHER ORDERED that this Hold Separate Order shall terminate at the end of the Hold Separate Period.

By the Commission, Commissioner Wright dissenting.

APPENDIX A

HOLD SEPARATE MONITOR AGREEMENT

NON-PUBLIC APPENDIX A-1

HOLD SEPARATE MONITOR COMPENSATION

[Redacted From the Public Record Version, But Incorporated By Reference]

NON-PUBLIC APPENDIX B

HOLD SEPARATE SERVICES

[Redacted From the Public Record Version, But Incorporated By Reference]

DECISION AND ORDER
[Public Record Version]

The Federal Trade Commission ("Commission"), having heretofore issued its Complaint charging Ardagh Group, S.A. ("Respondent Ardagh"), Saint-Gobain Containers, Inc. (also known as Verallia North America ("VNA"), and Compagnie de Saint-Gobain ("CSG"), with a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Respondents having been served with a copy of that Complaint,

together with a notice of contemplated relief and having filed their answers denying said charges; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter withdrawn the matter from adjudication in accordance with § 3.25(c) of its Rules; and the Commission having thereafter considered the matter and having thereupon accepted the executed Consent Agreement and placed such agreement on the public record for a period of thirty (30) days, and having duly considered the comment filed by an interested party pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in conformity with the procedure prescribed in § 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and factual findings and enters the following Order ("Order"):

1. Respondent Ardagh Group, S.A., is a limited liability corporation organized, existing, and doing business under, and by virtue of, the laws of Luxembourg with its office and principal place of business at 56, rue Charles Martel, Luxembourg, and operates its glass container business in the United States through its subsidiary Ardagh Glass, Inc., which has its office and principal place of business located at 401 E. Jackson Street, Suite 2800, Tampa, FL 33602.

2. Respondent Saint-Gobain Containers, Inc., is a corporation organized, existing, and doing business under, and by virtue of, the laws of the state of Delaware with its principal place of business located at 1509 S. Macedonia Ave, Muncie, IN 47302.

3. Respondent Compagnie de Saint-Gobain is a corporation organized, existing, and doing business under, and by virtue of, the laws of France with its office and principal place of business located at "Les Miroirs," 18 avenue d'Alsace, Courbevoie, France, and its United States office and principal place of business located at 750 E. Swedesford Rd, Valley Forge, PA 19482.

4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents and the proceeding is in the public interest.

ORDER

I.

IT IS HEREBY ORDERED that, as used in this Order, the following definitions, and all other definitions used in the Hold Separate Order, shall apply:

A. "Ardagh" means Ardagh Group, S.A., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates in each case controlled by Ardagh Group, S.A., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. Ardagh includes VNA, after the Acquisition Date.

B. "Commission" means the Federal Trade Commission.

C. "Acquirer" means any Person that receives the prior approval of the Commission to acquire the Anchor Glass Business pursuant to this Decision and Order.

D. "Acquisition" means the proposed acquisition by Respondent Ardagh of VNA as described in the Share

Purchase Agreement, dated as of January 17, 2013, between Respondent Ardagh and CSG.

E. "Acquisition Date" means the date the Acquisition is consummated.

F. "Anchor Glass Business" means all of Respondent Ardagh's assets, including Tangible Personal Property and intangible assets, businesses and goodwill, related to the research, development, manufacture, distribution, marketing or sale of Anchor Glass Products including, but not limited to:

1. The Anchor Glass Manufacturing Facilities;

2. The Anchor Glass Corporate Facility;

3. The Anchor Glass Molds;

4. The Anchor Glass Molds Facility;

5. The Anchor Glass Engineering Facility;

6. The Anchor Glass Contracts;

7. Intellectual Property relating to the research, development, manufacture, distribution, marketing or sale of Anchor Glass Products;

8. The non-exclusive rights to use Respondent Ardagh's process, method, techniques, and know-how for soda ash reduction in the manufacture of glass containers that is used by Respondent Ardagh in the Ardagh Retained Business;

9. All inventories relating to Anchor Glass Products, wherever located;

10. All (a) trade accounts receivable and other rights to payment from customers of the Anchor Glass Business and the full benefit of all security for

such accounts or rights to payment, (b) all other accounts or notes receivable in respect of the Anchor Glass Business and the full benefit of all security for such accounts or notes and (c) any claim, remedy, or other right related to any of the foregoing;

11. All consents, licenses, certificates, registrations, or permits issued, granted, given, or otherwise made available by or under the authority of any governmental body or pursuant to any legal requirement relating to the research, development, manufacture, distribution, marketing or sale of Anchor Glass Products, and all pending applications therefor or renewals thereof;

12. All Business Records relating to the research, development, manufacture, distribution, marketing or sale of Anchor Glass Products; *provided, however,* that where documents or other materials included in the Business Records to be divested contain information: (a) that relates both to the Anchor Glass Business to be divested and to the Ardagh Retained Business or other products or businesses and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the Anchor Glass Business to be divested; or (b) for which the relevant party has a legal obligation to retain the original copies, the relevant party shall be required to provide only copies or relevant excerpts of the documents and materials containing this information. In instances where such copies are provided to the Acquirer, the relevant party shall provide the Acquirer access to original documents under circumstances where copies of the documents are insufficient for evidentiary or regulatory purposes.

G. "Anchor Glass Contracts" means all agreements and contracts with customers (including, but not limited to, contracts, purchasing agreements, and rebate

agreements with customers who will be served from both the Anchor Glass Manufacturing Facilities and facilities retained by Respondent Ardagh, and agreements, contracts, and understandings for transportation, storage, and other services), suppliers, vendors, representatives, agents, licensees and licensors; and all leases, mortgages, notes, bonds, and other binding commitments, whether written or oral, and all rights thereunder and related thereto related to the Anchor Glass Business from the Anchor Glass Manufacturing Facilities;

H. "Anchor Glass Corporate Facility" means the facility located at 401 E Jackson Street # 2800, Tampa, FL 33602-5216, including, but not limited to, information technology systems, all physical assets and equipment related to the research, development, manufacture, sale, and distribution of products from the Anchor Glass Manufacturing Facilities. *Provided, however,* that parts, inventory, designs, or other assets held for use exclusively by or for the Ardagh Retained Business may be excluded.

I. "Anchor Glass Designated Employee" means any person employed by Respondent Ardagh (1) at the Anchor Glass Manufacturing Facilities; (2) working at or out of the Anchor Glass Corporate Facility; (3) at the Anchor Glass Engineering Facility; (4) at the Anchor Glass Molds Facility; (5) who has spent over twenty-five percent (25%) of his or her time, from January 2013 to December 2013, working for or on behalf of the Anchor Glass Business, wherever located; and (6) identified by agreement between Respondent Ardagh and an Acquirer and made a part of a Divestiture Agreement. *Provided, however,* that, if approved by the Commission, an Anchor Glass Designated Employee described in this Paragraph may be excluded from this definition by agreement between Respondent Ardagh and the Acquirer. *Provided further, however,* that the employees listed on Non-Public Appendix A to this Order shall be excluded for

purposes of the Hold Separate Order in this matter, but at the option of the Acquirer, may be recruited, interviewed and hired pursuant to the provisions of this Order.

J. "Anchor Glass Engineering Facility" means the Anchor Glass engineering facility located at 1901 N Shabbona St, Streator, IL 61364, including, but not limited to, all real property interests (including fee simple interests and real property leasehold interests), including all easements, appurtenances, licenses, and permits, together with all buildings and other structures, facilities, and improvements located thereon, owned, leased, or otherwise held by Respondent Ardagh, and all Tangible Personal Property therein, and parts, inventory, and all other assets relating to the Anchor Glass Business. *Provided, however,* that parts, inventory, designs, or other assets held for use exclusively by or for the Ardagh Retained Business may be excluded.

K. "Anchor Glass Manufacturing Facilities" means all real property interests (including fee simple interests and real property leasehold interests), including all easements, appurtenances, licenses, and permits, together with all buildings and other structures, facilities, and improvements located thereon, owned, leased, or otherwise held by Respondent Ardagh, and all Tangible Personal Property, therein, at the Elmira Facility, Jacksonville Facility, Warner Robins Facility, Henryetta Facility, Lawrenceburg Facility and the Shakopee Facility. *Provided, however,* that parts, inventory, designs, or other assets held for use exclusively by or for the Ardagh Retained Business may be excluded.

L. "Anchor Glass Molds" means all molds, including designs and drawings for molds in existence or in development, owned by Respondent Ardagh wherever located and used, intended for use, or designed or in development for use, by the Anchor Glass

Manufacturing Facilities or relating to development, manufacture, or sale of Anchor Glass Products

M. "Anchor Glass Molds Facility" means the Zanesville mold facility located at 1555 Fairview Road, Zanesville, OH 43701, including, but not limited to, all real property interests (including fee simple interests and real property leasehold interests), including all easements, appurtenances, licenses, and permits, together with all buildings and other structures, facilities, and improvements located thereon, owned, leased, or otherwise held by Respondent Ardagh, and all Tangible Personal Property therein, and parts, inventory, and all other assets relating to the research, development, manufacture, distribution, marketing or sale of Anchor Glass Products. *Provided, however,* that parts, inventory, designs, or other assets held for use exclusively by or for the Ardagh Retained Business may be excluded.

N. "Anchor Glass Products" means the glass containers:

1. manufactured by Respondent Ardagh at the Anchor Glass Manufacturing Facilities; or

2. designed, researched and developed, but not yet commercialized, by Respondent Ardagh, anywhere in the world, and that are intended to be manufactured at the Anchor Glass Manufacturing Facilities.

O. "Ardagh Retained Business" means the assets and businesses of Respondent Ardagh other than the Anchor Glass Business.

P. "Business Records" means all originals and all copies of any operating, financial or other information, documents, data, computer files (including files stored on a computer's hard drive or other storage media), electronic files, books, records, ledgers, papers, instruments, and other materials, whether located,

stored, or maintained in traditional paper format or by means of electronic, optical, or magnetic media or devices, photographic or video images, or any other format or media, including, without limitation: distributor files and records; customer files and records, customer lists, customer product specifications, customer purchasing histories, customer service and support materials, customer approvals, and other information; credit records and information; correspondence; referral sources; supplier and vendor files and lists; advertising, promotional, and marketing materials, including website content; sales materials; research and development data, files, and reports; technical information; data bases; studies; designs, drawings, specifications and creative materials; production records and reports; service and warranty records; equipment logs; operating guides and manuals; employee and personnel records; education materials; financial and accounting records; and other documents, information, and files of any kind.

Q. "Confidential Business Information" means information owned by, or in the possession or control of, Respondent Ardagh that is not in the public domain and that is directly related to the conduct of the Anchor Glass Business. The term "Confidential Business Information" *excludes* the following:

1. information relating to any of Respondent Ardagh's general business strategies or practices that does not discuss with particularity the Anchor Glass Business;

2. information specifically excluded from the Anchor Glass Business conveyed to the Acquirer;

3. information that is contained in documents, records, or books of Respondent Ardagh that is provided to an Acquirer that is unrelated to the Anchor Glass Business acquired by that Acquirer

or that is exclusively related to businesses or products retained by Respondent Ardagh;

4. information that is protected by the attorney work product, attorney-client, joint defense, or other privilege prepared in connection with the Acquisition and relating to any United States, state, or foreign antitrust or competition law; and

5. information that Respondent Ardagh demonstrates to the satisfaction of the Commission, in the Commission's sole discretion:

   a. Was or becomes generally available to the public other than as a result of disclosure by Respondent Ardagh;

   b. Is necessary to be included in Respondent Ardagh's mandatory regulatory filings; *provided, however,* that Respondent Ardagh shall make all reasonable efforts to maintain the confidentiality of such information in the regulatory filings;

   c. Was available, or becomes available, to Respondent Ardagh on a non-confidential basis, but only if, to the knowledge of Respondent Ardagh, the source of such information is not in breach of a contractual, legal, fiduciary, or other obligation to maintain the confidentiality of the information;

   d. Is information the disclosure of which is consented to by the Acquirer;

   e. Is necessary to be exchanged in the course of consummating the Acquisition or the transaction under the Divestiture Agreement;

   f. Is disclosed in complying with the Order;

g. Is information the disclosure of which is necessary to allow Respondent Ardagh to comply with the requirements and obligations of the laws of the United States and other countries, and decisions of Government Entities; or

h. Is disclosed in obtaining legal advice.

R. "Divestiture Agreement" means any agreement that receives the prior approval of the Commission between Respondent Ardagh (or between a Divestiture Trustee appointed pursuant to Paragraph IV. of this Order) and an Acquirer to purchase all or any of the Anchor Glass Business, and all amendments, exhibits, attachments, agreements, and schedules thereto that have been approved by the Commission.

S. "Divestiture Date" means the date on which Respondent Ardagh (or a Divestiture Trustee) closes on the divestiture of the Anchor Glass Business as required by Paragraph II (or Paragraph IV) of this Order.

T. "Elmira Facility" means the glass manufacturing plant located at 151 E McCanns Blvd, Elmira Heights, NY 14903.

U. "Henryetta Facility" means the glass manufacturing plant located at 601 E Bollinger Rd, Henryetta, OK 74437.

V. "Hold Separate Business" means the business that Respondent Ardagh shall hold separate pursuant to the Hold Separate Order.

W. "Intellectual Property" means:

1. Patents, and the rights to obtain and file for Patents, trademarks, and copyrights and registrations thereof and to bring suit against a

third party for the past, present or future infringement, misappropriation, dilution, misuse or other violations of any of the foregoing;

2. product manufacturing technology, including process technology, technology for equipment, inspection technology, and research and development of product or process technology;

3. Product and manufacturing copyrights;

4. all plans (including proposed and tentative plans, whether or not adopted or commercialized), research and development, specifications, drawings, and other assets (including the non-exclusive right to use Patents, know-how, and other intellectual property relating to such plans);

5. product trademarks, trade dress, trade secrets, technology, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, development, and other information, formulas, and proprietary information (whether patented, patentable or otherwise) related to the manufacture of the products, including, but not limited to, all product specifications, processes, analytical methods, product designs, plans, trade secrets, ideas, concepts, manufacturing, engineering, and other manuals and drawings, standard operating procedures, flow diagrams, chemical, safety, quality assurance, quality control, research records, clinical data, compositions, annual product reviews, regulatory communications, control history, current and historical information associated with any Government Entity approvals and compliance, and labeling and all other information related to the manufacturing process, and supplier lists;

6. licenses including, but not limited to, third party software, if transferrable, and sublicenses to software modified by Respondent Ardagh;

7. formulations and a description of all ingredients, materials, or components used in the manufacture of products; and

8. any other intellectual property used in the past by Respondent Ardagh in the design, manufacture, and sale of products from the Anchor Glass Business.

X. "Jacksonville Facility" means the glass manufacturing plant located at 2121 Huron St., Jacksonville, FL 32254-2052.

Y. "Lawrenceburg Facility" means the glass manufacturing plant located at 200 Belleview Dr., Greendale, IN 47025.

Z. "Patents" means pending patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention and statutory invention registrations, in each case existing as of the Acquisition Date, and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions.

AA. "Person" means any individual, partnership, firm, corporation, association, trust, unincorporated organization, or other business entity other than Respondent Ardagh.

BB. "Shakopee Facility" means the glass manufacturing plant located at 4108 Valley Industrial Blvd N, Shakopee, MN 55379.

CC. "Tangible Personal Property" means all machinery, equipment, tools, furniture, office equipment, computer hardware, supplies, materials, vehicles, rolling stock, and other items of tangible personal property (other than inventories) of every kind owned or leased by Respondent Ardagh, together with any express or implied warranty by the manufacturers or sellers or lessors of any item or component part thereof and all maintenance records and other documents relating thereto.

DD. "Transitional Assistance" means any transitional services required by the Acquirer for the operation of the divested business including, but not limited to administrative assistance (including, but not limited to, order processing, shipping, accounting, and information transitioning services), technical assistance, and supply agreements.

EE. "Warner Robins Facility" means the glass manufacturing plant located at 1044 Booth Rd, Warner Robins, GA 31088.

II.

IT IS FURTHER ORDERED that:

A. Respondent Ardagh shall divest the Anchor Glass Business at no minimum price, absolutely and in good faith, as an on-going business, no later than one-hundred eighty (180) days from the date Respondent Ardagh signs the Agreement Containing Consent Orders, to an Acquirer that receives the prior approval of the Commission and in a manner (including an asset or stock sale) that receives the prior approval of the Commission.

B. At the request of the Acquirer, pursuant to an agreement that receives the prior approval of the Commission, Respondent Ardagh shall, for a period not to exceed one (1) year from the date Respondent

Ardagh divests the Anchor Glass Business, provide Transitional Assistance to the Acquirer:

1. Sufficient to enable the Acquirer to operate the divested business in substantially the same manner that Respondent Ardagh conducted the divested assets and business prior to the divestiture; and

2. At substantially the same level and quality as such services are provided by Respondent Ardagh in connection with its operation of the divested assets and business prior to the divestiture.

   Provided, however, that Respondent Ardagh shall not (i) require the Acquirer to pay compensation for Transitional Assistance that exceeds the direct cost of providing such goods and services, or (ii) seek to limit the damages (such as indirect, special, and consequential damages) which an Acquirer would be entitled to receive in the event of Respondent Ardagh's breach of any agreement to provide Transitional Assistance.

C. Respondent Ardagh shall not terminate or modify any agreement that is part of the Divestiture Agreement before the end of the term approved by the Commission without:

1. Prior approval of the Commission;

2. The written agreement of the Acquirer and thirty (30) days prior notice to the Commission; or

3. In the case of a proposed unilateral termination by Respondent Ardagh due to an alleged breach of an agreement by the Acquirer, sixty (60) days notice of such termination. *Provided, however,* that such sixty (60) days notice shall be given only after the parties have:

a. Attempted to settle the dispute between themselves, and

b. Either engaged in arbitration and received an arbitrator's decision, or received a final court decision after all appeals.

D. Until Respondent Ardagh or the Divestiture Trustee complete the divestitures and other obligations to transfer the Anchor Glass Business as required by this Order:

Respondent Ardagh shall take actions as are necessary to:

1. maintain the full economic viability and marketability of the Anchor Glass Business;

2. minimize any risk of loss of competitive potential for the Anchor Glass Business;

3. prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to the Anchor Glass Business; and

4. not sell, transfer, encumber, or otherwise impair the Anchor Glass Business (other than in the manner prescribed in this Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the Anchor Glass Business.

E. From the date Respondent Ardagh executes the Divestiture Agreement, Respondent Ardagh shall provide a proposed Acquirer with the opportunity to recruit and employ any Anchor Glass Designated Employee in conformance with the following:

1. No later than ten (10) days after a request from a proposed Acquirer, or staff of the Commission, Respondent Ardagh shall provide a proposed

Acquirer with the following information for each Anchor Glass Designated Employee, as and to the extent permitted by law:

a. name, job title or position, date of hire and effective service date;

b. a specific description of the employee's responsibilities;

c. the base salary or current wages;

d. the most recent bonus paid, aggregate annual compensation for Respondent Ardagh's last fiscal year and current target or guaranteed bonus, if any;

e. employment status (*i.e.,* active or on leave or disability; full-time or part-time);

f. any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly-situated employees; and

g. at a proposed Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant Anchor Glass Designated Employee(s).

2. No later than ten (10) days after a request from a proposed Acquirer, Respondent Ardagh shall provide the proposed Acquirer with:

a. an opportunity to meet, personally and outside the presence or hearing of any employee or agent of Respondent Ardagh, with any Anchor Glass Designated Employee;

b. an opportunity to inspect the personnel files and other documentation relating to any such

employee, to the extent permissible under applicable laws; and

c. to make offers of employment to any Anchor Glass Designated Employee.

3. Respondent Ardagh shall (i) not interfere, directly or indirectly, with the hiring or employing by a proposed Acquirer of any Anchor Glass Designated Employee, (ii) not offer any incentive to any Anchor Glass Designated Employee to decline employment with a proposed Acquirer, (iii) not make any counteroffer to any Anchor Glass Designated Employee who receives a written offer of employment from a proposed Acquirer; *Provided, however,* that nothing in this Order shall be construed to require Respondent Ardagh to terminate the employment of any employee or prevent Respondent Ardagh from continuing the employment of any employee; and (iv) remove any impediments within the control of Respondent Ardagh that may deter any Anchor Glass Designated Employee from accepting employment with a proposed Acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondent Ardagh that would affect the ability of such employee to be employed by a proposed Acquirer.

F. For a period of two (2) years after the Divestiture Date, Respondent Ardagh shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any Person employed by an Acquirer of the Anchor Glass Business, to terminate his or her employment relationship with an Acquirer; *Provided, however,* Respondent Ardagh may:

1. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, so

long as these actions are not targeted specifically at any Anchor Glass Designated Employees; and

2. Hire employees of the Anchor Glass Business who apply for employment with Respondent Ardagh, so long as such individuals were not solicited by Respondent Ardagh in violation of this paragraph; *provided, further, however,* that this sub-Paragraph shall not prohibit Respondent Ardagh from making offers of employment to or employing any employee of the Anchor Glass Business if an Acquirer has notified Respondent Ardagh in writing that an Acquirer does not intend to make an offer of employment to that employee, or where such an offer has been made and the employee has declined the offer, or where the individual's employment has been terminated by an Acquirer.

G. The purpose of this Paragraph II is to ensure the continued use of the assets in the same businesses in which such assets were engaged at the time of the announcement of the Acquisition by Respondent Ardagh, minimize the loss of competitive potential for the Anchor Glass Business, minimize the risk of disclosure of unauthorized use of Confidential Business Information related to the Anchor Glass Business; to prevent the destruction, removal, wasting, deterioration, or impairment of the Anchor Glass Business, except for ordinary wear and tear and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

A. Employees of the Ardagh Retained Business shall not receive, have access to, use or continue to use, or disclose any Confidential Business Information

pertaining to the Anchor Glass Business except in the course of:

1. Performing their obligations as permitted under this Order or the Order to Hold Separate;

2. Performing their obligations under any Divestiture Agreement; or

3. Complying with financial reporting requirements or environmental, health, and safety policies and standards, ensuring the integrity of the financial and operational controls on the Anchor Glass Business, obtaining legal advice, defending legal claims, investigations, or enforcing actions threatened or brought against the Anchor Glass Business, or as required by law.

For purposes of this Paragraph III.A., Respondent Ardagh's employees who provide or are involved in the receipt of support services under the Hold Separate Order or staff the Hold Separate Business shall be deemed to be performing obligations under the Order to Hold Separate.

B. If the receipt, access to, use, or disclosure of Confidential Business Information pertaining to the Anchor Glass Business is permitted to Respondent Ardagh's employees under Paragraph III.A. of this Order, Respondent Ardagh shall limit such information (1) only to those Persons who require such information for the purposes permitted under Paragraph III.A., (2) only to the extent such Confidential Business Information is required, and (3) only after such Persons have signed an appropriate agreement in writing to maintain the confidentiality of such information.

C. Respondent Ardagh shall enforce the terms of this Paragraph III as to any Person other than the Acquirer of the Anchor Glass Business and take such action as

is necessary to cause each such Person to comply with the terms of this Paragraph III, including training of Respondent Ardagh's employees and all other actions that Respondent Ardagh would take to protect its own trade secrets and proprietary information.

IV.

IT IS FURTHER ORDERED that:

A. If Respondent Ardagh has not divested the Anchor Glass Business and otherwise fully complied with the obligations as required by Paragraph II.A of this Order, the Commission may appoint a Divestiture Trustee to divest the Anchor Glass Business in a manner that satisfies the requirements of this Order. The Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Hold Separate Monitor pursuant to the relevant provisions of the Hold Separate Order.

B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondent Ardagh shall consent to the appointment of a Divestiture Trustee in such action to divest the relevant assets in accordance with the terms of this Order. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent Ardagh to comply with this Order.

C. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent Ardagh, which

consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent Ardagh has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent Ardagh of the identity of any proposed Divestiture Trustee, Respondent Ardagh shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

D. Within ten (10) days after appointment of a Divestiture Trustee, Respondent Ardagh shall execute an agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestiture or transfer required by the Order.

E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Respondent Ardagh shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the relevant assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and to enter into Transitional Assistance agreements

2. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the

end of the twelve (12) month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or in the case of a court-appointed Divestiture Trustee, by the court; *Provided, however,* that the Commission may extend the divestiture period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondent Ardagh shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent Ardagh shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent Ardagh shall extend the time for divestiture under this Paragraph IV in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

4. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent Ardagh's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; *Provided, however,* if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the

Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondent Ardagh from among those approved by the Commission; *provided, further, however,* that Respondent Ardagh shall select such entity within five (5) days of receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent Ardagh, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent Ardagh, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondent Ardagh, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondent Ardagh shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the

Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee. For purposes of this Paragraph IV.E.6., the term "Divestiture Trustee" shall include all persons retained by the Divestiture Trustee pursuant to Paragraph IV.E.5. of this Order.

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.

8. The Divestiture Trustee shall report in writing to Respondent Ardagh and to the Commission every thirty (30) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

9. Respondent Ardagh may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *Provided, however,* such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

10. The Commission may require, among other things, the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.

F. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph IV.

G. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

V.

IT IS FURTHER ORDERED that:

A. The Divestiture Agreement shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of an Acquirer or to reduce any obligations of the Respondent Ardagh under such agreement.

B. The Divestiture Agreement shall be incorporated by reference into this Order and made a part hereof.

C. Respondent Ardagh shall comply with all provisions of the Divestiture Agreement, and any breach by Respondent Ardagh of any term of such agreement shall constitute a violation of this Order. If any term of the Divestiture Agreement varies from the terms of this Order ("Order Term"), then to the extent that Respondent Ardagh cannot fully comply with both terms, the Order Term shall determine Respondent Ardagh's obligations under this Order. Any failure by the Respondent Ardagh to comply with any term of such Divestiture Agreement shall constitute a failure to comply with this Order.

VI.

IT IS FURTHER ORDERED that:

A. At any time after Respondent Ardagh signs the Consent Agreement in this matter, the Commission may appoint a Monitor to assure that Respondent Ardagh expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order;

B. The Commission shall select the Monitor, subject to the consent of Respondent Ardagh, which consent shall not be unreasonably withheld. If Respondent Ardagh has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondent Ardagh of the identity of any proposed Monitor, Respondent Ardagh shall be deemed to have consented to the selection of the proposed Monitor.

C. Not later than ten (10) days after appointment of the Monitor, Respondent Ardagh shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondent Ardagh's compliance with the relevant terms of the Order in a manner consistent with the purposes of the Order.

D. If a Monitor is appointed pursuant to this Paragraph VI, Respondent Ardagh shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:

1. The Monitor shall have the power and authority to monitor Respondent Ardagh's compliance with the terms of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner

consistent with the purposes of the Order and in consultation with the Commission including, but not limited to:

a. Assuring that Respondent Ardagh expeditiously complies with all of its obligations and perform all of its responsibilities as required by the Decision and Order in this matter;

b. Monitoring any transition services agreements;

c. Assuring that Confidential Business Information is not received or used by Respondent Ardagh or the Acquirer, except as allowed in the Order in this matter.

2. The Monitor shall have the power and authority to monitor Respondent Ardagh's compliance with the divestiture and related requirements of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission.

3. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.

E. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondent Ardagh's personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondent Ardagh's compliance with its obligations under the Order, including, but not limited to, its obligations related to the Anchor Glass Business.

F. Respondent Ardagh shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondent Ardagh's compliance with the Order.

G. The Monitor shall serve, without bond or other security, at the expense of Respondent Ardagh, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have the authority to employ, at the expense of Respondent Ardagh, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.

H. Respondent Ardagh shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Monitor. For purposes of this Paragraph VI.H., the term "Monitor" shall include all persons retained by the Monitor pursuant to Paragraph VI.G. of this Order.

I. Respondent Ardagh shall report to the Monitor in accordance with the requirements of this Order and as otherwise provided in the agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by the Respondent Ardagh, and any reports submitted by the Acquirer with respect to the performance of Respondent Ardagh's obligations under the Order or the Remedial Agreement(s). Within thirty (30) days from the date the Monitor receives these reports, the Monitor shall

report in writing to the Commission concerning performance by Respondent Ardagh of its obligations under the Order.

J. Respondent Ardagh may require the Monitor and each of the Monitor's consultants, accountants and other representatives and assistants to sign a customary confidentiality agreement. *Provided, however,* that such agreement shall not restrict the Monitor from providing any information to the Commission.

K. The Commission may require, among other things, the Monitor and each of the Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.

L. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph VI.

M. Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Order.

N. The Monitor appointed pursuant to this Order may be the same Person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order, or the same Person appointed as Hold Separate Monitor pursuant to the relevant provisions of the Order to Hold Separate in this matter.

VII.

IT IS FURTHER ORDERED that for a period of ten (10) years from the date this Order becomes final, Respondent Ardagh shall not, without providing advance written notification to the

Commission in the manner described in this Paragraph VII, directly or indirectly, acquire:

A. any stock, share capital, equity, or other interest in any Person, corporate or non-corporate, that manufactures or sells glass containers in or into the United States; or

B. any business, whether by asset purchase or otherwise, that engages in or engaged in, at any time after the Acquisition, or during the six (6) month period prior to the Acquisition, the manufacture, production, or sale of glass containers in or into the United States.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (herein referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondent Ardagh and not of any other party to the transaction. Respondent Ardagh shall provide the Notification to the Commission at least thirty days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondent Ardagh shall not consummate the transaction until thirty days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

Provided, however, that prior notification shall not be required by this paragraph for a transaction for which Notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

Provided, further, however, that prior notification shall not be required by this Paragraph VII for any acquisition after which Respondent Ardagh would hold no more than one percent (1%) of the outstanding securities or other equity interest in any Person described in this Paragraph VII.

VIII.

IT IS FURTHER ORDERED that:

A. Within thirty (30) days after the date this Order becomes final and every thirty (30) days thereafter until Respondent Ardagh has fully complied with the provisions of Paragraph II of this Order, Respondent Ardagh shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order and the Hold Separate Order. Respondent Ardagh shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with this Order and the Hold Separate Order, including a description of all substantive contacts or negotiations relating to the divestiture and approval, and the identities of all parties contacted. Respondent Ardagh shall include in its compliance reports copies of, other than of privileged materials, all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestiture and approval, and, as applicable, a statement that any divestiture approved by the Commission has been accomplished, including a description of the manner in which Respondent Ardagh completed such divestiture and the date the divestiture was accomplished.

B. One (1) year after the date this Order becomes final and annually thereafter until this Order terminates, and at such other times as the Commission may request, Respondent Ardagh shall submit to the Commission a

verified written report setting forth in detail the manner and form in which it has complied and is complying with this Order and any Divestiture Agreement.

IX.

IT IS FURTHER ORDERED that Respondent Ardagh shall notify the Commission at least thirty (30) days prior:

A. to any proposed dissolution of Respondent Ardagh;

B. to any proposed acquisition, merger, or consolidation of Respondent Ardagh; or

C. any other change in the Respondent Ardagh, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

X.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent Ardagh, with respect to any matter contained in this Order, Respondent Ardagh shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all non-privileged books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondent Ardagh related to compliance with the Consent Agreement and/or this Order and the Hold Separate Order, which copying services shall be provided by Respondent Ardagh at the request of the authorized representative of the Commission and at the expense of Respondent Ardagh;

B. Upon five (5) days' notice to Respondent Ardagh and without restraint or interference from them, to interview officers, directors, or employees of Respondent Ardagh, who may have counsel present.

XI.

IT IS FURTHER ORDERED that this Order shall terminate on June 17, 2024.

XII.

IT IS FURTHER ORDERED that the Complaint is dismissed as to Respondent Saint-Gobain Containers, Inc. and Respondent Compagnie de Saint-Gobain.

By the Commission, Commissioner Wright dissenting and Commissioner McSweeny not participating.

NON-PUBLIC APPENDIX A

HSO EXCLUDED EMPLOYEES BUT

SUBJECT TO INTERVIEW AND HIRE UNDER DECISION AND ORDER

[Redacted From the Public Record Version, But Incorporated By Reference]

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

I. Introduction

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") with Ardagh Group S.A. ("Ardagh"). The purpose of the Consent Agreement is to remedy the anticompetitive effects of Ardagh's proposed acquisition of Saint-Gobain Containers, Inc. ("Saint-Gobain") from Compagnie de Saint-Gobain. Under the terms of the Consent Agreement, Ardagh must divest six of its nine United States glass container manufacturing plants to an acquirer approved by the Commission. The Consent Agreement provides the acquirer the manufacturing plants and other tangible and intangible assets it needs to effectively compete in the markets for the manufacture and sale of glass containers to both beer brewers and spirits distillers in the United States. Ardagh must complete the divestiture within six months of the date it signs the Consent Agreement.

On January 17, 2013, Ardagh agreed to acquire Saint-Gobain from its French parent company, Compagnie de Saint-Gobain, for approximately $1.7 billion. This acquisition would concentrate most of the $5 billion U.S. glass container industry in two major competitors – Owens-Illinois, Inc. ("O-I") and the combined Ardagh/Saint-Gobain. These two major competitors would also control the vast majority of glass containers sold to beer brewers and spirits distillers in the United States. On June 28, 2013, the Commission issued an administrative complaint alleging that the acquisition, if consummated, may substantially lessen competition in the markets for the manufacture and sale of glass containers to brewers and distillers in the United States in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

The Consent Agreement has been placed on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become a part of the

public record. After 30 days, the Commission will review the Consent Agreement and comments received, and decide whether it should withdraw, modify, or make the Consent Agreement final.

II. The Parties

Ardagh, headquartered in Luxembourg, is a global leader in glass and metal packaging. Ardagh entered the United States glass container industry through two 2012 acquisitions – first acquiring a single-plant glass container manufacturer, Leone Industries, and then an eight-plant manufacturer, Anchor Glass Container Corporation ("Anchor"). Through the Anchor acquisition, Ardagh became the third-largest glass container manufacturer in the country, supplying glass containers for beer, spirits, non-alcoholic beverages, and food. Ardagh's nine glass container manufacturing plants are located in seven U.S. states.

Saint-Gobain is a wholly-owned U.S. subsidiary of Compagnie de Saint-Gobain, a French company which, among other businesses, manufactures and sells glass containers throughout the world. In the United States, Saint-Gobain is the second-largest glass container manufacturer, supplying beer, spirits, wine, non-alcoholic beverages, and food containers. Saint-Gobain operates 13 glass container manufacturing plants located in 11 U.S. states. Saint-Gobain, operates under the name "Verallia North America" or "VNA."

III. The Manufacture and Sale of Glass Containers to Brewers and Distillers in the United States

Absent the remedy, Ardagh's acquisition would harm competition in two relevant lines of commerce: the manufacture and sale of glass containers to (1) beer brewers, and (2) spirits distillers in the United States. Currently, only three firms – Owens-Illinois, Inc., Saint-Gobain, and Ardagh – manufacture and sell most glass containers to brewers and distillers in the United States. Collectively, these three firms control approximately 85 percent of the United States glass container market for brewers, and approximately 77 percent of the market for distillers.

The Commission often calculates the Herfindahl-Hirschman Index ("HHI") to assess market concentration. Under the Federal Trade Commission and Department of Justice Horizontal Merger Guidelines, markets with an HHI above 2,500 are generally classified as "highly concentrated," and acquisitions "resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power." In this case, both relevant product markets are already concentrated and the acquisition would increase the HHIs substantially. Absent the proposed remedy, the acquisition would increase the HHI by 782 points to 3,657 for glass beer containers, and by 1,072 points to 3,138 for glass spirits containers. With the proposed remedy, however, Ardagh's acquisition of Saint-Gobain will result in no increase in HHI in the glass container market for beer brewers and a 33 point HHI increase in the glass container market for distillers.

The relevant product markets in which to analyze the effects of the acquisition do not include other packaging materials, such as aluminum cans for beer or plastic bottles for spirits for several reasons. First, Ardagh and Saint-Gobain routinely identify each other and O-I as their most direct competitors, focusing their business strategies, market analysis, and pricing on glass container competition. Indeed, glass container pricing is not responsive to the pricing of other types of containers. Second, although brewers and distillers use aluminum and plastic packaging, respectively, for their products, these customers solicit and evaluate glass container bids independently of their can and plastic procurement efforts. Third, brewers and distillers demand glass so that they may maintain a premium image and brand equity and meet their consumers' expectations. Thus, brewers and distillers cannot easily or quickly substitute their glass container purchases with other packaging materials without jeopardizing the sale of their own products. Finally, Ardagh and Saint-Gobain distinguish glass containers from containers made with other materials based on qualities including oxygen impermeability, chemical inertness, and glass' ability to be recycled.

The United States is the appropriate geographic market in which to evaluate the likely competitive effects of the

acquisition. Ardagh and Saint-Gobain each maintain geographically diverse networks of plants that manufacture and sell glass containers to brewers and distillers throughout the country. Most U.S. brewers and distillers have similar competitive glass container alternatives from which to choose, regardless of their geographic location. The relevant geographic market is no broader than the United States because product weight and logistics constraints limit brewers' and distillers' ability to purchase significant volumes of glass containers from outside the country.

IV. Effects of the Acquisition

Absent relief, the acquisition would result in an effective duopoly likely to cause significant competitive harm in the markets for the manufacture and sale of glass containers to brewers and distillers. The glass container industry is a highly consolidated, stable industry, with low growth rates and high barriers to entry. The acquisition would increase the ease and likelihood of anticompetitive coordination between the only two remaining major suppliers. The acquisition would also eliminate direct competition between Ardagh and Saint-Gobain. Thus, the acquisition would likely result in higher prices and a reduction in services and other benefits to brewers and distillers.

V. Entry

Entry into the markets for the manufacture and sale of glass containers to brewers and distillers would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the likely competitive harm from the acquisition. The glass container industry in the United States enjoys significant barriers to entry and expansion including the high cost of building glass manufacturing plants, high fixed operating costs, the need for substantial technological and manufacturing expertise, and long-term customer contracts. For these reasons, entry by a new market participant or expansion by an existing one, would not deter the likely anticompetitive effects from the acquisition.

VI. The Consent Agreement

The proposed Consent Agreement remedies the competitive concerns raised by the acquisition by requiring Ardagh to divest six of its nine glass container manufacturing plants in the United States to an acquirer within six months of executing the Consent Agreement. In addition, the Consent Agreement requires Ardagh to transfer all customer contracts currently serviced at those six plants to an acquirer through an agreement approved by the Commission.

Under the proposed Consent Agreement, Ardagh will divest six of the manufacturing plants that it acquired when it purchased Anchor in 2012, along with Anchor's corporate headquarters, mold and engineering facilities. The six plants produce glass containers for brewers and distillers and are located in: Elmira, NY; Jacksonville, FL; Warner Robins, GA; Henryetta, OK; Lawrenceburg, IN; and Shakopee, MN. Anchor's corporate headquarters, mold and engineering facilities are located in Tampa, FL, Zanesville, OH, and Streator, IL, respectively. Other assets that Ardagh will divest include customer contracts, molds, intellectual property, inventory, accounts receivable, government licenses and permits, and business records. In addition, the Consent Agreement limits Ardagh's use of, and access to, confidential business information pertaining to the divestiture assets.

Through the proposed Consent Agreement, the acquirer of these assets will be the third-largest glass container manufacturer in the United States. These assets replicate the amount of glass containers for beer and spirits that the third largest supplier offers today. The acquirer will own plants that span a broad geographic footprint, offer a well-balanced product mix, and have flexible manufacturing capabilities. Its presence will preserve the three-way competition that currently exists in the relevant markets and moderate the potential for coordination.

Ardagh must complete the divestiture within six months of signing the Consent Agreement. Pending divestiture, Ardagh is obligated to hold the divestiture assets separate and to maintain the viability, marketability and competitiveness of the assets.

With the hold separate in place, the divested assets, under the direction of an experienced senior management team, will be in a position to compete in the glass industry, independent from Ardagh. A hold separate monitor will supervise the management of the divestiture assets until Ardagh completes the divestiture.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement, and is not intended to constitute an official interpretation of the proposed Decision and Order or to modify its terms in any way.

Statement of the Federal Trade Commission[1]

In June 2013, the Commission issued a complaint alleging that Ardagh Group, S.A.'s proposed $1.7 billion acquisition of Saint-Gobain Containers, Inc. would reduce competition in the U.S. markets for glass containers for beer and spirits. Specifically, the Commission alleges that the acquisition would have eliminated head-to-head competition between the parties and resulted in a near duopoly in markets already vulnerable to coordination. If the Commission had not challenged the deal, the merged firm and its only remaining significant competitor, Owens-Illinois would have controlled more than 75 percent of the relevant markets. The Commission staff developed evidence to prove at trial that the acquisition would likely have substantially lessened competition in violation of Section 7 of the Clayton Act. After the start of litigation, the parties chose to settle the matter by divesting six of the nine U.S. plants currently owned by Ardagh. The Commission has now accepted the proposed consent order for public comment and believes it addresses the competitive issues here, as well as the widespread customer concerns expressed by brewers and distillers who depend on a steady and competitively- priced

[1] Chairwoman Ramirez and Commissioners Brill and Ohlhausen join in this statement.

supply of glass containers. We outline below our concerns with this deal and the benefits of the proposed consent.

The 2010 Merger Guidelines explain that the Commission will likely challenge a transaction where "(l) the merger would significantly increase concentration and lead to a moderately or highly concentrated market; (2) that market shows signs of vulnerability to coordinated conduct. .. ; and (3) the Agencies have a credible basis on which to conclude that the merger may enhance that vulnerability."[2] We have reason to believe each of these factors is present here. The transaction would have dramatically increased concentration in already highly-concentrated markets. The glass container markets for beer and spirits are vulnerable to post-acquisition coordination, exhibiting features such as low demand growth, tight capacity, high and stable market shares, and high barriers to entry that typify markets that have experienced coordination. The existing three major glass manufacturers already have access to a wealth of information about the markets and each other, including plant-by-plant production capabilities, profitability, the identities of each other's customers, and details regarding each other's contracts and negotiations with customers. Customers, industry analysts, public statements, and distributors all serve as conduits for market information. The Commission found evidence that companies in this industry understand their shared incentives to keep capacity tight, avoid price wars, and follow a "price over volume" strategy. We believe this transaction would have made it easier for the remaining two dominant manufacturers to coordinate with one another on price and non-price terms to achieve supracompetitive prices or other anticompetitive outcomes.

As noted in the 2010 Merger Guidelines, the Commission will also likely challenge a transaction producing harmful unilateral effects. For instance, this could occur where the merged firm would no longer have to negotiate against other

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[2] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines§ 7.1 (2010) [hereinafter 2010 Horizontal Merger Guidelines], *available at* http://www.ftc.gov/sites/default/files/attachments/merger-review/I 008l9hmg.pdf.

competitors for customer supply contracts, or where the transaction would eliminate a competitor that otherwise could have expanded output in response to a price increase.[3] The Commission charges that Ardagh's acquisition of Saint-Gobain would have eliminated head-to-head competition between the two merging firms, which are the second- and third-largest U.S. glass container manufacturers in the relevant product markets. Brewers and distillers have reaped substantial benefits from the rivalry between the two, often playing one against the other in supply negotiations.

Once a prima facie showing of competitive harm is made, the Commission will consider evidence from the parties of verifiable, merger-specific efficiencies that could offset this harm.[4] In highly concentrated markets with high barriers to entry, as here, the parties can rebut the evidence of harm only with evidence of "extraordinary efficiencies."[5] Efficiencies represent an important aspect of the Commission's merger analysis, with a recent study showing that over a ten-year period 37 of 48 closed investigations involved internal staff memoranda examining efficiencies.[6] Similarly, a recent survey analyzing evidence considered by Commission staff prior to issuing second requests concluded that staff credited parties' detailed efficiency claims "[i]n most cases," even if they proved insufficient to offset competitive concerns about the transaction.[7]

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[3] *See* 2010 Horizontal Merger Guidelines§§ 6, 6.2-6.3.

[4] *See id.* § 10.

[5] *Fed Trade Comm'n v. Heinz,* 246 F.3d 708, 720 (D.C. Cir. 2001); *In re Polypore Int'!, Inc.,* Initial Decision, No. 9327, 2010 WL 866178, at *184-85 (FTC Mar. 1, 2010).

[6] Malcolm B. Coate & Andrew J. Heimert, *Merger Efficiencies at the Federal Trade Commission: 1997- 2007* 14 n.31 (2009), *available at* http://www.ftc.gov/sites/default/files/documents/reports/merger-efficiencies-federal-trade-commission-l997%E2%80%932007/0902mergerefficiencies.pdf.

[7] Darren S. Tucker, *A Survey of Evidence Leading to Second Requests at the FTC,* 78 Antitrust L.J. 591, 602 (2013).

In this matter, many of Ardagh's proffered synergies were not merger-specific and could have been achieved absent the acquisition. For instance, the parties claimed the merger would allow them to reduce overhead within the Saint-Gobain organization. However, this claim related to the staffing of the current Saint-Gobain organization alone and is separate from any additional savings to be reaped from eliminating staff positions made redundant by the combination of Ardagh and Saint-Gobain. Thus, the claim is not merger specific. In addition, Ardagh made broad claims of additional operational efficiencies, and likely would have achieved some. However, the parties put forward insufficient evidence showing that the level of synergies that could be substantiated and verified would outweigh the clear evidence of consumer harm.

For these reasons, we respectfully disagree with Commissioner Wright's conclusion that there is no reason to believe the transaction violates Section 7 of the Clayton Act. We also disagree with Commissioner Wright's suggestion that the Commission imposed an unduly high evidentiary standard in analyzing the parties' efficiency claims here and believe he overlooks several important points in his analysis. We are mindful of our responsibility to weigh appropriately all evidence relevant to a transaction and, moreover, understand our burden of proof before a trier of fact.

Commissioner Wright expresses concern that competitive effects are estimated whereas efficiencies must be "proven," potentially creating a "dangerous asymmetry" from a consumer welfare perspective.[8] We disagree. Both competitive effects and efficiencies analyses involve some degree of estimation. This is a necessary consequence of the Clayton Act's role as an incipiency statute. In addition, while competitive effects data and information tends to be available from a variety of sources, the data and information feeding efficiencies calculations come almost entirely from the merging parties. Indeed, the 2010 Merger Guidelines observe that"[e]fficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the

[8] Dissenting Statement of Commissioner Wright at 5.

merging firms."[9] The need for independent verification of this party data animates the requirement that, to be cognizable, efficiencies must be substantiated and verifiable.

Courts have repeatedly emphasized that, "while reliance on the estimation and judgment of experienced executives about costs may be perfectly sensible as a business matter, the lack of a verifiable method of factual analysis resulting in the cost estimates renders them not cognizable."[10] This is for good reason. Indeed," if this were not so, then the efficiencies defense might well swallow the whole of Section 7 of the Clayton Act."[11] The merger analysis the Commission undertook in this case is thus entirely consistent with the 2010 Horizontal Merger Guidelines and established case law.

Finally, we also believe the proposed consent order addresses the competitive concerns we have identified. The proposed order requires Ardagh to sell six manufacturing plants and related assets to a single buyer within six months, thereby creating an independent third competitor that fully replaces the competition that would have been lost in both the beer and spirits glass container markets had the merger proceeded unchallenged. In sum, we have ample reason to believe that the proposed merger was anticompetitive and without appropriate efficiency justification, and that the proposed remedy will maintain competition in the market for glass containers for beer and spirits. We commend and thank Commission staff for their hard work on this matter.

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[9] 2010 Horizontal Merger Guidelines§ 10.

[10] *United States v. H&R Block, Inc.,* 833 F. Supp. 2d 36, 46 (D.D.C. 2011); *see also* 2010 Horizontal Merger Guidelines§ 10 (noting that it is "incumbent upon the merging firms to substantiate efficiency claims so that the Agencies can verify [them] by reasonable means.").

[11] *H&R Block,* 833 F. Supp. 2d at 46.

Dissenting Statement of Commissioner Joshua D. Wright

The Commission has voted to issue a Complaint and Decision & Order ("Order") against Ardagh Group ("Ardagh") to remedy the allegedly anticompetitive effects of Ardagh's proposed acquisition of Saint-Gobain Containers Inc. and Compagnie de Saint-Gobain Gointly, "St. Gobain"). I dissented from the Commission's decision because the evidence is insufficient to provide reason to believe Ardagh's acquisition will substantially lessen competition in glass containers manufactured and sold to beer brewers and spirits distillers in the United States, in violation of Section 7 of the Clayton Act. FTC staff and their economic expert should be commended for conducting a thorough investigation of this matter, working diligently to develop and analyze a substantial quantity of documentary and empirical evidence, and providing thoughtful analyses of the transaction's potential competitive effects. Indeed, I agree with the Commission that there is evidence sufficient to give reason to believe the proposed transaction would likely result in unilateral price increases. After reviewing the record evidence, however, I concluded there is no reason to believe the transaction violates Section 7 of the Clayton Act because any potential anticompetitive effect arising from the proposed merger is outweighed significantly by the benefits to consumers flowing from the transaction's expected cognizable efficiencies. It follows, in my view, that the Commission should close the investigation and allow the parties to complete the merger without imposing a remedy.

I write separately today to explain my reasoning for my vote in the matter and to highlight some important issues presented by this transaction relating to the burden of proof facing merging parties seeking to establish cognizable efficiencies.

I. Potential Anticompetitive Effects Are Small At Best Relative to Cognizable Efficiencies

The Commission alleges both unilateral and coordinated price effects will arise from the proposed transaction. The

economic logic of the unilateral effects theory is straightforward: If the merger combines the two glass manufacturers who are the most preferred for a set of customers, there is the potential for a price increase arising from the loss of competition between those two firms. This is because sales previously diverted to the next closest competitor in response to a price increase will now be internalized by the post-merger firm. When analyzing the potential for unilateral price effects, the 2010 Merger Guidelines indicate the Agencies will consider "any reasonably available and reliable information," including "documentary and testimonial evidence, win/loss reports and evidence from discount approval processes, customer switching patterns, and customer surveys."[1] The Merger Guidelines also contemplate a number of quantitative analyses to facilitate the analysis of potential unilateral effects including calculating diversion ratios and the value of diverted sales. Where sufficient data are available, the Merger Guidelines indicate "the Agencies may construct economic models designed to quantify the unilateral price effects resulting from the merger."[2] In my view, the totality of record evidence supports an inference - though a fragile one - that the merger is likely to result in very modest unilateral price effects at best.

With respect to the potential coordinated price effects, I find successful coordination in this market highly unlikely.[3]

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[1] U.S. DEP'T OF JUSTICE & FED. TRADE CoMM'N, HORIZONTAL MERGER GUIDELINES § 6.1 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hing-2010.html[hereinafter MERGER GUIDELINES].

[2] *Id.*

[3]Although coordinated effects may be more likely with two rather than three key competitors, I do not find evidence sufficient to conclude coordination is likely. For example, I find that prices are individually negotiated and not particularly transparent, and the incentive to cheat without detection would likely undermine a collusive outcome. In the ordinary course of business, competitive firms collect information and monitor one another's behavior. There is no evidence that the information collected by firms in the glass container market is accurate or that coordination based upon that information has taken place to date.

However, even if coordination was a more plausible concern, I am not persuaded record evidence is probative of the effects that would arise as a result of *this* merger. My view and analysis of the record evidence relied upon to assess the magnitude of any potential coordinated effects is that it is suspect and cannot identify price differences attributable to changes in post-merger incentives to coordinate that would result from the proposed transaction rather than other factors. In addition, even if coordinated effects were likely, any estimated expected effect would need to be discounted by a probability of successful coordination that is less than one.

In summary, given the totality of the available evidence, I am persuaded that the proposed transaction is likely to generate, at best, small unilateral price effects.

The key question in determining whether the proposed transaction is likely to violate Section 7 of the Clayton Act is thus whether any cognizable efficiencies "likely would be sufficient to reverse the merger's potential to harm customers in the relevant market."[4] The 2010 Merger Guidelines and standard cost-benefit principles teach that efficiencies should matter most when competitive effects are smal l.[5] The

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[4] MERGER GUIDELINES§ 10.

[5] MERGER GUIDELINES § 10 ("In the Agencies' experience, efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great."). It is sometimes argued, pointing to language in the Merger Guidelines that "efficiencies almost never justify a merger to monopoly or near-monopoly," that the erger Guidelines rule out or render the burden facing merger parties practically insurmountable in the case of mergers to monopoly or "three-to-two" situations. In my view, this is a misreading of the Merger Guidelines in letter and spirit. The sentence prior notes that "efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great." The Merger Guidelines' reference to mergers to monopoly or near-monopoly are illustrations of cases in which likely adverse effects might be large. The Merger Guidelines themselves do not rule out an efficiencies defense when a merger with small anticompetitive effects, with any market structure, generates cognizable efficiencies that are sufficient to prevent the merger from being anticompetitive. Nor do the Merger Guidelines suggest that a merger in a market with many firms that exhibits significant unilateral price effects should face a less serious burden in order to

Commission's view of the record evidence is apparent in the Complaint, which alleges that "nearly all" of the efficiencies proffered by the parties are non-cognizable.[6] However, my own review of the record evidence leads me to disagree with that conclusion. In fact, I find that given reasonable assumptions, cognizable efficiencies are likely to be substantial and more than sufficient to offset any anticompetitive price increase. While reasonable minds can differ with respect to the magnitude of cognizable efficiencies in this case, I do not find the allegation of zero or nearly zero efficiencies plausible. Indeed, my own analysis of the record evidence suggests expected cognizable efficiencies are up to six times greater than any likely unilateral price effects. The relative magnitude of the expected cognizable efficiencies set forth is dispositive of the matter under my own analysis.

II. When Is There an Efficiencies Defense at the FTC?

I would like to highlight some important issues presented by this transaction as they relate to how the Commission analyzes parties' efficiencies claims, and in particular, whether the burden of proof facing parties seeking to establish cognizable efficiencies is or should be meaningfully different than the burden facing the agency in establishing that a proposed merger is likely to substantially lessen competition.

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establish an efficiencies defense. The Merger Guidelines' more general shift toward effects over market structure is also consistent with this analysis and undermines the logic of a position that the comparison of anticompetitive harms to cognizable efficiencies should be conducted differently depending upon the number of firms in the relevant market. To the extent the Commission believes the judicial decisions cited in note 5 of their statement endorse the notion that extraordinary efficiencies are required to justify a merger to monopoly or duopoly even when the anticompetitive effects from that merger are small, this is the analytical equivalent of allowing the counting of the number of firms within a market to trump analysis of competitive effects. The Commission should reject that view as inconsistent with the goal of promoting consumer welfare.

[6] *See, e.g.* Complaint, In the Matter of Ardagh Group S.A., F.T.C. Docket No. 9356 (June 28, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2013/07/130701ardaghcmpt.pdf.

My view is that the burden facing the agency with respect to the likelihood of anticompetitive effects should be in parity to that faced by the parties with respect to efficiencies. I recognize that this view is at least superficially in tension with the 2010 Merger Guidelines, which appear to embrace an asymmetrical approach to analyzing harms and benefits. Indeed, the 2010 Merger Guidelines declare that "the Agencies will not simply compare the magnitude of the cognizable efficiencies with the magnitude of the likely harm to competition absent the efficiencies."[7] This tension is easily resolved in the instant case because the efficiencies substantially outweigh the potential harms, but it merits greater discussion.

To begin with, it is important to define which issues are up for discussion and which are not with some precision. The issue is not whether the burden-shifting framework embedded within Section 7 of the Clayton Act is a useful way to structure economic and legal analysis of complex antitrust issues.[8] It is. Nor is the pertinent question whether the parties properly bear the burden of proof on efficiencies. They do.[9]

The issues here are twofold. The first issue is whether the magnitude of the burden facing merging parties attempting to demonstrate cognizable efficiencies *should* differ from the burden the Commission must overcome in establishing the likelihood of anticompetitive effects arising from the transaction *in theory.* The second is whether the magnitudes of those burdens differ *in practice.* The Commission appears to answer the first question in the negative.[10] With respect to the

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[7] MERGER GUIDELINES§ 10.

[8] See, e.g., United States v. Baker Hugh es, Inc., 908 F.2d 981 (D.C. Cir. 1990).

[9] *See* MERGER GUIDELINES§ 10.

[10] Statement of the Commission, In the Matter of Ardagh Group S.A., Saint-Gobain Containers, Inc., and Compagnie de Saint-Gobain, File No. 131-0087 (April 11, 2014) ("We also disagree with Commissioner Wright's suggestion that the Commission imposed an unduly high evidentiary standard in analyzing the parties' efficiency claims").

second question, the Commission points to some evidence that the Agency does in fact consider efficiencies claim s when presented in many investigations. There is little dispute, however, that the Commission gives some form of consideration to efficiency claims; the relevant issue is over precisely *how* the Commission considers them. More specifically, must merging parties overcome a greater burden of proof on efficiencies in practice than does the FTC to satisfy its prima fade burden of establishing anticompetitive effects? This question, in my view, merits greater discussion.

Even when the same burden of proof is applied to anticompetitive effects and efficiencies, of course, reasonable minds can and often do differ when identifying .and quantifying cognizable efficiencies as appears to have occurred in this case. My own analysis of cognizable efficiencies in this matter indicates they are significant. In my view, a critical issue highlighted by this case is whether, when, and to what extent the Commission will credit efficiencies generally, as well as whether the burden faced by the parties in establishing that proffered efficiencies are cognizable under the Merger Guidelines is higher than the burden of proof facing the agencies in establishing anticompetitive effects. After reviewing the record evidence on both anticompetitive effects and efficiencies in this case, my own view is that it would be impossible to come to the conclusions about each set forth in the Complaint and by the Commission - and particularly the conclusion that cognizable efficiencies are nearly zero - without applying asymmetric burdens.

Merger analysis is by its nature a predictive enterprise. Thinking rigorously about probabilistic assessment of competitive harms is an appropriate approach from an economic perspective. However, there is some reason for concern that the approach applied to efficiencies is deterministic in practice. In other words, there is a potentially dangerous asymmetry from a consumer welfare perspective of an approach that embraces probabilistic prediction, estimation, presumption, and simulation of anticompetitive effects on the one hand but requires efficiencies to be *proven* on the other.

There is ample discretion in the 2010 Merger Guidelines to allow for this outcome in practice. For example, the merger-specificity requirement could be interpreted narrowly to exclude any efficiency that can be recreated with any form of creative contracting. While the Merger Guidelines assert that Agencies "do not insist upon a less restrictive alternative that is merely theoretical," there is little systematic evidence as to how this requirement is applied in practice. Verifiability, on the other hand, could be interpreted to impose stricter burden of proof than the agency is willing to accept when it comes to predictions, estimates, presumptions, or simulations of anticompetitive effects. There is little guidance as to how these provisions of the Merger Guidelines ought to be interpreted.[11] Neither is further guidance likely forthcoming from the courts given how infrequently mergers are litigated. None of this, of course, is to say that parties should not bear these burdens in practice. Efficiencies, like anticompetitive effects, cannot and should not be presumed into existence. However, symmetrical treatment in both theory and practice of evidence proffered to discharge the respective burdens of proof facing the agencies and merging parties is necessary for consumer-welfare based merger policy.

There are legitimate and widespread concerns that this has not been the case. Academics, agency officials, and practitioners have noted that although efficiencies are frequently a significant part of the business rationale for a transaction, receiving credit for efficiencies in a merger review is often difficult.[12] Professor Daniel Crane has analyzed the perceived asymmetries between competitive effects analysis

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[11] The 2006 Merger Guidelines Commentary provides some guidance on efficiencies, but offer little guidance on the interpretation of these provisions and the type of substantiation required. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES (Mar. 2006), *available at* http://www.justice.gov/atr/public/guidelines/215247.htm#44.

[12] *See, e.g.,* Michael B. Bernstein & Justin P. Hedge, *Maximizing Efficiencies: Getting Credit Where Credit Is Due,* ANTITRUST SOURCE, Dec. 2012, *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/dec12_hedge_12_20f.authcheckdam.pdf.

and efficiencies discussed above and their implications for competition systems and consumer welfare.[13] Others have pointed out that recent court cases reveal that "the efficiency defense faces an impossibly high burden."[14] Moreover, testimony from senior agency officials recognize the potential costs of imposing an unnecessarily high burden of proof to demonstrate cognizable efficiencies and states that symmetrical treatment of the evidence as they related to efficiencies versus competitive effects is warranted.

> *Placing too high a burden on the parties to quantify efficiencies and to show that they are merger-specific risks prohibiting transactions that would be efficiency-enhancing. On the other hand, we are not able simply to take the parties' word that the efficiencies they have identified will actually materialize. Ultimately, we evaluate evidence related to efficiencies under the same standard we apply to any other evidence of competitive effects.*[15]

The lack of guidance in analyzing and crediting efficiencies has led to significant uncertainty as to what standard the Agency applies in practice to efficiency claims and led to inconsistent applications of Section 10 of the

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[13] Daniel A. Crane, *Rethinking Merger Efficiencies,* 110 MICH. L. REV. 347, 386-87 (2011). Professor Crane argues that "as a matter of both verbal formulation in the governing legal norms and observed practice of antitrust enforcement agencies and courts, the government is accorded greater evidentiary leniency in proving anticompetitive effects than the merging parties are in proving offsetting efficiencies," *id.* at 348, and rejects a variety of justifications for asymmetrical treatment of merger costs and benefits.

[14] Malcolm B. Coate, *Efficiencies in Merger Analysis: An Institutionalist View,* 13 SUP. CT. ECON. REV. 230 (2005).

[15] Statement of Kenneth Heyer on Behalf of the United States Department of Justice, Antitrust Modernization Commission Hearings on the Treatment of Efficiencies in Merger Enforcement (Nov. 17, 2005), *available at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Statement-Heyer.pdf.

Merger Guidelines, even among agency staff.[16] In my view, standard microeconomic analysis should guide how we interpret Section 10 of the 2010 Merger Guidelines, as it does the rest of the antitrust law. To the extent the Merger Guidelines are interpreted or applied to impose asymmetric burdens upon the agencies and parties to establish anticompetitive effects and efficiencies, respectively, such interpretations do not make economic sense and are inconsistent with a merger policy designed to promote consumer welfare.[17] Application of a more symmetric standard is unlikely to allow, as the Commission alludes to, the efficiencies defense to "swallow the whole of Section 7 of the Clayton Act." A cursory read of the cases is sufficient to put to rest any concerns that the efficiencies defense is a mortal threat to agency activity under the Clayton Act. The much more pressing concern at present is whether application of asymmetric burdens of proof in merger review will swallow the efficiencies defense.

[16] In a recent study examining agency analysis of efficiencies claims, an FTC economist and attorney found significant disparities. Malcolm B. Coate & Andrew J. Heimert, Merger Efficiencies at the Federal Trade Commission: 1997-2007 (2009), *available at* http://www.ftc.gov/sites/default/files/documents/reports/merger-efficiencies-federal-trade-commission-1997%E2%80%932007/0902mergerefficiencies.pdf. Coate and Heimert find that "BE staff endorsed 27 percent of the claims considered, while BC accepted significantly fewer (8.48 percent) of the claims considered during the studied period." The disparity also applies to rejection of efficiencies claims. The Bureau of Economics rejected 11.9 percent of the claims, while the Bureau of Competition rejected a significantly higher 31.9 percent of claims. *Id.* at 26.

[17] For example, Professor Crane explains that "[i]f the government and merging parties were held to the same standard of proof-preponderance of the evidence, for example-then, conceptually, harms and efficiencies would be given equal weight despite the different allocations of burdens of proof." In addition, "[i]f probabilities of harm are easier to demonstrate on an individualized basis than probabilities of efficiencies, even though in the aggregate both harms and efficiencies are similarly likely in the relevant categories of cases, then merger policy will display a bias in favor of theories of harm even if it adopts an explicit symmetry principle." Crane, *supra* note 11, at 387-88.

III. Conclusion

There are many open and important questions with respect to the treatment of efficiencies at the Agencies. While the Agencies' analytical framework applied to diagnosing potential anticompetitive effects got an important update with the 2010 Merger Guidelines, there remains significant room for improvement with respect to the aligning agency analysis of efficiencies with standard principles of economic analysis. Primary among these important questions is whether the burden of proof required to establish cognizable efficiencies should be symmetrical to the burden the Agencies must overcome to establish anticompetitive effects. In my view, issues such as out-of-market efficiencies and the treatment of fixed costs also warrant further consideration.[18]

For the reasons set forth in this statement, I conclude that the harms from the transaction are small at best and, applying a symmetric standard to assessing the expected benefits and harms of a merger, the expected cognizable efficiencies are substantially greater than the expected harms. Accordingly, I believe the merger as proposed would have benefitted consumers. As such, I cannot join my colleagues in supporting today's consent order because I do not have reason to believe the transaction violates Section 7 of the Clayton Act nor that a consent ordering divestiture is in the public interest.

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[18] See, e.g., Jan M. Rybnicek & Joshua D. Wright, *Outside In or Inside Out?: Counting Merger Efficiencies Inside and Out of the Relevant Market, in* 2 WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE - LIBER AMICORUM (2014) (forthcoming}, *available at* ht tp://pa:pers.ssm.com/sol3 /pa:pe rs.cfm?abstract id=2411270; Judd E. Ston & Joshua D. Wright, *The Sound of One Hand Cla pping: The 2010 Merger Guidelines and the Challenge of Judicial Adopt ion,* 39 REV. INDUS. ORG. 145 (2011).