

Complaint

IN THE MATTER OF

LIBBEY INC., ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket 9301; File No. 0110194**Complaint, May 9, 2002--Decision, October 7, 2002*

This consent order addresses the acquisition by Respondent Libbey Inc. – the largest maker and seller of food service glassware in the United States – of Anchor Hocking Corporation, the third largest maker and seller of food service glassware in the United States, and a wholly-owned subsidiary of Respondent Newell Rubbermaid Inc. The order, among other things, requires the respondents to provide the Commission with prior notice of the acquisition, sale, transfer, or other conveyance of all or part of Anchor or Anchor’s Food Service Business. The order also requires Respondent Libbey to provide the Commission with prior notice of its acquisition of any interest in Anchor’s stock or in the assets of Anchor’s Food Service Business. In addition, the order requires Respondent Newell, for ten years, to provide the Commission with prior notice if it sells, transfers, or otherwise conveys any part of Anchor’s Food Service Business to Libbey or Vitrocrisa, and to provide such prior notice for five years with respect to such transactions in all other circumstances.

Participants

For the Commission: *Richard Liebeskind, Chul Pak, Rhett Krulla, Morris Bloom, Brian Burgess, William Diaz, Lisa A. Rosenthal, April Tabor, Robert Tovsky, Robert Williams, Mary Forster, Art Strong, Elizabeth A. Piotrowski, Debra J. Holt, Christopher Garmon, Joseph Breedlove, Leslie Farber, and Mary T. Coleman.*

For the Respondents: *Bruce J. Prager and E. Marcellus Williamson, Latham & Watkins, Richard C. Weisberg, Libbey, and William S. D’Amico, Chadbourne & Parke.*

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COMPLAINT

The Federal Trade Commission (“Commission”), having reason to believe that respondents Libbey Inc. (“Libbey”), a corporation, and Newell Rubbermaid, Inc. (“Newell Rubbermaid”), a corporation, entered into (1) an agreement, dated as of June 17, 2001, for the acquisition by Libbey of the stock of Anchor Hocking Corporation (“Anchor”) from Newell Rubbermaid, and (2) an amended agreement, dated as of January 21, 2002, for the acquisition by Libbey of the stock of Anchor from Newell Rubbermaid, both in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, which acquisitions, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

RESPONDENT LIBBEY

1. Respondent Libbey is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 300 Madison Avenue, Toledo, Ohio 43699-0060.

2. Libbey is the largest maker and seller of food service glassware in the United States, with substantially more than half of the sales. Libbey produces and sells food service glassware, a line of products that includes many different styles of tumblers and stemware for beverages, and other glassware products ranging from serving platters to candle holders. Libbey produces and sells glassware, among other segments, to food service customers, including distributors who resell soda-lime glassware to restaurants, hotels and other food service establishments.

RESPONDENT NEWELL RUBBERMAID

3. Respondent Newell Rubbermaid is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 29 East Stephenson Street, Freeport, Illinois 61032. Anchor is an indirect, wholly-owned subsidiary of Newell Rubbermaid.

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4. Anchor is the third largest maker and seller of food service glassware in the United States. Anchor is Libbey's most formidable competitor in the food service glassware market.

JURISDICTION

5. Libbey is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

6. Newell Rubbermaid is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

THE ACQUISITION AND THE AMENDED MERGER
AGREEMENT

7. Pursuant to a Stock Purchase Agreement dated June 17, 2001, Libbey proposed to acquire all of the stock of Anchor from Newell Rubbermaid (the "acquisition").

8. On December 18, 2001, the Commission authorized the commencement of an action under Section 13(b) of the FTC Act to seek a preliminary injunction barring the acquisition during the pendency of administrative proceedings. Thereafter, on January 14, 2002, the FTC commenced such an action in the United States District Court for the District of Columbia, and on April 22, 2002, the district court granted the FTC's motion for a preliminary injunction pending the completion of administrative adjudication.

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9. On or about January 21, 2002, after the preliminary injunction action was commenced, respondents amended their merger agreement (the “amended merger agreement”). Respondents amended their merger agreement in response to the Commission’s vote to challenge the acquisition. Pursuant to the amended merger agreement, Libbey would still acquire all of the stock of Anchor, but prior to closing Anchor would transfer to Newell Rubbermaid’s Rubbermaid Commercial Products (“RCP”) division less than 10% of the assets of Anchor, and the consideration to be paid by Libbey for Anchor would be reduced by less than 10%.

10. Under the amended merger agreement, the assets to be transferred to RCP are most (not all) of the molds, customer relationships and certain other assets used in Anchor’s food service glassware business. Anchor would keep, and Libbey would still acquire, key assets used by Anchor in the food service glassware business, most significantly Anchor’s two glassware manufacturing plants. Newell would not retain any capability to manufacture glassware.

11. After the district court granted the Commission’s motion for a preliminary injunction, respondents told the court that Libbey would not solicit certain Anchor employees. At approximately the same time, Newell and a third party modified the price term under a supply agreement for RCP.

12. The amended merger agreement and the changes described in Paragraph 11 do not materially change the acquisition or its likely effect on competition.

RELEVANT MARKET

13. A relevant line of commerce in which to assess the effects of the acquisition and the amended merger agreement is food service glassware.

GEOGRAPHIC MARKET

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14. The relevant geographic area in which to assess the effects of the acquisition and the amended merger agreement is the United States.

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MARKET STRUCTURE

15. The United States food service glassware market is highly concentrated.

16. Libbey is the largest maker and seller of food service glassware in the United States, with substantially more than half of the sales.

17. Anchor is the third largest maker and seller of food service glassware in the United States.

18. Libbey and Anchor are direct and actual competitors in the manufacture and sale of food service glassware. They compete with each other on price by, among other things, offering discounts and other promotions on the sale of their food service glassware. Anchor prices and discounts its food service glassware in response to Libbey's pricing, and in order to take sales from Libbey. Anchor has succeeded in taking food service glassware sales from Libbey by offering lower prices to food service customers and distributors.

19. The acquisition and the amended merger agreement would combine the largest and third largest manufacturers and sellers of food service glassware in the United States, substantially increasing concentration in the food service glassware market, would result in a highly concentrated market, would eliminate the existing substantial competition between Libbey and Anchor, would impair the competitive viability of Newell Rubbermaid, and would substantially reduce competition and tend to create a monopoly in the market for food service glassware in the United States.

ANTICOMPETITIVE EFFECTS OF THE ACQUISITION
AND THE AMENDED MERGER AGREEMENT

20. The amended merger agreement, if consummated, would impair the competitive viability of Newell Rubbermaid as a competitor in the sale of food service glassware in the United States, and would reduce competition in the food service glassware market.

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21. The acquisition and the amended merger agreement may substantially lessen competition in the following ways, among others:

- a. they would eliminate actual, direct and substantial competition between Libbey and Anchor;
- b. they would increase the level of concentration in the relevant market;
- c. they may lead to increases in price for the relevant product;
- d. they may increase barriers to entry into the relevant market;
- e. they may give Libbey market power in the relevant market; and
- f. they may allow Libbey to exercise market power in the relevant market either unilaterally or in coordination with others.

ENTRY CONDITIONS

22. Entry into the relevant product market would not be timely, likely, or sufficient in its magnitude, character, and scope to deter or counteract anticompetitive effects of the acquisition and the amended merger agreement.

VIOLATIONS CHARGED

COUNT I – ILLEGAL ACQUISITION

23. The allegations contained in Paragraphs 1-22 are repeated and realleged as though fully set forth here.

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24. The effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

COUNT II – ILLEGAL ACQUISITION AGREEMENT

25. The allegations contained in Paragraphs 1-22 are repeated and realleged as though fully set forth here.

26. Libbey and Newell Rubbermaid, through the Stock Purchase Agreement described in Paragraph 7, have engaged in unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

COUNT III – ILLEGAL ACQUISITION
AMENDED MERGER AGREEMENT

27. The allegations contained in Paragraphs 1-22 are repeated and realleged as though fully set forth here.

28. The effect of the amended merger agreement may be substantially to lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

COUNT IV – ILLEGAL ACQUISITION AGREEMENT
AMENDED MERGER AGREEMENT

29. The allegations contained in Paragraphs 1-22 are repeated and realleged as though fully set forth here.

30. Libbey and Newell Rubbermaid, through the amended merger agreement described in Paragraph 9 and the changes thereto described in Paragraph 11, have engaged in unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

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NOTICE

Proceedings on the charges asserted against you in this complaint will be held before an Administrative Law Judge (ALJ) of the Federal Trade Commission, under Part 3 of the Commission's Rules of Practice, 16 C.F.R. Part 3. A copy of Part 3 of the Rules is enclosed with this complaint.

You may file an answer to this complaint. Any such answer must be filed within 20 days after service of the complaint on you. If you contest the complaint's allegations of fact, your answer must concisely state the facts constituting each ground of defense, and must specifically admit, deny, explain, or disclaim knowledge of each fact alleged in the complaint. You will be deemed to have admitted any allegations of the complaint that you do not so answer.

If you elect not to contest the allegations of fact set forth in the complaint, your answer shall state that you admit all of the material allegations to be true. Such an answer will 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 ALJ will file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. Such an answer may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice.

If you do not answer within the specified time, you waive your right to appear and contest the allegations of the complaint. The ALJ is then authorized, without further notice to you, to find that the facts are as alleged in the complaint and to enter an initial decision and a cease and desist order.

The ALJ will schedule an initial prehearing scheduling conference to be held not later than 14 days after the last answer is filed by any party named as a respondent in the complaint. Unless

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otherwise directed by the ALJ, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within 5 days of receiving a respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

A hearing on the complaint will begin on August 12, 2002, at 10:00 A.M. in Room 532, or such other date as determined by the ALJ. At the hearing, you will have the right to contest the allegations of the complaint and to show cause why a cease and desist order should not be entered against you.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Stock Purchase Agreement described in Paragraph 7 or the amended merger agreement described in Paragraph 9 violates Section 5 of the Federal Trade Commission Act, as amended, or that the proposed acquisition or the proposed amended merger agreement challenged in this proceeding would, if consummated, violate Section 7 of the Clayton Act, as amended, or Section 5 of the Federal Trade Commission 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. An order to cease and desist from any action to effect the acquisition and the amended merger agreement by Libbey of any assets or securities of Newell Rubbermaid.
2. Rescission of the Stock Purchase Agreement and the amended merger agreement between respondents.

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3. Divestiture of an ongoing, operating business, including all assets, tangible and intangible, including, but not limited to, all intellectual property, knowhow, trademarks, trade names, research and development, and customer contracts, and including all improvements to existing products and new products developed by Newell Rubbermaid.

4. Such other or additional relief as is necessary to ensure the creation of one or more viable, competitive, independent entities to compete against Libbey in the manufacture and sale of food service glassware.

5. A requirement, for a ten (10) year period, that Libbey and Newell Rubbermaid provide the Commission with notice in advance of acquiring the assets or securities of, or any other combination with, any person engaged in the manufacture or sale of food service glassware in the United States.

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 ninth day of May, 2002.

By the Commission.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having heretofore issued its complaint charging the Respondents named in the caption hereof with violations of Section 5 of the Federal Trade Commission Act, as amended, and Section 7 of the Clayton Act, as amended, and Respondents having been served with a copy of that complaint, together with a notice of contemplated relief, and Respondents having answered the complaint denying said charges and asserting affirmative defenses but admitting the jurisdictional allegations set forth therein; and

The Respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the Respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said 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 Secretary of the Commission having thereafter withdrawn this 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, now in further conformity with the procedure prescribed in § 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following Order:

1. Respondent Libbey Inc. (“Libbey”) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 300 Madison Avenue, Toledo, Ohio 43604.

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2. Respondent Newell Rubbermaid Inc. ("Newell") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 29 East Stephenson Street, Freeport, Illinois 61032. Anchor Hocking Inc. and Anchor Hocking Consumer Glass Corporation, corporations organized, existing and doing business under and by virtue of the laws of the State of Delaware, with their offices and principal places of business located at 519 Pierce Avenue, Lancaster, Ohio 43130, are indirect, wholly-owned subsidiaries of Newell. Newell Holdings Delaware, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal places of business located at 29 E. Stephenson Street, Freeport, Illinois 61032, is an indirect, wholly-owned subsidiary of Newell.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the Commission has determined that this proceeding is in the public interest.

ORDER

I

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. "Libbey" means Libbey Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates, controlled by Libbey, and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.

B. "Newell" means Newell Rubbermaid Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates, controlled by Newell (including, but not limited to,

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Anchor and RCP), and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.

C. "Commission" means the Federal Trade Commission.

D. "Anchor" means Anchor Hocking Inc. and Anchor Hocking Consumer Glass Corporation, two Delaware corporations organized, existing and doing business under and by virtue of the laws of the State of Delaware, with their offices and principal places of business located at 519 Pierce Avenue, Lancaster, Ohio 43130, and assets of Anchor's Food Service Business held by Newell Holdings Delaware, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 29 E. Stephenson Street, Freeport, Illinois 61032.

E. "RCP" means Rubbermaid Commercial Products LLC, a limited liability company organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 3124 Valley Avenue, Winchester, Virginia 22601.

F. "Vitrocrisa" means Vitrocrisa, S. de R.L. de C.V., a joint venture between Libbey and Vitro, S.A., organized, existing and doing business under and by virtue of the laws of Mexico, with its office and principal place of business located at Doblado Norte 1627, Col. Terminal, 64580 Monterrey, Mexico.

G. "Anchor's Food Service Business" means all of Anchor's rights, title, and interest in and to all assets and businesses, tangible or intangible, anywhere in the world, used in the research, development, manufacture, distribution, licensing, marketing, or sale of glassware products to Food Service Customers in the United States, including, but not limited to:

1. Real property (together with appurtenances, licenses, and permits) owned, leased or otherwise held by Anchor, including,

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but not limited to, the Lancaster, Ohio and Monaca, Pennsylvania glassware manufacturing plants, and related machinery, fixtures, equipment, furniture, tools and other tangible property, including, but not limited to, glassware molds;

2. Personal property owned, leased, or otherwise held by Anchor;

3. Inventories, stores, and supplies held by, or under the control of, Anchor;

4. Intellectual property rights owned by or licensed to Anchor, including, but not limited to, trademarks, patents, copyrights, and trade secrets;

5. Rights of Anchor under any contract, including, but not limited to, licenses, leases, customer contracts (including, but not limited to, contracts with Food Service Customers), supply agreements and procurement contracts;

6. Pending and issued governmental approvals, registrations, consents, licenses, permits, waivers, or other authorizations held by Anchor, including foreign equivalents;

7. Rights of Anchor under any warranty or guarantee, express or implied;

8. Items of prepaid expense owned by Anchor; and

9. Separately maintained, and relevant portions of not separately maintained, books, records, and files held by, or under the control of, Anchor.

PROVIDED, HOWEVER, that Anchor's Food Service Business shall not include:

i. Rights of Anchor to warehouse space;

ii. Office equipment, furniture and accessories;

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- iii. Computer hardware and accessories;
- iv. Motor vehicles, forklifts, overhead cranes, and other transportation equipment;
- v. Raw materials, including, but not limited to, electricity, natural gas, water, sand, soda lime, cullet, corrugate and other packaging materials and metal, ceramic and plastic accessories;
- vi. Scrap metal and other scrap materials;
- vii. Machine replacement parts;
- viii. Decorating equipment;
- ix. Packaging equipment;
- x. Hand tools;
- xi. Machine tools;
- xii. Sandblasting equipment; and
- xiii. Bakeware, candles, floral items and storage jars, and the molds used to form these items.

Anchor's Food Service Business expressly includes any and all assets of Anchor's Food Service Business sold or transferred to any other Person, including RCP or any other Person or business unit included within Newell, on or after June 10, 2002, except in the ordinary course of business.

H. "Food Service Customers" means restaurants, hotels and other food service establishments, whether private or public, that use or sell glassware in the course of serving or selling food or beverages to consumers, and includes distributors or resellers of glassware to such establishments; PROVIDED, HOWEVER, that

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Food Service Customers shall not include retail stores, original equipment manufacturers, and warehouse clubs.

I. "Person" means any natural person, partnership, corporation, company, association, trust, joint venture or other business or legal entity, including any governmental agency.

J. "Respondents" means Libbey and Newell, individually and collectively.

II

IT IS FURTHER ORDERED that Libbey shall not, without prior written notification to the Commission, acquire, directly or indirectly, through subsidiaries or otherwise, any ownership, leasehold, or other interest, in whole or in part, in the stock of Anchor or the assets of the Anchor Food Service Business.

III

IT IS FURTHER ORDERED that Newell shall not, without prior written notification to the Commission, sell, transfer, or otherwise convey, directly or indirectly, through subsidiaries or otherwise, any ownership, leasehold, or other interest, in all or any part of Anchor's Food Service Business:

A. to Libbey or to Vitrocrisa, for a period commencing on the date this Order becomes final and continuing for ten (10) years; and

B. to any Person other than to Libbey or to Vitrocrisa, for a period commencing on the date this Order becomes final and continuing for five (5) years;

PROVIDED, HOWEVER, that such notification shall not be required for sales, transfers or other conveyances by Newell: (i) to a Person or business unit included within Newell; (ii) in the ordinary course of business; (iii) of inventory to liquidators; or

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(iv) of accounts receivable in connection with financing transactions.

IV

IT IS FURTHER ORDERED that Respondent Libbey and Respondent Newell shall provide the respective prior written notifications required by Paragraphs II and III of this Order, as applicable, 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 (hereinafter referred to as the “Notification”), which Notification shall be prepared and transmitted in accordance with the requirements of that part, except that (i) no filing fee will be required for any such Notification, (ii) Notification shall be filed with the Secretary of the Commission, (iii) Notification need not be made to the United States Department of Justice, and (iv) Notification is required only of the applicable Respondent and not of any other party to the relevant transaction. Notification shall be provided to the Commission at least thirty (30) days prior to consummating any transaction covered by the respective requirements of Paragraph II or Paragraph III, as applicable (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), the applicable Respondent shall not consummate the transaction until thirty (30) days after submitting such additional information or documentary material. Early termination of the waiting periods in Paragraphs II and III may be requested and, where appropriate, granted by letter from the Commission’s Bureau of Competition. PROVIDED, HOWEVER, that prior notification shall not be required by Paragraphs II and III 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.

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V

IT IS FURTHER ORDERED that:

A. Within sixty (60) days after the date this Order becomes final, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they have complied and are complying with this Order; and

B. One (1) year from the date this Order becomes final, annually for the next nine (9) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may require, Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with this Order.

VI

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Order.

VII

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request, Respondents 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 books, ledgers, accounts, correspondence, memoranda and other records and

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documents in the possession or under the control of Respondents relating to any matters contained in this Order; and

B. Upon five (5) days' notice to Respondents and without restraint or interference from them, to interview officers, directors, employees, agents or independent contractors of Respondents, who may have counsel present, relating to any matters contained in this Order.

VIII

IT IS FURTHER ORDERED that this Order shall terminate on October 7, 2012.

By the Commission.

Analysis

**Analysis to Aid Public Comment on Agreement Containing
Consent Order****I. Introduction**

The Federal Trade Commission has accepted for public comment a Decision and Order (“Proposed Order”), pursuant to an Agreement Containing Consent Order (“Consent Agreement”), against Libbey Inc. and Newell Rubbermaid Inc. (collectively “Respondents”). The Proposed Order is intended to resolve anticompetitive effects in the United States food service glassware market stemming from the proposed acquisition by Libbey of Anchor Hocking Corporation, a wholly-owned subsidiary of Newell. Under the Proposed Order, Libbey cannot acquire any stock of Anchor or the assets of Anchor’s food service glassware business without prior notice to the Commission. Additionally, Newell cannot sell or transfer all or a substantial part of the assets of Anchor’s food service business without prior notice to the Commission.

**II. The Parties, the Transaction and the History of the
Litigation**

Libbey is the largest maker and seller of food service glassware in the United States, with substantially more than half of the sales, and has plants located in Ohio, Louisiana and California. Libbey produces and sells food service glassware, a line of products that includes many different styles of tumblers and stemware for beverages. Libbey sells food service glassware to customers that use glassware in the course of serving or selling food or beverages to consumers, including distributors who resell glassware to restaurants, hotels and other such establishments. Besides food service glassware, Libbey produces and sells glassware products ranging from serving platters to candle holders for the retail and industrial segments.

Newell is a diversified company based in Illinois. Anchor is an indirect, wholly-owned subsidiary of Newell, with manufacturing

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facilities in Ohio and Pennsylvania. Anchor is the third largest maker and seller of food service glassware in the United States, and, as found by a District Court, is Libbey's most formidable competitor in food service. Besides food service glassware, Anchor produces and sells glassware products ranging from bakeware to candle holders for the retail and industrial segments.

Pursuant to an agreement dated June 17, 2001, Libbey proposed to acquire all of the stock of Anchor from Newell (the "acquisition"). On December 18, 2001, the Commission authorized the commencement of an action under Section 13(b) of the FTC Act to seek a preliminary injunction barring the acquisition during the pendency of administrative proceedings. On January 14, 2002, the FTC commenced such an action against Respondents in the United States District Court for the District of Columbia.

Pursuant to an agreement dated January 21, 2002, after the preliminary injunction action was commenced and in response to the Commission's vote to challenge the acquisition, Libbey and Newell amended their merger agreement (the "amended merger agreement"). The amended merger agreement provided that Libbey would acquire all of the stock of Anchor, but prior to closing Anchor would transfer to Newell's Rubbermaid Commercial Products ("RCP") division less than 10 percent of the assets of Anchor, and the consideration to be paid by Libbey for Anchor would be reduced by less than 10 percent. Under the amended merger agreement, the assets to be transferred to RCP were most (not all) of the molds, customer relationships and certain other assets used in Anchor's food service glassware business. Anchor would have kept, and Libbey would still have acquired, key assets used by Anchor in the food service glassware business—most significantly, Anchor's two glassware manufacturing plants. Newell would not retain any capability to manufacture glassware.

In its Amended Complaint, filed February 22, 2002, the FTC alleged that the acquisition pursuant to the amended merger

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agreement would substantially lessen competition. The proposed merger would eliminate Anchor as a competitor from the food service glassware market and RCP would be unable to replace Anchor as a viable competitor. The Commission later issued a statement on April 2, 2002, in which it reaffirmed its position that the amended merger would result in a lessening of competition in violation of the Clayton and FTC Acts. Statement of the Federal Trade Commission Regarding *FTC v. Libbey Inc., et al.*, Apr. 2, 2002.

On April 22, 2002, the District Court granted the FTC's motion for a preliminary injunction pending the completion of administrative adjudication. Memorandum Opinion ("Op.") (*FTC v. Libbey Inc., et al.*, 2002 U.S. Dist. LEXIS 8867 (D.D.C., Apr. 22, 2002)).

In granting the FTC's motion, the Court found that Libbey dominates the food service glassware market with a 65 percent share, while Anchor, with seven percent of the market, has the third largest share. Op. at 3. Although Libbey's market share dwarfs Anchor's, the Court found that "Anchor is Libbey's most formidable competitor in the food service glassware market," because it is "the largest seller of Libbey look-alikes," *id.* at 18, and because its prices "are frequently 10 to 20 percent lower than Libbey's prices," *id.* at 5.

The Court concluded that both the acquisition and the amended merger likely would reduce competition in the food service glassware market; the food service glassware market was highly concentrated, and, "if what is now Anchor were eliminated from the market, there are no other viable alternatives to Libbey's food service glassware that consumers could [rely] upon to acquire their glassware at the lower prices now offered by Anchor." *Id.* at 28. Moreover, the Court held that RCP would not replace Anchor as an effective competitor. Because RCP would not retain important assets, such as Anchor's manufacturing plants, brand name, customer relationships, and key employees, the Court held

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that the amended merger would have the same anti-competitive effect as if Libbey had acquired all of Anchor. *Id.* at 23.

On May 2, 2002, Respondents moved to vacate the preliminary injunction order on the ground that Newell and a third party supplier had modified the price term under a glassware supply agreement for RCP. On May 17, 2002, the District Court denied Respondents' motion because of the numerous other cost components that would likely make RCP's costs substantially higher than Anchor's costs and, therefore, not a viable competitive alternative to Anchor. *FTC v. Libbey Inc.*, Order Denying Defendants' Motion to Vacate, May 17, 2002. Reiterating the reasons in its earlier opinion, the Court stated that "the FTC's concerns remain[ed] plausible" and noted that the appropriate venue to fully evaluate the amended merger was at a full administrative hearing before the FTC. *Id.* at 3.

Following the District Court's preliminary injunction order, on May 9, 2002, the Commission issued its complaint against Respondents. Shortly after answering the complaint, on June 10, 2002, Respondents announced that they had withdrawn plans for Libbey to acquire Anchor from Newell. On July 23, 2002, Respondents entered into the Consent Agreement. Pursuant to Rule 3.25 of the Commission's Rules of Practice, 16 C.F.R. § 3.25, a motion was filed to withdraw the matter from adjudication, and on July 25, 2002, the matter was withdrawn from adjudication for the purpose of considering the Consent Agreement.

III. The Complaint

In its administrative complaint, the FTC charged that both the acquisition and the amended merger violated the Clayton and FTC Acts. The complaint alleges that the acquisition and the amended merger would eliminate competition between Libbey and Anchor, increase market concentration, and increase barriers to entry. The complaint also alleges that the amended merger would impair the

Analysis

viability of Newell as a competitor in the sale of food service glassware.

IV. Terms of the Proposed Order

The Proposed Order (“Order”) is effective for 10 years and requires Libbey and Newell to provide the Commission with written notice prior to the acquisition, sale, transfer, or other conveyance of all or part of Anchor or Anchor’s Food Service Business. Under the terms of the Order, Libbey is required to provide the Commission with prior written notice of its acquisition of any interest in Anchor’s stock or in the assets of Anchor’s Food Service Business. Order ¶ II. In addition, Newell must provide the Commission with prior written notice if it sells, transfers, or otherwise conveys any part of Anchor’s Food Service Business to any entity not included within Newell. Order ¶ III. If Newell sells, transfers or otherwise conveys Anchor’s Food Service Business to Libbey or Vitrocrisa, Newell’s obligation to notify the Commission extends for 10 years. *Id.* In all other circumstances, Newell is obligated to provide notice for five years. *Id.*

Anchor’s Food Service Business is defined as “all of Anchor’s rights, title, and interest in and to all assets and businesses, tangible or intangible, anywhere in the world, used in the research, development, manufacture, distribution, licensing, marketing, or sale of glassware products to Food Service Customers in the United States,” and expressly includes assets that Newell may have internally transferred to other divisions on or after June 10, 2002. Order ¶ I.G. Anchor’s Food Service Business does not include items that are generally available, are not unique to the glassware industry, or are minimally used in the production of food service glassware, such as sand, scrap metal, and office equipment. *Id.*

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V. Opportunity for Public Comment

The Proposed Order has been placed on the public record for 30 days for receipt of comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the Consent Agreement and the comments received and will decide whether to make the Proposed Order final. By accepting the Consent Agreement subject to final approval, the Commission anticipates that the competitive problems alleged in the Complaint will be resolved.

The Commission invites public comment to aid the Commission in determining whether it should make final the Proposed Order contained in the Consent Agreement. The Commission does not intend this analysis to constitute an official interpretation of the Proposed Order, nor does this analysis modify in any way the terms of the Proposed Order.

Complaint

IN THE MATTER OF

R. T. WELTER AND ASSOCIATES, INC., ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-4063; File No. 0110175**Complaint, October 8, 2002--Decision, October 8, 2002*

This consent order addresses practices used by Respondents R.T. Welter and Associates, Inc. ("RTWA"), R. Todd Welter – a non-physician consultant who through his company, RTWA, represented a group of approximately 88 physicians specializing in obstetrics and gynecology known as Professionals in Women's Care ("PIWC") – and eight medical group practices in the Denver, Colorado metropolitan area. The order, among other things, prohibits the respondents from entering into or facilitating any agreement between or among any physicians: (1) to negotiate with payors on any physician's behalf; (2) to deal, not to deal, or threaten not to deal with payors; (3) on what terms to deal with any payor; or (4) not to deal individually with any payor, or to deal with any payor only through an arrangement involving the respondents. The order also prohibits the respondents from facilitating exchanges of information between physicians concerning whether, or on what terms, to contract with a payor. In addition, the order prohibits the respondents from attempting to engage in – or from inducing anyone to engage in – any action prohibited by the order. In addition, the order prohibits Respondents RTWA and Welter, for three years, from negotiating with any payor on behalf of any PIWC physician, and from advising any PIWC physician to accept or reject any term, condition, or requirement of dealing with any payor. The order also requires Respondent RTWA to distribute the complaint and order to all physicians who participated in PIWC – and to the payors that negotiated contracts with RTWA or Respondent Welter on behalf of any of the eight respondent practice groups – and requires the Respondent Practice Groups to terminate – without penalty at any payor's request – current contracts, with respect to providing physician services, negotiated by Respondent Welter with payors.

Participants

For the Commission: *Paul J. Nolan, Christi J. Braun, David R. Pender, Jeffrey W. Brennan, Rendell A. Davis, Jr., Daniel P. Ducore, Fred Martin, Thomas Iosso and Louis Silvia.*