

Complaint

IN THE MATTER OF

**BALL CORPORATION
AND
REXAM PLC**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. C-4581; File No. 151 0088
Complaint, June 28, 2016 – Decision, August 15, 2016*

This consent order addresses the £5.4 billion, or \$8.4 billion acquisition by Ball Corporation of certain assets of Rexam PLC. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by lessening competition in the markets for standard 12-ounce aluminum beverage cans and specialty aluminum beverage cans in the United States. The consent order requires Ball and Rexam to divest seven aluminum can body plants, one aluminum can end plant, and other innovation and support functions in order to preserve competition in the relevant markets in the United States.

Participants

For the *Commission*: James Abell, Cem Akleman, Monica Castillo van Panhuys, Leonor V. Davila, Eric Elmore, David Laing, Joonsuk Lee, Michael Lovinger, and Steven Wilensky.

For the *Respondents*: Nicholas Gaglio and John Harkrider, Axinn, Veltrop & Harkrider LLP; Mary Lehner and Paul Yde, Freshfields Bruckhaus Deringer US LLP.

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act (“FTC Act”), and by virtue of the authority vested in it by said Acts, the Federal Trade Commission (“Commission”), having reason to believe that Respondent Ball Corporation (“Ball”), a corporation subject to the jurisdiction of the Commission, agreed to acquire Respondent Rexam PLC (“Rexam”), a public limited liability company subject to the jurisdiction of the Commission, in violation of Section 7 of the

Complaint

Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent Ball is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Indiana with its headquarters and principal place of business located at 10 Longs Peak Drive, Broomfield, Colorado.

2. Respondent Rexam is a public limited liability company organized, existing, and doing business under and by virtue of the laws of the United Kingdom with its headquarters and principal place of business located at 4 Millbank, London, United Kingdom.

II. JURISDICTION

3. Respondents, and each of their relevant operating subsidiaries and parent entities, are, and at all times relevant herein have been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the FTC Act, 15 U.S.C. § 44.

III. THE PROPOSED ACQUISITION

4. Pursuant to a Recommended Cash and Share Offer (the “Merger Agreement”) dated as of February 19, 2015, Ball proposes to purchase all issued and outstanding common stock of Rexam in a transaction valued at approximately \$8.4 billion (the “Acquisition”), including the assumption of debt.

IV. THE RELEVANT PRODUCT MARKETS

5. The relevant lines of commerce in which to analyze the effects of the Acquisition are standard 12-ounce aluminum beverage cans (“Standard Cans”), and specialty aluminum

Complaint

beverage cans (“Specialty Cans”), which come in a variety of dimensions that differ from Standard Cans.

6. Standard Cans are used to package beverages such as carbonated soft drinks, beer, tea, and sparkling water in 12-ounce containers. Standard Cans are sold to consumers primarily for future consumption in multipacks, but are also sold for immediate consumption in vending machines and other establishments. Standard Cans are the most widely available and consumed beverage cans and represent approximately 75% of beverage cans produced in the United States today.

7. Beverage producers would not switch from Standard Cans to other package types such as Specialty Cans, polyethylene terephthalate (“PET”) bottles, or glass bottles in response to a small but significant and non-transitory increase in price in Standard Cans. Beverage producers have made substantial investments in infrastructure that specializes in filling Standard Cans and cannot be used to fill PET bottles or glass bottles. Moreover, beverage producers package in Standard Cans to meet consumer demand, and would risk a loss in sales if they switched to other packaging substrates.

8. Specialty Cans consist of an assortment of beverage cans in different shapes and sizes, including 7.5-ounce slim cans, 8-ounce slim cans, 12-ounce sleek cans, 16-ounce cans, 24-ounce cans, and others. Beverage producers purchase Specialty Cans to reach different consumers and consumption occasions than Standard Cans. For example, carbonated soft drink companies use 7.5-ounce cans to reach consumers who prefer a more convenient, portion-controlled product in a sub-100 calorie package. Similarly, many energy drink producers have adopted the 16-ounce can to differentiate their products from competition and appeal to their target customers.

9. Although one type of Specialty Can is not a substitute for another, it is appropriate to evaluate the Acquisition’s likely effects through an analysis of the assortment of Specialty Cans because each of the products in the assortment is offered under similar competitive conditions. Grouping the many different

Complaint

types of Specialty Cans into an assortment, or cluster, enables the efficient evaluation of competitive effects.

10. Beverage producers would not switch from Specialty Cans to other package types such as Standard Cans, PET bottles, or glass bottles in response to a small but significant and non-transitory increase in price in Specialty Cans. Beverage producers package in specific shapes and sizes of Specialty Cans to maximize sales and attract certain customers who would not purchase their products in a different package type. Moreover, beverage producers have made substantial investments in infrastructure used to fill Specialty Cans and that cannot be used to fill PET bottles or glass bottles.

V. THE RELEVANT GEOGRAPHIC MARKETS

11. The relevant geographic markets in which to analyze the competitive effects of the Acquisition for Standard Cans are regional. Driven by high freight costs and large production volumes, customers purchase Standard Cans from suppliers that are located within the same general region as the customers' filling plants. There are at least three regional markets in the United States in which competition between Ball and Rexam would be lessened for the sale of Standard Cans: (1) the South/Southeast; (2) the Midwest; and (3) the West Coast, consisting primarily of California. Imports of Standard Cans from outside the United States would not be a viable option because of the significant shipping times and shipping costs that imports would entail.

12. The relevant geographic market in which to analyze the competitive effects of the Acquisition on Specialty Cans is the United States. Specialty Cans are shipped much greater distances than Standard Cans, sometimes even cross country, because Specialty Cans have lower volumes and significantly fewer supply locations than Standard Cans. Imports of Specialty Cans into the United States would not be a viable option for customers because of the significant shipping times and shipping costs that such imports would entail.

Complaint

VI. ENTRY CONDITIONS

13. Entry into the relevant markets would not be timely, likely, or sufficient to prevent or deter the expected anticompetitive effects of the Acquisition. Considerable entry barriers exist in the manufacture of aluminum beverage cans, including significant volume requirements necessary to manufacture efficiently; high capital costs to construct a can plant; and length of time to begin manufacturing aluminum beverage cans efficiently. Moreover, there would be little incentive for new entry given a consistent decline in demand for aluminum beverage cans in the United States, which has led to a steady removal of beverage can production for over 20 years.

14. Likewise, the threat of vertical integration by beverage producers would not be timely, likely, or sufficient to prevent or deter the expected anticompetitive effects of the Acquisition. A typical beverage can plant must produce over a billion Standard Cans and/or Specialty Cans a year in order to be competitive, which precludes the vast majority of beverage producers from contemplating vertical integration because they would not have the necessary scale. Even for the largest beverage producers, vertical integration would not be a credible threat due to significant capital costs and technical requirements, and the fact that they would have to continue to rely on incumbent beverage can manufacturers for at least part of their Standard Can and Specialty Can needs.

VII. EFFECTS OF THE ACQUISITION

15. The Acquisition, if consummated, is likely to substantially lessen competition in the relevant lines of commerce in the following ways, among others:

- a. by eliminating direct and substantial competition between Respondents Ball and Rexam;
- b. by increasing the likelihood that Ball will unilaterally exercise market power; and

Complaint

- c. by increasing the likelihood of coordinated interaction among competitors in the relevant markets.

16. The ultimate effects of the Acquisition would be to increase the likelihood that prices of Standard Cans and Specialty Cans will rise, and that quality, selection, service, and innovation will be lessened.

VIII. VIOLATIONS CHARGED

17. The allegations contained in Paragraphs 1 through 16 above are hereby incorporated by reference as though fully set forth here.

18. The Acquisition described in Paragraph 4, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

19. The Acquisition described in Paragraph 4, if consummated, would constitute a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

20. The Merger Agreement described in Paragraph 4 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-eighth day of June, 2016, issues its complaint against said Respondents.

By the Commission.

Order to Maintain Assets

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Ball Corporation (“Ball”) of the voting securities of Respondent Rexam PLC (“Rexam”), collectively “Respondents,” and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations 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; 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 draft of 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 considered the matter and having determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Maintain Assets:

1. Respondent Ball Corporation, is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Indiana with its executive offices and principal place of business at 10 Longs Peak Drive, Bloomfield, CO 80021.

Order to Maintain Assets

2. Respondent Rexam PLC, is a public limited company organized, existing, and doing business under, and by virtue of, the laws of England and Wales with its principal executive offices located at 4 Millbank, London SW1P 3XR, United Kingdom, and its United States address for service of process and the Complaint, the Decision and Order, and the Order to Maintain Assets, as follows: Corporate Secretary, Rexam Beverage Can Company, 4201 Congress Street, Suite 340, Charlotte, NC 28209.
3. The Commission has jurisdiction over 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 to Maintain Assets, the following definitions, and all other definitions used in the Consent Agreement and proposed Decision and Order (and when made final, the Decision and Order), which are incorporated herein by reference and made a part hereof, shall apply:

- A. “Ball” means Ball Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates in each case controlled by Ball Corporation, including, but not limited to, Ball UK Acquisition Ltd., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. Ball includes Rexam, after the Acquisition Date.
- B. “Rexam” means Rexam PLC, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates in each case controlled by Rexam PLC, including, but not

Order to Maintain Assets

limited to, Rexam Beverage Can Company (“RBCC”), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

- C. “Respondents” means Ball and Rexam, individually and collectively.
- D. “Commission” means the Federal Trade Commission.
- E. “Decision and Order” means the:
 - 1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final and effective Decision and Order by the Commission; and
 - 2. Final Decision and Order issued by the Commission following the issuance and service of a final Decision and Order by the Commission in this matter.
- F. “Acquirer” means:
 - 1. Ardagh; or
 - 2. A Person approved by the Commission to acquire the Aluminum Beverage Cans Business pursuant to the Decision and Order.
- G. “Aluminum Beverage Cans Business” means all of RBCCs assets, including Tangible Personal Property and intangible assets, businesses and goodwill, related to the research, development, manufacture, distribution, marketing or sale of Aluminum Beverage Cans Products including, but not limited to:
 - 1. The Aluminum Beverage Cans Manufacturing Facilities;
 - 2. The Aluminum Beverage Cans Corporate Facility;

Order to Maintain Assets

3. The Aluminum Beverage Cans Technical and Engineering Facility;
4. The Aluminum Beverage Cans Contracts;
5. An upfront, paid up, perpetual and royalty-free license to all Intellectual Property relating to the research, development, manufacture, distribution, marketing or sale of Aluminum Beverage Cans Products; *provided, however*, this license shall include rights to all of Respondent Rexam's Intellectual Property related to the Aluminum Beverage Cans Products worldwide;
6. All inventories relating to Aluminum Beverage Cans Products, affiliated with an Aluminum Beverage Cans Manufacturing Facility, wherever located;
7. 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 Aluminum Beverage Cans Products, and all pending applications therefor or renewals thereof;
8. All Business Records relating to the research, development, manufacture, distribution, marketing or sale of Aluminum Beverage Cans 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 Aluminum Beverage Cans Business to be divested and to the 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 Aluminum Beverage Cans Business to be divested; or (b) for which the relevant party has a legal obligation to retain the

Order to Maintain Assets

original copies, the relevant party shall be required to provide only copies or relevant excerpts of the documents and materials containing this information, then Respondents may keep such records and provide copies with appropriate redactions to the Acquirer. 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.

Provided, however, assets contained in Schedules 1.2(c), 1.2(m), 1.2(n)(i), 1.2(n)(ii), and 1.2(v) of the Divestiture Agreement shall be excluded.

- H. “Aluminum Beverage Cans Designated Employee” means any person employed by RBCC (1) at the Aluminum Beverage Cans Manufacturing Facilities; (2) working at or out of the Aluminum Beverage Cans Corporate Facility; (3) at the Aluminum Beverage Cans Technical and Engineering Facility; (4) who has spent over twenty-five percent (25%) of his or her time, from January 2015 to December 2015, working for or on behalf of the Aluminum Beverage Cans Business, wherever located; or (5) identified by agreement between Respondent Rexam and an Acquirer and made a part of a Divestiture Agreement including, but not limited to, the Aluminum Beverage Cans Divestiture Employees.
- I. “Aluminum Beverage Cans Divestiture Employees” are certain employees working at or out of the Aluminum Beverage Cans Corporate Facility and the Aluminum Beverage Cans Technical and Engineering Facility, and are identified in Non-Public Confidential Appendix C attached to the Decision and Order.
- J. “Ardagh” means Ardagh Group S.A., a limited liability corporation organized, existing, and doing business under, and by virtue of, the laws of

Order to Maintain Assets

Luxembourg with its office and principal executive offices located at 56, rue Charles Martel, Luxembourg, and its United States address for business operations is 401 E. Jackson Street, Suite 2800, Tampa, FL 33062.

- K. “Confidential Business Information” means information owned by, or in the possession or control of, RBCC that is not in the public domain and that is directly related to the conduct of the Aluminum Beverage Cans Business. The term “Confidential Business Information” *excludes* the following:
1. information specifically excluded from the Aluminum Beverage Cans Business conveyed to the Acquirer;
 2. information that is contained in documents, records, or books of RBCC that is provided to an Acquirer that is unrelated to the Aluminum Beverage Cans Business acquired by that Acquirer or that is exclusively related to businesses or products retained by Respondent Rexam;
 3. 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
 4. information that Respondent Rexam 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 Rexam;
 - b. Is necessary to be included in Respondent Rexam’s mandatory regulatory filings; *provided, however*, that Respondent Rexam shall make all reasonable efforts to maintain

Order to Maintain Assets

the confidentiality of such information in the regulatory filings;

- c. Was available, or becomes available, to Respondent Ball on a non-confidential basis, but only if, to the knowledge of Respondent Ball, 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 or any Remedial Agreement;
- f. Is disclosed in complying with the Order;
- g. Is information the disclosure of which is necessary to allow Respondents 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.

L. “Divestiture Agreement” means:

- 1. the Equity and Asset Purchase Agreement by and among Ardagh Group S.A., Ball Corporation, and Rexam PLC, dated April 22, 2016, and all amendments, exhibits, attachments, agreements, and schedules thereto, attached to the Decision and Order as Non-public Confidential Appendix A; or
- 2. any agreement that receives the prior approval of the Commission between Respondents (or between a Divestiture Trustee appointed pursuant to

Order to Maintain Assets

Paragraph IV. of this Order) and an Acquirer to purchase the Aluminum Beverage Cans Business, and all amendments, exhibits, attachments, agreements, and schedules thereto that have been approved by the Commission.

- M. “Divestiture Date” means the date on which Respondent Rexam (or a Divestiture Trustee) closes on the divestiture of the Aluminum Beverage Cans Business as required by Paragraph II (or Paragraph IV) of the Decision and Order.
- N. “Employee Access Period” means one (1) year from the Divestiture Date.
- O. “Monitor” means any monitor appointed pursuant to Paragraph III of this Order to Maintain Assets or Paragraph III of the Decision and Order.
- P. “Monitor Agreement” means the Monitor Agreement dated February 25, 2016, between ING Financial Markets LLC, and Ball Corporation. The Monitor Agreement is attached to the Decision and Order as Public Appendix E.
- Q. “Orders” means the Decision and Order and the Order to Maintain Assets.
- R. “Remedial Agreement(s)” means:
 - 1. Any agreement between Respondents and an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, and divested, transferred, delivered, or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission’s determination to make this Order final; and/or

Order to Maintain Assets

2. Any agreement between Respondents and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of the Order.
- S. “Transition Services” 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.
- T. “Transitional Services Agreement(s)” means:
1. The agreements between Respondents and Ardagh for the provision of Transition Services and attached to the Decision and Order as Non-Public Confidential Appendix B; or
 2. Any agreement entered into between Respondents and an Acquirer (or the Divestiture Trustee and an Acquirer) for the provision of Transition Services.

II.

IT IS FURTHER ORDERED that from the date this Order to Maintain Assets becomes final and effective:

- A. Respondents shall take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Aluminum Beverage Cans Business, to minimize any risk of loss of competitive potential for such Aluminum Beverage Cans Business,

Order to Maintain Assets

and to prevent the destruction, removal, wasting, deterioration, or impairment of the Aluminum Beverage Cans Business except for ordinary wear and tear. Respondents shall not sell, transfer, encumber, or otherwise impair the Aluminum Beverage Cans Business (other than in the manner prescribed in the Decision and Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the related Aluminum Beverage Cans Business.

- B. Respondents shall maintain the operations of the Aluminum Beverage Cans Business in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets of such business) and shall use their best efforts to preserve the existing relationships with the following: suppliers; vendors and distributors; customers; employees; and others having business relations with the Aluminum Beverage Cans Business. Respondents' responsibilities shall include, but are not limited to, the following:
1. Providing the Aluminum Beverage Cans Business with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such business, and to carry on, at least at their scheduled pace, all capital projects, business plans, and promotional activities for the Aluminum Beverage Cans Business;
 2. Continuing, at least at their scheduled pace, any additional expenditures for the Aluminum Beverage Cans Business authorized prior to the date the Consent Agreement was signed by Respondents, including, but not limited to, all research, development, manufacturing, distribution, marketing, and sales expenditures;
 3. Providing such resources as may be necessary to respond to competition against the Aluminum

Order to Maintain Assets

Beverage Cans Business and/or to prevent any diminution in sales of each of the Aluminum Beverage Cans Products prior to the divestiture;

4. Making available for use by the Aluminum Beverage Cans Business funds sufficient to perform all routine maintenance and other maintenance as may be necessary to, and all replacements of, the assets related to the Aluminum Beverage Cans Business;
 5. Providing the Aluminum Beverage Cans Business with such funds as are necessary to maintain the full economic viability, marketability and competitiveness of the Aluminum Beverage Cans Business;
 6. Providing such support services to the Aluminum Beverage Cans Business as were being provided by Respondents as of the date the Consent Agreement was signed by Respondents; and
 7. Maintaining a work force at least equivalent in size, training, and expertise to what has been associated with the Aluminum Beverage Cans Business for the last fiscal year.
- C. Until the Divestiture Date, Respondents shall provide all Aluminum Beverage Cans Designated Employees with reasonable financial incentives to continue in their positions and to research, develop, manufacture, and/or market the Aluminum Beverage Cans Products consistent with past practices and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Aluminum Beverage Cans Business pending divestiture. Such incentives shall include a continuation of all employee compensation and benefits offered by Respondents until the divestiture of the Aluminum Beverage Cans Business has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted

Order to Maintain Assets

by law), and additional incentives as may be necessary to prevent any diminution of the competitiveness of the Aluminum Beverage Cans Business.

- D. From the date Respondents execute the Divestiture Agreement until the Employee Access Period terminates, Respondents shall provide a proposed Acquirer with the opportunity to recruit and employ any Aluminum Beverage Cans 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, Respondents shall provide a proposed Acquirer with the following information for each Aluminum Beverage Cans 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 RBCC'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

Order to Maintain Assets

Aluminum Beverage Cans Designated
Employee(s);

2. No later than ten (10) days after a request from a proposed Acquirer, Respondents shall provide the proposed Acquirer with:
 - a. an opportunity to meet, personally and outside the presence or hearing of any employee or agent of Respondents, with any Aluminum Beverage Cans 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 Aluminum Beverage Cans Designated Employee;
3. Respondents shall (i) not interfere, directly or indirectly, with the hiring or employing by a proposed Acquirer of any Aluminum Beverage Cans Designated Employee, (ii) not offer any incentive to any Aluminum Beverage Cans Designated Employee to decline employment with a proposed Acquirer, (iii) not make any counteroffer to any Aluminum Beverage Cans Designated Employee who receives a written offer of employment from a proposed Acquirer, and (iv) remove any impediments within the control of Respondents that may deter any Aluminum Beverage Cans 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 Respondents that would affect the ability of such employee to be employed by a proposed Acquirer; *provided, however*, that nothing in this Order shall be construed to require

Order to Maintain Assets

Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee.

- E. Respondents shall provide reasonable financial incentives to the Aluminum Beverage Cans Divestiture Employees as needed to facilitate the employment of such employees by the Acquirer; *provided, however*, (i) if the proposed Acquirer has made a written offer of employment to an Aluminum Beverage Can Divestiture Employee, and (ii) such employee has declined employment with the proposed Acquirer, then Respondents, in consultation with the Monitor (if one is appointed), shall make available a substitute employee with substantially the same skills and job function to the Acquirer for employment.
- F. For a period of two (2) years after the Divestiture Date, Respondents shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any Person employed by an Acquirer of the Aluminum Beverage Cans Business, to terminate his or her employment relationship with an Acquirer;

Provided, however, Respondents 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 Aluminum Beverage Cans Designated Employees; and (2) hire employees of the Aluminum Beverage Cans Business who apply for employment with Respondents, so long as such individuals were not solicited by Respondents in violation of this paragraph;

Provided, further, however, that this Paragraph shall not prohibit Respondents from making offers of employment to or employing any employee of the Aluminum Beverage Cans Business if an Acquirer has notified Respondents in writing that an Acquirer does not intend to make an offer of employment to that

Order to Maintain Assets

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. Respondents shall ensure that employees of the Respondents' Retained Business shall not receive, have access to, use or continue to use, or disclose any Confidential Business Information pertaining to the Aluminum Beverage Cans Business except in the course of:

1. Performing their obligations as permitted under this Order to Maintain Assets or the Decision and Order;
2. Performing their obligations under any Remedial 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 Aluminum Beverage Cans Business, obtaining legal advice, defending legal claims, investigations, or enforcing actions threatened or brought against the Aluminum Beverage Cans Business, or as required by law;

Provided, however, for purposes of this Paragraph, Respondents' employees who provide or are involved in the receipt of support services under this Order to Maintain Assets shall be deemed to be performing obligations under the Decision and Order.

H. If the receipt, access to, use, or disclosure of Confidential Business Information pertaining to the Aluminum Beverage Cans Business is permitted to Respondents' employees under Paragraph II.F. of the Decision and Order, Respondents shall limit such information (1) only to those Persons who require such

Order to Maintain Assets

information for the purposes permitted under Paragraph II.F. of the Decision and Order, (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.

- I. Respondents shall enforce the confidentiality terms of this Order to Maintain Assets and the Decision and Order as to any Person other than the Acquirer of the Aluminum Beverage Cans Business and take such action as is necessary to cause each such Person to comply with these terms, including training of Respondents' employees and all other actions that Respondents would take to protect its own trade secrets and proprietary information.
- J. Respondents shall adhere to and abide by the Remedial Agreements (which agreement shall not vary or contradict, or be construed to vary from or contradict, the terms of the Orders, it being understood that nothing in the Orders shall be construed to reduce any obligations of Respondents under such agreements), which are incorporate by reference into this Order to Maintain Assets and made a part hereof.
- K. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Aluminum Beverage Cans Business within the Geographic Territory through its full transfer and delivery to the Acquirer, to minimize any risk of loss of competitive potential for the Aluminum Beverage Cans Business within the Geographic Territory, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Aluminum Beverage Cans Business except for ordinary wear and tear.

Order to Maintain Assets

III.**IT IS FURTHER ORDERED** that:

- A. At any time after the Respondents sign the Consent Agreement in this matter, the Commission may appoint a monitor (“Monitor”) to assure that the Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Orders and the Remedial Agreements. The Commission hereby appoints ING Financial Markets LLC (“ING”) as the Monitor and approves the Monitor Agreement between ING and Respondents which agreement, *inter alia*, names Philip Comerford, Jr., as ING designated Project Manager.
- B. Not later than one (1) day after the appointment of the Monitor, Respondents shall, pursuant to the Monitor Agreement and to the Orders, confer on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondents’ compliance with the relevant requirements of the Orders in a manner consistent with the purposes of the Orders.
- C. The Monitor shall serve until the later of (1) eighteen (18) months after the Divestiture Date or (2) the termination of all Respondents’ obligations under all Remedial Agreements; *provided, however*, the Commission may extend or modify this period as may be necessary to accomplish the purposes of the Orders.
- D. Respondents 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 Respondents’ compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a

Order to Maintain Assets

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

- a. Assuring that Respondents expeditiously comply with all of their obligations and performs all of their responsibilities as required by this Orders and the Remedial Agreements;
 - b. Monitoring all Remedial Agreements; and
 - c. Assuring that Confidential Business Information is not received or used by Respondents or the Acquirer, except as allowing in the Orders;
2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission;
3. The Monitor shall serve for such time as is necessary to monitor Respondents' compliance with the provisions of the Orders and the Remedial Agreements;
4. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondents' 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 Respondents' compliance with its obligations under the Orders and the Remedial Agreements. Respondents 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 Respondents' compliance with the Orders and the Remedial Agreements;
5. The Monitor shall serve, without bond or other security, at the expense of Respondents on such

Order to Maintain Assets

reasonable and customary terms and conditions as the Commission may set. The Monitor shall have the authority to employ, at the expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission;

6. Respondents 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 malfeasance, gross negligence, willful or wanton acts, or bad faith by the Monitor. For purposes of this Paragraph III, the term "Monitor" shall include all persons retained by the Monitor pursuant to Paragraph III.D.5 of this Order to Maintain Assets and Paragraph III.D.5 of the Decision and Order;
7. Respondents shall report to the Monitor in accordance with the requirements of the Orders and/or as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by the Respondents, and any reports submitted by the Acquirer with respect to the performance of Respondents' obligations under the Orders and the Remedial Agreements;
8. Within one (1) month from the date the Monitor is appointed pursuant to this Paragraph, every sixty (60) days thereafter, and otherwise requested by

Order to Maintain Assets

the Commission, the Monitor shall report in writing to the Commission concerning performance by Respondents' of their obligations under the Orders and the Remedial Agreements;

9. Respondents may require the Monitor and each of the Monitors consultants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Monitor from providing any information to the Commission.
- E. The Commission may, among other things, require 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.
- F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor.
- G. In the event a substitute Monitor is required, the Commission shall select the Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the proposed substitute Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed substitute Monitor, Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor. Not later than ten (10) days after appointment of a substitute Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the substitute Monitor all the rights and powers necessary to permit the substitute Monitor to monitor Respondent's compliance with the terms of the Orders

Order to Maintain Assets

and the Remedial Agreements in a manner consistent with the purposes of the Orders.

- H. The 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 Orders and the Remedial Agreements.

IV.**IT IS FURTHER ORDERED** that:

- A. Within five (5) days of the Acquisition Date, Respondents shall submit to the Commission a letter certifying the date on which the Acquisition occurred.
- B. Respondents shall submit to the Commission and, if appointed, the Monitor, a verified written report setting forth in detail the manner and form in which it intends to comply, are complying, and have complied with this Order:
1. Within thirty (30) days after the date this Order to Maintain Assets becomes final;
 2. Every thirty (30) days thereafter until Respondents have fully divested, licensed, transferred and/or granted the Aluminum Beverage Cans Business to an Acquirer; and
 3. Every three (3) months thereafter so long as Respondents have a continuing obligation under this Order and/or the Remedial Agreements to render services to the Acquirer or otherwise to comply with this Order;

Provided, however, that, after the proposed Decision and Order in this matter becomes final, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission at

Order to Maintain Assets

the same time as the reports required to be submitted by Respondents pursuant to the Decision and Order.

V.

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

- A. Any proposed dissolution of Respondents;
- B. Any proposed acquisition, merger, or consolidation of Respondents; or
- C. Any other change in the Respondents, 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.

VI.

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 Respondents, with respect to any matter contained in this Order, 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 non-privileged books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondents related to compliance with the Consent Agreement and/or this Order, which copying services shall be provided by Respondents at the request of the authorized representative of the Commission and at the expense of Respondents; and
- B. Upon five (5) days' notice to Respondents and without restraint or interference from them, to interview

Order to Maintain Assets

officers, directors, or employees of Respondents, who may have counsel present.

VII.

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate on the later of:

- A. The day after the divestiture of the Aluminum Beverage Cans Business, as required by and described in the proposed Decision and Order, has been completed and the Monitor, in consultation with the Commission staff and the Acquirer, notified the Commission that all assignments, conveyances, deliveries, grants, license, transactions, transfers and other transitions related to such divestiture are complete;
- B. The day the proposed Decision and Order becomes final; or
- C. The Commission otherwise directs that this Order to Maintain Assets be terminated;

Provided, however, if the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of the Commission Rule 2.34, 16 C.F.R. § 2.34, this Order to Maintain Assets shall terminate no later than three (3) days after such action by the Commission.

By the Commission.

Decision and Order

DECISION AND ORDER
[Public Record Version]

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Ball Corporation (“Ball”) of the voting securities of Respondent Rexam PLC (“Rexam”), collectively “Respondents,” and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations 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; 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 considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent Ball Corporation, is a corporation organized, existing, and doing business under, and by

Decision and Order

virtue of, the laws of the State of Indiana with its executive offices and principal place of business at 10 Longs Peak Drive, Bloomfield, CO 80021.

2. Respondent Rexam PLC, is a public limited company organized, existing, and doing business under, and by virtue of, the laws of England and Wales with its principal executive offices located at 4 Millbank, London SW1P 3XR, United Kingdom, and its United States address for service of process and the Complaint, the Decision and Order, and the Order to Maintain Assets, as follows: Corporate Secretary, Rexam Beverage Can Company, 4201 Congress Street, Suite 340, Charlotte, NC 28209.
3. 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 Order to Maintain Assets, shall apply:

- A. “Ball” means Ball Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates in each case controlled by Ball Corporation, including, but not limited to, Ball UK Acquisition Ltd., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. Ball includes Rexam, after the Acquisition Date.
- B. “Rexam” means Rexam PLC, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries,

Decision and Order

partnerships, divisions, groups, and affiliates in each case controlled by Rexam PLC, including, but not limited to, Rexam Beverage Can Company (“RBCC”), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

- C. “Commission” means the Federal Trade Commission.
- D. “Acquirer” means:
 - 1. Ardagh; or
 - 2. a Person approved by the Commission to acquire the Aluminum Beverage Cans Business pursuant to this Decision and Order.
- E. “Acquisition” means the proposed acquisition by Respondent Ball of all the voting securities of Respondent Rexam as described in the Recommended Cash and Share Offer for Rexam PLC by Ball UK Acquisition Limited, A Wholly-Owned Subsidiary of Ball Corporation, dated February 19, 2015, between Ball Corporation, Ball UK Acquisition Ltd., and Rexam PLC, and any amendments, exhibits, or schedules attached thereto.
- F. “Acquisition Date” means the date the Acquisition is consummated.
- G. “Aluminum Beverage Cans Business” means all of RBCC’s assets, including Tangible Personal Property and intangible assets, businesses and goodwill, related to the research, development, manufacture, distribution, marketing or sale of Aluminum Beverage Cans Products including, but not limited to:
 - 1. The Aluminum Beverage Cans Manufacturing Facilities;
 - 2. The Aluminum Beverage Cans Corporate Facility;

Decision and Order

3. The Aluminum Beverage Cans Technical and Engineering Facility;
4. The Aluminum Beverage Cans Contracts;
5. An upfront, paid up, perpetual and royalty-free, license to all Intellectual Property relating to the research, development, manufacture, distribution, marketing or sale of Aluminum Beverage Cans Products; *provided, however*, this license shall include rights to all of Respondent Rexam's Intellectual Property related to the Aluminum Beverage Cans Products worldwide.
6. All inventories relating to Aluminum Beverage Cans Products, affiliated with an Aluminum Beverage Cans Manufacturing Facility, wherever located;
7. 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 Aluminum Beverage Cans Products, and all pending applications therefor or renewals thereof;
8. All Business Records relating to the research, development, manufacture, distribution, marketing or sale of Aluminum Beverage Cans 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 Aluminum Beverage Cans Business to be divested and to the 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 Aluminum Beverage Cans Business to be divested; or (b) for which the relevant party has a legal obligation to retain the

Decision and Order

original copies, the relevant party shall be required to provide only copies or relevant excerpts of the documents and materials containing this information, then Respondents may keep such records and provide copies with appropriate redactions to the Acquirer. 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.

Provided, however, assets contained in Schedules 1.2(c), 1.2(m), 1.2(n)(i), 1.2(n)(ii), and 1.2(v) of the Divestiture Agreement shall be excluded.

- H. “Aluminum Beverage Cans 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 Aluminum Beverage Cans Manufacturing Facilities and facilities retained by Respondent Ball, 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 Aluminum Beverage Cans Business from the Aluminum Beverage Cans Manufacturing Facilities;
- I. “Aluminum Beverage Cans Corporate Facility” means the facility located at 8770 W. Bryn Mawr Avenue, Chicago, IL 60631, 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 Aluminum Beverage Cans Manufacturing Facilities; *provided, however,* that parts, inventory,

Decision and Order

designs, or other assets held for use exclusively by or for the Retained Business may be excluded.

- J. “Aluminum Beverage Cans Designated Employee” means any person employed by RBCC (1) at the Aluminum Beverage Cans Manufacturing Facilities; (2) working at or out of the Aluminum Beverage Cans Corporate Facility; (3) at the Aluminum Beverage Cans Technical and Engineering Facility; (4) who has spent over twenty-five percent (25%) of his or her time, from January 2015 to December 2015, working for or on behalf of the Aluminum Beverage Cans Business, wherever located; or (5) identified by agreement between Respondent Rexam and an Acquirer and made a part of a Divestiture Agreement including, but not limited to, the Aluminum Beverage Cans Divestiture Employees.
- K. “Aluminum Beverage Cans Divestiture Employees” are certain employees working at or out of the Aluminum Beverage Cans Corporate Facility and the Aluminum Beverage Cans Technical and Engineering Facility, and are identified in Non-Public Confidential Appendix C attached to this Order.
- L. “Aluminum Beverage Cans 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 RBCC, and all Tangible Personal Property, therein, at the Bishopville Facility, Chicago Facility, Fairfield Facility, Fremont Facility, Olive Branch Facility, Valparaiso Facility, Whitehouse Facility, and Winston-Salem Facility. *Provided, however*, that parts, inventory, designs, or other assets held for use exclusively by or for the Retained Business may be excluded.

Decision and Order

- M. “Aluminum Beverage Cans Products” means the Standard Aluminum Beverage Cans and Specialty Aluminum Beverage Cans:
1. manufactured by RBCC at the Aluminum Beverage Cans Manufacturing Facilities; or
 2. designed, researched and developed, but not yet commercialized, by RBCC, anywhere in the world, and that are intended to be manufactured at the Aluminum Beverage Cans Manufacturing Facilities.
- N. “Aluminum Beverage Cans Technical and Engineering Facility” means the technical and engineering facility located at 2520 Lively Boulevard, Elk Grove, IL 60007, 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 RBCC, and all Tangible Personal Property therein, and parts, inventory, and all other assets relating to the Aluminum Beverage Cans Business. *Provided, however*, that parts, inventory, designs, or other assets held for use exclusively by or for the Retained Business may be excluded.
- O. “Ardagh” means Ardagh Group S.A., a limited liability corporation organized, existing, and doing business under, and by virtue of, the laws of Luxembourg with its office and principal executive offices located at 56, rue Charles Martel, Luxembourg, and its United States address for business operations is 401 E. Jackson Street, Suite 2800, Tampa, FL 33062.
- P. “Arizona” means Arizona Beverages USA LLC, a limited liability corporation, organized, existing, and doing business under, and by virtue of, the laws of the State of New York with its executive offices and

Decision and Order

principal place of business at 60 Crossways Park Drive W, Woodbury, NY 11797.

- Q. “Arizona Contract Manufacturing Agreement” means:
1. The Arizona Contract Manufacturing Agreement entered into between Ardagh Metal Beverage USA Inc. and Rexam Beverage Can Company, dated on the Divestiture Date , and any attachments, amendments, exhibits, and schedules related thereto that have been approved by the Commission. This Arizona Contract Manufacturing Supply Agreement is attached to this Order and contained in Non-Public Appendix D; or
 2. Any agreement between Respondents (or between a Divestiture Trustee appointed pursuant to Paragraph IV. of this Order) and an Acquirer for the purchase of Specialty Aluminum Beverage Cans Products as provided for in Paragraph II.B. of this Order, that receives the prior approval of the Commission, and all amendments, exhibits, attachments, agreements, and schedules thereto that have been approved by the Commission.
- R. “Arizona-Rexam Supply Agreement” means that Amended and Restated Can Supply Agreement, dated May 26, 2015, by and between Rexam Beverage Can Company and Arizona Beverages USA LLC.
- S. “Bishopville Facility” means the aluminum beverage cans manufacturing plant located at 609 Cousar Street, Bishopville, SC 29010.
- T. “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,

Decision and Order

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.

- U. “Cap Can®” means RBCC’s Aluminum Beverage Cans Products with a re-sealable cap opening.
- V. “Chicago Facility” means the aluminum beverage cans manufacturing plant located at 1101 West 43rd Street, Chicago, IL 60609.
- W. “Confidential Business Information” means information owned by, or in the possession or control of, RBCC that is not in the public domain and that is directly related to the conduct of the Aluminum Beverage Cans Business. The term “Confidential Business Information” *excludes* the following:
 - 1. information specifically excluded from the Aluminum Beverage Cans Business conveyed to the Acquirer;
 - 2. information that is contained in documents, records, or books of RBCC that is provided to an

Decision and Order

Acquirer that is unrelated to the Aluminum Beverage Cans Business acquired by that Acquirer or that is exclusively related to businesses or products retained by Respondent Rexam;

3. 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
4. information that Respondent Rexam 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 Rexam;
 - b. Is necessary to be included in Respondent Rexam's mandatory regulatory filings; *provided, however*, that Respondent Rexam shall make all reasonable efforts to maintain the confidentiality of such information in the regulatory filings;
 - c. Was available, or becomes available, to Respondent Ball on a non-confidential basis, but only if, to the knowledge of Respondent Ball, 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 or any Remedial Agreement;

Decision and Order

- f. Is disclosed in complying with the Order;
 - g. Is information the disclosure of which is necessary to allow Respondents 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.
- X. “Direct Cost” means a cost not to exceed the cost of labor, material, travel and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service.
- Y. “Divestiture Agreement” means:
 - 1. the Equity and Asset Purchase Agreement by and among Ardagh Group S.A., Ball Corporation, and Rexam PLC, dated April 22, 2016, and all amendments, exhibits, attachments, agreements, and schedules thereto, attached to this Order as Non-public Confidential Appendix A; or
 - 2. any agreement that receives the prior approval of the Commission between Respondents (or between a Divestiture Trustee appointed pursuant to Paragraph IV. of this Order) and an Acquirer to purchase the Aluminum Beverage Cans Business, and all amendments, exhibits, attachments, agreements, and schedules thereto that have been approved by the Commission.
- Z. “Divestiture Date” means the date on which Respondent Rexam (or a Divestiture Trustee) closes on the divestiture of the Aluminum Beverage Cans Business as required by Paragraph II (or Paragraph IV) of this Order.
- AA. “Employee Access Period” means one (1) year from the Divestiture Date.

Decision and Order

- BB. “Fairfield Facility” means the aluminum beverage cans manufacturing plant located at 2433 Crocker Circle, Fairfield, CA 94533.
- CC. “Fremont Facility” means the aluminum beverage cans manufacturing plant located at 2145 Cedar Street, Fremont, OH 43420; *PROVIDED, HOWEVER*, assets (including Intellectual Property) exclusively related to the manufacture and production of Cap Can® ends are excluded.
- DD. “Geographic Territory” means the United States.
- EE. “Government Entities” means any Federal, state, local or non-U.S. government, or any court, legislature, government agency, or government commission, or any judicial or regulatory authority of any government.
- FF. “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);

Decision and Order

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 RBCC;
 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 RBCC in the design, manufacture, and sale of products from the Aluminum Beverage Cans Business.
- GG. “Monitor” means any monitor appointed pursuant to Paragraph III of this Order or Paragraph III of the Order to Maintain Assets.
- HH. “Monitor Agreement” means the Monitor Agreement dated February 25, 2016, between ING Financial

Decision and Order

Markets LLC, and Ball Corporation. The Monitor Agreement is attached as Appendix E to this Order.

- II. “Olive Branch Facility” means the aluminum beverage cans manufacturing plant located at 10800 Marina Drive, Olive Branch, MS 38654.
- JJ. “Order to Maintain Assets” means the Order to Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.
- KK. “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.
- LL. “Person” means any individual, partnership, firm, corporation, association, trust, unincorporated organization, or other business entity other than Respondents or Ardagh.
- MM. “Remedial Agreement(s)” means:
 - 1. Any agreement between Respondents and an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, and divested, transferred, delivered, or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission’s determination to make this Order final; and/or

Decision and Order

2. Any agreement between Respondents and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of the Order.
- NN. “Retained Business” means the assets and businesses of Respondents other than the Aluminum Beverage Cans Business.
- OO. “Retained Business Firewalled Employees” means Respondents’ employees of the Retained Business who have responsibilities over or are involved in establishing the pricing of Aluminum Beverage Cans Products.
- PP. “Specialty Aluminum Beverage Cans” means specialty aluminum beverage cans of various sizes including, but not limited to: (1) 7.5-ounce slim cans; (2) 8-ounce slim cans; (3) 12-ounce sleek cans; (4) 16-ounce cans; and (5) 24-ounce cans.
- QQ. “Standard Aluminum Beverage Cans” means 12-ounce aluminum beverage cans.
- RR. “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 RBCC, 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.

Decision and Order

- SS. “Transition Services” 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.
- TT. “Transitional Services Agreement(s)” means:
1. The agreements between Respondents and Ardagh for the provision of Transition Services and attached to this Order as Non-Public Confidential Appendix B; or
 2. Any agreement entered into between Respondents and an Acquirer (or the Divestiture Trustee and an Acquirer) for the provision of Transition Services.
- UU. “Valparaiso Facility” means the aluminum beverage cans manufacturing plant located at 4001 Montdale Park Drive, Valparaiso, IN 46383.
- VV. “Whitehouse Facility” means the aluminum beverage cans manufacturing plant located at 10444 Waterville Street, Whitehouse, OH 43571.
- WW. “Winston-Salem Facility” means the aluminum beverage cans manufacturing plant located at 4000 Old Milwaukee Lane, Winston-Salem, NC 27197.

II.**IT IS FURTHER ORDERED** that:

- A. Within ten (10) days of the Acquisition Date, Respondents shall divest the Aluminum Beverage Cans Business to Ardagh, pursuant to and in accordance with the Divestiture Agreement (which shall not limit or contradict, or be construed to vary from or contradict, the terms of this Order), and such

Decision and Order

agreement, if it becomes a Remedial Agreement related to the Aluminum Beverage Cans Business is incorporated by reference into this Order and made a part hereof;

Provided, however, if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that Ardagh is not an acceptable Acquirer of the Aluminum Beverage Cans Business then Respondents shall immediately rescind the transaction with Ardagh, in whole or in part, as directed by the Commission, and shall divest, license, and/or transfer the Aluminum Beverage Cans Business within six (6) months from the date this Order is issued, absolutely and in good faith, at no minimum price, to an Acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission;

Provided, further, however, that if Respondents have complied with the terms of this Paragraph before the date on which this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondents or appoint the Divestiture Trustee, to effect such modifications to the manner of the divestiture to Ardagh (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

- B. At the Acquirer's option and upon reasonable notice, for a period not to exceed the length of the Arizona-Rexam Supply Agreement, Respondents shall enter an Arizona Contract Manufacturing Agreement and shall purchase a supply of Specialty Aluminum Beverage Cans Products from the Acquirer in order to ensure that Arizona is able to obtain Specialty Aluminum

Decision and Order

Beverage Cans Products on substantially the same terms as the Arizona-Rexam Supply Agreement.

- C. If Respondents (or a Divestiture Trustee) enter into an Arizona Contract Manufacturing Agreement with the Acquirer, Respondents shall:
1. Purchase a supply of Specialty Aluminum Beverage Cans Products from the Acquirer: (i) at the same price set forth in the Arizona-Rexam Supply Agreement; (ii) at substantially the same quality as such Specialty Aluminum Beverage Cans Products are currently manufactured; and (iii) as supplied from the manufacturing locations that are geographically close to Arizona's facilities as specified in the Arizona-Rexam Supply Agreement;
 2. Terminate, on reasonable notice and without cost or penalty to the Acquirer, the Arizona Contract Manufacturing Agreement if: (i) Arizona terminates the Arizona-Rexam Supply Agreement; or (ii) the Acquirer enters into a new agreement with Arizona for the supply of Specialty Aluminum Beverage Cans Products; and
 3. Implement procedures to ensure that Confidential Business Information pertaining to any volumes Respondents purchase from the Acquirer pursuant to the Arizona Contract Manufacturing Agreement shall not be used, disclosed, or shared with any of Respondents' Retained Business Firewalled Employees; *provided, however*, Respondents may use or disclose this Confidential Business Information as necessary to comply with Paragraph II.F.
- D. At the request of the Acquirer, for a period not to exceed eighteen (18) months from the Divestiture Date, Respondents shall provide, at no greater than Direct Cost, Transition Services from knowledgeable

Decision and Order

employees of Respondents to assist the Acquirer in the transfer of the Aluminum Beverage Cans Business from Respondents to the Acquirer in a timely and orderly manner pursuant to the Transitional Services Agreements.

- E. Within ten (10) days of the Divestiture Date, Respondents shall submit to the Acquirer, at Respondents' expense, all Business Records of the Aluminum Beverage Cans Business, in good faith, and in a manner that ensures their completeness and accuracy and that fully preserves their usefulness; *provided, however*, pending complete delivery of all such Business Records of the Aluminum Beverage Cans Business to the Acquirer, Respondents shall provide the Acquirer, and the Interim Monitor with access to all such Business Records of the Aluminum Beverage Cans Business and employees who possess or able to locate such information for the purposes of identifying the books, records, and files directly related to the Aluminum Beverage Cans Business and facilitating the delivery in a manner consistent with this Order.
- F. Respondents shall ensure that employees of the Respondents' Retained Business shall not receive, have access to, use or continue to use, or disclose any Confidential Business Information pertaining to the Aluminum Beverage Cans Business except in the course of:
 - 1. Performing their obligations as permitted under this Order or the Order to Maintain Assets;
 - 2. Performing their obligations under any Remedial 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 Aluminum

Decision and Order

Beverage Cans Business, obtaining legal advice, defending legal claims, investigations, or enforcing actions threatened or brought against the Aluminum Beverage Cans Business, or as required by law;

Provided, however, for purposes of this Paragraph, Respondents' employees who provide or are involved in the receipt of support services under the Order to Maintain Assets shall be deemed to be performing obligations under this Order.

- G. If the receipt, access to, use, or disclosure of Confidential Business Information pertaining to the Aluminum Beverage Cans Business is permitted to Respondents' employees under Paragraph II.F. of this Order, Respondents shall limit such information (1) only to those Persons who require such information for the purposes permitted under Paragraph II.F., (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.
- H. Respondents shall enforce the confidentiality terms of this Order as to any Person other than the Acquirer of the Aluminum Beverage Cans Business and take such action as is necessary to cause each such Person to comply with these terms, including training of Respondents' employees and all other actions that Respondents would take to protect its own trade secrets and proprietary information.
- I. From the date Respondents execute the Divestiture Agreement until the Employee Access Period terminates, Respondents shall provide a proposed Acquirer with the opportunity to recruit and employ any Aluminum Beverage Cans Designated Employee in conformance with the following:

Decision and Order

1. No later than ten (10) days after a request from a proposed Acquirer, or staff of the Commission, Respondents shall provide a proposed Acquirer with the following information for each Aluminum Beverage Cans 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 RBCC'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 Aluminum Beverage Cans Designated Employee(s);
2. No later than ten (10) days after a request from a proposed Acquirer, Respondents shall provide the proposed Acquirer with:
 - a. an opportunity to meet, personally and outside the presence or hearing of any employee or agent of Respondents, with any Aluminum Beverage Cans Designated Employee;

Decision and Order

- 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 Aluminum Beverage Cans Designated Employee;
3. Respondents shall (i) not interfere, directly or indirectly, with the hiring or employing by a proposed Acquirer of any Aluminum Beverage Cans Designated Employee, (ii) not offer any incentive to any Aluminum Beverage Cans Designated Employee to decline employment with a proposed Acquirer, (iii) not make any counteroffer to any Aluminum Beverage Cans Designated Employee who receives a written offer of employment from a proposed Acquirer, and (iv) remove any impediments within the control of Respondents that may deter any Aluminum Beverage Cans 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 Respondents that would affect the ability of such employee to be employed by a proposed Acquirer;

Provided, however, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee.

- J. Respondents shall provide reasonable financial incentives to the Aluminum Beverage Cans Divestiture Employees as needed to facilitate the employment of such employees by the Acquirer; *PROVIDED, HOWEVER,* (i) if the proposed Acquirer has made a written offer of employment to an Aluminum Beverage Can Divestiture Employee, and (ii) such

Decision and Order

employee has declined employment with the proposed Acquirer, then Respondents, in consultation with the Monitor (if one is appointed), shall make available a substitute employee with substantially the same skills and job function to the Acquirer for employment.

- K. For a period of two (2) years after the Divestiture Date, Respondents shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any Person employed by an Acquirer of the Aluminum Beverage Cans Business, to terminate his or her employment relationship with an Acquirer;

Provided, however, Respondents 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 Aluminum Beverage Cans Designated Employees; and (2) hire employees of the Aluminum Beverage Cans Business who apply for employment with Respondents, so long as such individuals were not solicited by Respondents in violation of this paragraph;

Provided, further, however, that this Paragraph shall not prohibit Respondents from making offers of employment to or employing any employee of the Aluminum Beverage Cans Business if an Acquirer has notified Respondents 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.

- L. Until Respondents (or the Divestiture Trustee) complete the divestiture and other obligations to transfer the Aluminum Beverage Cans Business as required by this Order, Respondents shall take actions as are necessary to:

Decision and Order

1. Maintain the full economic viability and marketability of the Aluminum Beverage Cans Business;
 2. Minimize any risk of loss of competitive potential for the Aluminum Beverage Cans Business;
 3. Prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to the Aluminum Beverage Cans Business; and
 4. Not sell, transfer, encumber, or otherwise impair the Aluminum Beverage Cans 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 Aluminum Beverage Cans Business.
- M. 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 Respondents, minimize the loss of competitive potential for the Aluminum Beverage Cans Business, minimize the risk of disclosure or unauthorized use of Confidential Business Information related to the Aluminum Beverage Cans Business; to prevent the destruction, removal, wasting, deterioration, or impairment of the Aluminum Beverage Cans 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. At any time after the Respondents sign the Consent Agreement in this matter, the Commission may appoint a monitor ("Monitor") to assure that the

Decision and Order

Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order, the Order to Maintain Assets and the Remedial Agreements. The Commission hereby appoints ING Financial Markets LLC (“ING”) as the Monitor and approves the Monitor Agreement between ING and Respondents which agreement, *inter alia*, names Philip Comerford, Jr., as ING designated Project Manager.

- B. Not later than one (1) day after the appointment of the Monitor, Respondents shall, pursuant to the Monitor Agreement and to this Order, confer on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondents’ compliance with the relevant requirements of the Order in a manner consistent with the purposes of the Order.
- C. The Monitor shall serve until the later of (1) eighteen (18) months after the Divestiture Date or (2) the termination of all Respondents’ obligations under all Remedial Agreements; *provided, however*, the Commission may extend or modify this period as may be necessary to accomplish the purposes of this Order and the Order the Maintain Assets.
- D. Respondents 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 Respondents’ compliance with the divestiture and asset maintenance obligations 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, including, but not limited to:

Decision and Order

- a. Assuring that Respondents expeditiously comply with all of their obligations and performs all of their responsibilities as required by this Order, the Order to Maintain Assets, and the Remedial Agreements;
 - b. Monitoring any Transition Services Agreements; and
 - c. Assuring that Confidential Business Information is not received or used by Respondents or the Acquirer, except as allowing in this Order and in the Order to Maintain Assets;
2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission;
3. The Monitor shall serve for such time as is necessary to monitor Respondents' compliance with the provisions of this Order, the Order to Maintain Assets, and the Remedial Agreements;
4. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondents' 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 Respondents' compliance with its obligations under this Order, the Order to Maintain Assets, and the Remedial Agreements. Respondents 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 Respondents' compliance with this Order, the Order to Maintain Assets, and the Remedial Agreements;
5. The Monitor shall serve, without bond or other security, at the expense of Respondents on such

Decision and Order

reasonable and customary terms and conditions as the Commission may set. The Monitor shall have the authority to employ, at the expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission;

6. Respondents 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 malfeasance, gross negligence, willful or wanton acts, or bad faith by the Monitor. For purposes of this Paragraph III, the term "Monitor" shall include all persons retained by the Monitor pursuant to Paragraph III.D.5 of this Order.;
7. Respondents shall report to the Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by the Respondents, and any reports submitted by the Acquirer with respect to the performance of Respondents' obligations under this Order, the Order to Maintain Assets, and the Remedial Agreements;
8. Within one (1) month from the date the Monitor is appointed pursuant to this Paragraph, every sixty (60) days thereafter, and otherwise requested by

Decision and Order

the Commission, the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under this Order, the Order to Maintain Assets, and the Remedial Agreements;

9. Respondents may require the Monitor and each of the Monitors consultants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Monitor from providing any information to the Commission.
- E. The Commission may, among other things, require 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.
- F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor.
- G. In the event a substitute Monitor is required, the Commission shall select the Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the proposed substitute Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed substitute Monitor, Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor. Not later than ten (10) days after appointment of a substitute Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the substitute Monitor all the rights and powers necessary to permit the substitute Monitor to monitor

Decision and Order

Respondent's compliance with the terms of this Order, the Order to Maintain Assets, and the Remedial Agreements in a manner consistent with the purposes of this Order.

- H. The 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 this Order, the Order to Maintain Assets, and the Remedial Agreements.

IV.**IT IS FURTHER ORDERED** that:

- A. If Respondents have not divested, absolutely and in good faith and with the Commission's prior approval, the Aluminum Beverage Cans Business and otherwise fully complied with the obligations as required by Paragraph II of this Order, the Commission may appoint a Divestiture Trustee to divest the Aluminum Beverage Cans 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 Monitor pursuant to the relevant provisions of this 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, Respondents 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

Decision and Order

Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

- C. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have 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 Respondents of the identity of any proposed Divestiture Trustee, Respondents 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, Respondents 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, Respondents 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 Services agreements;

Decision and Order

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. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents 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 Respondents' absolute and unconditional obligation to divest expeditiously and at no

Decision and Order

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 Respondents from among those approved by the Commission; *provided, further, however*, that Respondents 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 Respondents, 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 Respondents, 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 Respondents, 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;

Decision and Order

6. Respondents 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 Respondents and to the Commission every thirty (30) days concerning the Divestiture Trustee's efforts to accomplish the divestiture;
9. Respondents 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; and
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

Decision and Order

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 Remedial Agreements 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 Respondents under such agreement.
- B. The Remedial Agreements shall be incorporated by reference into this Order and made a part hereof.
- C. Respondents shall comply with all provisions of the Remedial Agreements, and any breach by Respondents of any term of such agreement shall constitute a violation of this Order. If any term of the Remedial Agreements varies from the terms of this Order ("Order Term"), then to the extent that Respondents cannot fully comply with both terms, the Order Term shall determine Respondents' obligations under this Order. Any failure by the Respondents to comply with any term of such Divestiture Agreement shall constitute a failure to comply with this Order.

Decision and Order

- D. Respondents shall not modify or amend any of the terms of any Remedial Agreement without the prior approval of the Commission, except as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5). Notwithstanding any term of the Remedial Agreement(s), any modification or amendment of any Remedial Agreement made without the prior approval of the Commission, or as otherwise provided in Rule 2.41(f)(5), shall constitute a failure to comply with this Order.

VI.**IT IS FURTHER ORDERED** that:

- A. Within five (5) days of the Acquisition Date, Respondents shall submit to the Commission a letter certifying the date on which the Acquisition occurred.
- B. Respondents shall submit to the Commission and, if appointed, the Monitor, a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order:
1. Within thirty (30) days after the date this Order becomes final;
 2. Every thirty (30) days thereafter until Respondents have fully divested, licensed, transferred and/or granted the Aluminum Beverage Cans Business to an Acquirer; and
 3. Every three (3) months thereafter so long as Respondents have a continuing obligation under this Order and/or the Remedial Agreements to render services to the Acquirer or otherwise to comply with this Order.

Decision and Order

- C. At such other times as the Commission may request, Respondents 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 Remedial Agreement.

VII.

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

- A. Any proposed dissolution of Respondents;
- B. Any proposed acquisition, merger, or consolidation of Respondents; or
- C. Any other change in the Respondents, 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.

VIII.

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 Respondents, with respect to any matter contained in this Order, 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 non-privileged books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondents related to compliance with the Consent Agreement and/or this Order, which copying services shall be provided by Respondents at the request of the authorized representative of the Commission and at the expense of Respondents; and

Decision and Order

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

IX.

IT IS FURTHER ORDERED that this Order shall terminate on August 15, 2026.

By the Commission.

NON-PUBLIC APPENDIX A**DIVESTITURE AGREEMENT**

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

NON-PUBLIC APPENDIX B**TRANSITION SERVICES AGREEMENT**

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

Decision and Order

NON-PUBLIC APPENDIX C

**ALUMINUM BEVERAGE CANS DIVESTITURE
EMPLOYEES**

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

NON-PUBLIC APPENDIX D

**ARIZONA CONTRACT MANUFACTURING
AGREEMENT**

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

Decision and Order

PUBLIC APPENDIX E**MONITOR AGREEMENT**

This Monitor Agreement (this "Agreement") entered into this ~~26~~²⁷ day of February, 2016 by and among ING Financial Markets LLC ("ING" or the "Monitor"), Ball Corporation ("Ball") and Rexam PLC ("Rexam" and together with Ball, the "Respondents"), (ING, Ball and/or Rexam collectively, the "Parties") provides as follows:

WHEREAS, the United States Federal Trade Commission (the "Commission") has accepted or will shortly accept for public comment an Agreement Containing Consent Order, including a proposed Decision and Order and a proposed Order to Hold Separate and Maintain Assets ("Hold Separate Order" and collectively, the "Orders"), which, among other things, requires the divestiture of certain plants and other assets, as defined in the Orders, and contemplates the appointment of a Monitor to monitor Respondents' compliance with its obligations under the Orders;

WHEREAS, the Commission plans to appoint ING as Monitor pursuant to the Orders, and ING has consented to such appointment;

WHEREAS, the Orders will further provide that Respondents shall execute an agreement, subject to the prior approval of the Commission, that confers all the rights and powers necessary to permit the Monitor to monitor Respondents' compliance with the terms of the Orders; and

WHEREAS, the Parties to this Agreement intend to be legally bound, subject only to the Commission's approval of this Agreement.

NOW, THEREFORE, the Parties agree as follows:

All capitalized terms used in this Agreement and not specifically defined herein shall have the respective definitions given to them in the Orders.

ARTICLE I

1.1 Monitor's Responsibilities. The Monitor shall be responsible for monitoring Respondents' compliance with its obligations as set forth in the Orders and the Divestiture Agreements, as defined in the Orders ("Monitor's Responsibilities").

1.2 Access to Relevant Information and Facilities. Subject to any legally recognized privilege, the Monitor shall have full and complete access to the personnel, facilities, books, and records of Respondents related to Respondents' obligations under the Orders and the Divestiture Agreements, as the Monitor may reasonably request. Respondents shall cooperate with any reasonable request of the Monitor. The Monitor shall give Respondents reasonable notice of any request for such access or such information and shall attempt to schedule any access or requests for information in such a manner as will not unreasonably interfere with Respondents' operations. At the request of the Monitor, Respondents shall promptly arrange meetings and discussions, including tours of relevant facilities, at reasonable times and locations

Decision and Order

between the Monitor and employees of Respondents who have knowledge relevant to the proper discharge of the Monitor's responsibilities under the Orders.

1.3 Compliance Reports. Respondents shall report to the Monitor in accordance with the requirements of the Orders.

1.4 Monitor's Obligations. The Monitor shall:

- a. carry out the Monitor's Responsibilities, including submission of periodic reports, and such additional written reports as may be requested by the Commission staff, to the Commission staff regarding Respondents' compliance with the Orders;
- b. maintain the confidentiality of all confidential information, including Confidential Business Information, and any other non-public confidential information provided to the Monitor by Respondents, the Acquirers of the Divested Businesses, any supplier or customer of Respondents, or the Commission, and shall use such confidential information only for the purpose of discharging the Monitor's obligations pursuant to this Agreement and not for any other purpose, including, without limitation, any other business, scientific, technological, or personal purpose. The Monitor may disclose confidential information only to:
 - i. persons employed by ING Groep N.V. or an affiliate of ING Groep N.V. or who are working with the Monitor under this Agreement;
 - ii. persons working with the Monitor under this Agreement (and only to the extent such persons have executed a confidentiality agreement consistent with the provisions of this Agreement); and
 - iii. persons employed at the Commission, the European Commission or the Brazilian Administrative Council of Economic Defense (*CADE*) working on this matter.
- c. request confidential treatment by the Commission, the European Commission, and CADE of any confidential information turned over to these entities;
- d. maintain a record and inform the Commission of all persons (other than the persons referenced in 1.4 (b)(i) and 1.4 (b)(iii) above) to whom confidential information related to this Monitor Agreement has been disclosed;
- e. require any consultants, accountants, attorneys, and any other representatives or assistants retained by the Monitor to assist in carrying out the Monitor's Responsibilities to execute a confidentiality agreement that requires such third parties to treat confidential information with the same standards of care and obligations of confidentiality to which the Monitor must adhere under this Agreement;

Decision and Order

- f. maintain the confidentiality, for a period of three (3) years after the termination of this Agreement, of all other aspects of the performance of the Monitor's Responsibilities and not disclose any confidential information, including Confidential Business Information, relating thereto;
- g. not be involved in any way in the management, production, supply and trading, sales, marketing, and financial operations of any products of Respondents that compete with the products sold by the plants and other assets, as defined in and to be divested pursuant to the Orders, except to the extent permitted by the Orders, and
- h. upon termination of the Monitor's duties under this Agreement, consult with the Commission's staff regarding disposition of any written and electronic materials (including materials that Respondents provided to the Monitor) in the possession or control of the Monitor that relate to the Monitor's duties, and the Monitor shall dispose of such materials, which may include sending such materials to the Commission's staff, as directed by the staff. In response to a request by Respondents to return or destroy materials that Respondents provided to the Monitor, the Monitor shall inform the Commission's staff of such request and, if the Commission's staff do not object, shall comply with the Respondents' request. Notwithstanding the foregoing, the Monitor shall not be required to return or destroy confidential information contained in an archived computer back-up system for its disaster recovery and/or security purposes, and it may retain a copy of confidential information, subject to the terms of this Agreement, in accordance with its internal record retention procedures for legal or regulatory purposes. Nothing herein shall abrogate the Monitor's duty of confidentiality, which includes an obligation not to disclose any non-public information obtained while acting as a Monitor for three (3) years after termination of this Agreement.

For the purpose of this Agreement, information shall not be considered confidential or proprietary to the extent that it is or becomes part of the public domain (other than as the result of any action by the Monitor or by any employee, agent, affiliate or consultant of the Monitor), or to the extent that the recipient of such information can demonstrate that such information was already known to the recipient at the time of receipt from a source other than the Monitor, the Respondents, or any director, officer, employee, agent, consultant or affiliate of the Monitor, Respondents, when such source was not known to recipient after due inquiry to be restricted from making such disclosure to such recipient.

In the event that confidential information must be disclosed by the Monitor or any person referenced in 1.4(b)(i) herein under applicable law or pursuant to legal process, such party shall, to the extent not otherwise prohibited, give written notice to the Respondents that such disclosure is required so that the Respondents may, at Respondents' sole expense, seek an appropriate protective order or waive compliance with the terms hereof or both. If, absent

Decision and Order

the entry of a protective order or the receipt of a waiver of this Monitor Agreement, the Monitor or any person referenced in 1.4(b)(i) herein is compelled by law or legal process to disclose any confidential information, such party (x) may disclose such information solely to the extent required by law; (y) shall not disclose such information until such time as it is required by law; and (z) shall exercise commercially reasonable efforts to obtain reliable assurances that confidential treatment will be accorded to any confidential information so disclosed. Notwithstanding the foregoing, the Monitor or any person referenced in 1.4(b)(i) herein may disclose confidential information to any regulatory or self-regulatory agency having jurisdiction over such party in the course of routine reviews or audits when such disclosure is required by law, which confidential information may be disclosed with notice to Respondents.

1.5 Monitor Payment. Ball will pay the Monitor the hourly fee specified in the attached confidential fee schedule ("Hourly Fee") for all reasonable time spent in performance of the Monitor's duties under this Agreement. In addition, Ball will pay: (a) out-of-pocket expenses reasonably incurred by the Monitor in the performance of the Monitor's duties; and (b) fees and disbursements reasonably incurred by such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities hereunder; however, all such fees and disbursements shall be pre-approved by Ball, which shall not withhold approval unreasonably. The Monitor shall provide Ball with an invoice on a monthly basis that includes details and an explanation of all matters for which Monitor submits an invoice and Ball shall pay such invoices according to Ball's standard payment terms of 15/31 second month prox terms. Any consultants, accountants, attorneys, and other representatives and assistants retained by the Monitor shall invoice their services to the Monitor who will review and approve such invoices and submit to Ball for payment. At its own expense, Ball may retain an independent auditor to verify such invoices. The Monitor and Ball shall submit any disputes about invoices to the Commission for assistance in resolving such disputes.

1.6 Monitor's Indemnification. Ball agrees to indemnify the Monitor, ING Groep N.V. and all affiliates of ING Groep N.V. and their directors and employees (the "Indemnified Parties") and Ball shall hold the Indemnified Parties harmless (regardless of any action, whether in contract, statutory law, tort or otherwise) against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties and obligations hereunder, 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 liabilities, losses, damages, claims, or expenses result from gross negligence, willful misconduct, or bad faith by the Indemnified Parties. The Monitor's maximum liability to Respondents relating to services rendered pursuant to this Monitor Agreement (regardless of the form of the action, whether in contract, statutory law, tort, or otherwise) shall be limited to the total sum of the fees paid to the Monitor by Ball, except to the extent resulting from the gross negligence, willful misconduct or bad faith by the Indemnified Parties, in which case the liability is not so limited.

Decision and Order

1.7 Disputes. In the event of a disagreement or dispute between Respondents and the Monitor concerning Respondents' obligations under one or both of the Orders, and, in the event that such disagreement or dispute cannot be resolved by the Parties, any Party may seek the assistance of the individual in charge of the Commission's Compliance Division.

1.9 Conflicts of Interest. If the Monitor becomes aware during the term of this Agreement that it has or may have a conflict of interest that may affect or could have the appearance of affecting performance by the Monitor of any of the Monitor's Responsibilities, the Monitor shall immediately inform Ball and the Commission of any such conflict.

ARTICLE II

2.1 Termination. This Agreement shall terminate upon the earlier of: (a) the expiration or termination of the Orders; (b) the expiration or termination of the last to expire of the Divestiture Agreements; (c) Respondents' receipt of written notice from the Commission that the Commission has determined that ING has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve as Monitor; and (d) with at least thirty (30) days advance notice to be provided by the Monitor to Respondents and to the Commission, upon resignation of the Monitor. If this Agreement is terminated for any reason, the confidentiality obligations set forth in Section 1.3 above will remain in force.

2.2 Governing Law. This Agreement and the rights and obligations of the Parties hereunder shall in all respects be governed by the substantive laws of the state of New York, including all matters of construction, validity and performance. The Orders shall govern this Agreement and any provisions herein which conflict or are inconsistent with them may be declared null and void by the Commission and any provision not in conflict shall survive and remain a part of this Agreement.

2.3 Disclosure of Information. Nothing in this Agreement shall require Respondents to disclose any material information that is subject to a legally recognized privilege or that Respondents are prohibited from disclosing by reason of law or an agreement with a third party.

2.4 Assignment. This Agreement may not be assigned or otherwise transferred by Respondents or the Monitor without the consent of Respondents and the Monitor and the approval of the Commission. Any such assignment or transfer shall be consistent with the terms of the Orders.

2.5 Modification. No amendment, modification, termination, or waiver of any provision of this Agreement shall be effective unless made in writing, signed by all Parties, and approved by the Commission. Any such amendment, modification, termination, or waiver shall be consistent with the terms of the Orders.

2.6 Entire Agreement. This Agreement, and those portions of the Orders incorporated herein by reference, constitute the entire agreement of the Parties and supersede any and all prior agreements and understandings between the Monitor and Respondents, written or oral, with respect to the subject matter hereof.

Decision and Order

2.7 Duplicate Originals. This Agreement may be executed in several counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same document.

2.8 Section Headings. Any heading of a section is for convenience only and is to be assigned no significance whatsoever as to its interpretation and intent.

ARTICLE III

3.1 In the performance of his functions and duties under this Agreement, the Monitor shall exercise the standard of care and diligence that would be expected of a reasonable person in the conduct of its own business affairs.

3.2 It is understood that the Monitor will be serving under this Agreement as an independent contractor and that the relationship of employer and employee shall not exist between the Monitor and Respondents. The Monitor shall not have a fiduciary responsibility to the Respondents, but shall have fiduciary duties to the Commission.

3.3 This Agreement is for the sole benefit of the Parties hereto and their permitted assigns and the Commission, and nothing herein express or implied shall give, or be construed to give, any other person any legal or equitable rights hereunder.

3.4 In the event that ING wishes to terminate this Agreement, ING shall provide written notice to the Respondents and the Commission. Respondents and ING shall work in good faith with the Commission to identify and propose to the Commission a successor Monitor. ING shall continue to serve as Monitor under the terms of this Agreement until such time as the Commission approves a successor Monitor, and ING's termination of this Agreement shall be effective only upon the approval by the Commission of a successor Monitor.

ARTICLE IV

4.1 If the Orders include a Hold Separate Order, the Monitor should have all of the powers and responsibilities and protections conferred upon the Monitor by the Hold Separate Order, including but not limited to:

- a. monitoring the organization and operations of the Hold Separate Business, as defined in the Hold Separate Order;
- b. monitoring the management of the Hold Separate Business through the Manager, as defined in the Hold Separate Order;
- c. monitoring the independence of the Hold Separate Business;
- d. monitoring Respondents' compliance with its obligations as required by the Hold Separate Order; and
- e. reviewing Replacement Contracts and Allocated Shared Contracts, both as defined in the Hold Separate Order, and determining, in consultation with

Decision and Order

Commission staff, whether these contracts comply with the Hold Separate Order.

4.2 As of the date of this Agreement, Respondents shall transfer to and confer upon the Monitor all rights, powers and authority necessary to permit the Monitor to perform its duties and responsibilities pursuant to and consistent with the purposes of the Hold Separate Order.

4.3 Subject to applicable laws and regulations, the Monitor shall have full and complete access to the personnel, books, records, documents, and facilities of the Hold Separate Business, and to any other relevant information as the Monitor may reasonably request, including but not limited to all documents kept by the Respondents in the ordinary course of business that relate to the Hold Separate Business. Respondents shall develop such financial and other information as the Monitor may reasonably request and shall cooperate with the Monitor. The Monitor shall give Respondents reasonable notice of any request for such access or information. The Monitor shall attempt to schedule any access or requests for information in such a manner as will not unreasonably interfere with Respondents' operations.

[The rest of the page has been intentionally left blank.]

Decision and Order

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the date first above written.

MONITOR

ING Financial Markets LLC



Phillip Comerford, Jr.
Managing Director

RESPONDENT

Ball Corporation

By:
Title:

RESPONDENT**REXAM**

Rexam PLC

By:
Title:

Decision and Order

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the date first above written.

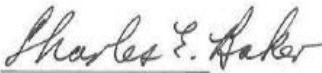
MONITOR

ING Financial Markets LLC

Phillip Comerford, Jr.
Managing Director

RESPONDENT

Ball Corporation


By: *CHARLES E. BAKER*
Title: *VICE PRESIDENT*

RESPONDENT**REXAM**

Rexam PLC

By:
Title:

Decision and Order

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the date first above written.

MONITOR

ING Financial Markets LLC

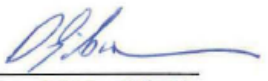
RESPONDENT

Ball Corporation

Phillip Comerford, Jr.
Managing Director

By:
Title:**RESPONDENT****REXAM**

Rexam PLC



By: *DAVID GIBSON*
Title: *COMPANY SECRETARY*

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT**I. INTRODUCTION AND BACKGROUND**

Pursuant to an agreement dated February 19, 2015 (the “Acquisition”), Ball Corporation (“Ball”) seeks to acquire Rexam PLC (“Rexam”) in a transaction valued at approximately £5.4 billion, or \$8.4 billion, at the time the Acquisition was announced. In order to preserve competition that would be lessened as a result of the proposed Acquisition, the Federal Trade Commission (“Commission”) has accepted for public comment, subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) from Ball and Rexam. The Commission has also issued a Complaint and Decision & Order, and has assigned a Monitor Trustee to oversee compliance with the Consent Agreement.

The Commission’s Complaint alleges that the proposed Acquisition, 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, as amended, 15 U.S.C. § 45, by lessening competition in the markets for standard 12-ounce aluminum beverage cans (“Standard Cans”) and specialty aluminum beverage cans (“Specialty Cans”) in the United States. The Consent Agreement would remedy the alleged violations by restoring the competition that would be lost as a result of the proposed Acquisition.

Under the terms of the proposed Consent Agreement, Ball and Rexam are required to divest seven aluminum can body plants, one aluminum can end plant, and other innovation and support functions in order to preserve competition in the relevant markets in the United States. These manufacturing plants account for the majority of Rexam’s sales in the United States. Ball and Rexam have agreed to divest these and additional assets around the world to Ardagh Group S.A. (“Ardagh”) in a transaction entered into on April 22, 2016 and valued at \$3.42 billion, including assumption of liabilities.

Analysis to Aid Public Comment

The proposed 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 part of the public record. After 30 days, the Commission will again review the proposed Consent Agreement and any comments received, and decide whether the Consent Agreement should be withdrawn, modified, or made final.

II. THE PARTIES

Ball, an Indiana corporation headquartered in Broomfield, CO, is the largest manufacturer of aluminum beverage cans in the both the United States and the world. In 2015, Ball had total sales of \$8.0 billion, 74% of which were derived from its worldwide metal beverage container business. Approximately 16% of Ball's revenues come from its worldwide sales of metal food and household containers, and approximately 10% from its U.S. aerospace business. In 2015, Ball had approximately \$2.7 billion in sales of aluminum beverage cans in the United States.

Rexam is the second-largest manufacturer of aluminum beverage cans in North America and the world. Rexam is a United Kingdom company headquartered in London. Rexam manufactures only aluminum beverage containers today, after selling its plastic packaging business in 2011 and its glass manufacturing business in 2005. In 2015, Rexam had total aluminum beverage container sales of about \$5.7 billion, with approximately \$1.75 billion coming from the United States.

Ardagh, headquartered in Luxembourg, is one of the world's largest producers of glass bottles for the beverage industry and metal cans for the food industry. Ardagh does not currently produce aluminum cans for the beverage industry, but it serves many of the same customers as Ball and Rexam through its glass bottle business. In 2015, Ardagh had sales of approximately \$5.9 billion, with approximately \$3.6 billion coming from glass packaging and \$2.3 billion from metal food packaging.

Analysis to Aid Public Comment

III. STANDARD CANS

The first relevant line of commerce in which to analyze the Acquisition is standard 12-ounce aluminum beverage cans (“Standard Cans”). Approximately 3 out of every 4 beverage cans sold in the United States today are Standard Cans, which are found, for instance, in a 12-pack of carbonated soft drinks or beer. Beverage producers purchase Standard Cans because of their superior shelf life, filling efficiency, recyclability, compact storage, and relatively low cost.

Other packaging substrates, such as plastic bottles and glass bottles, do not serve as competitive constraints to Standard Cans. Beverage producers sell their products in different types of containers in order to meet consumer demand, and could not substitute other container types for Standard Cans without risking a loss in sales. Beverage producers have also invested substantial sums of money in specialized filling lines that are designed to fill either aluminum cans, plastic bottles, or glass bottles, and cannot switch from one container type to another. As a result, beverage producers negotiate for Standard Cans independently from plastic bottles and glass bottles, and do not shift volumes between Standard Cans and other packaging substrates in response to fluctuations in their relative prices.

The relevant geographic markets in which to analyze competition for Standard Cans are regional. Beverage producers incur significant freight costs from shipping empty cans to their filling plants. For this reason, manufacturers of Standard Cans have built a network of plants throughout the United States to meet regional customer demand and minimize shipping costs. Although aluminum can manufacturers often ship Standard Cans several hundred miles and win bids when they are not the closest supplier, it is not common or cost-effective for Standard Cans to ship cross-country. As a result, the Complaint identifies three regional markets in the United States in which substantial competition exists between Ball and Rexam for the sale of Standard Cans: (1) the South/Southeast; (2) the Midwest; and (3) the West Coast, consisting primarily of California.

Analysis to Aid Public Comment

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.”¹ Absent the proposed remedy, the Acquisition would increase HHIs for Standard Cans by 1,712 points to 4,874 in the South/Southeast; by 2,201 points to 5,050 in the Midwest; and by 1,673 points to 4,680 on the West Coast. As a result, there is a presumption that the proposed merger of Ball and Rexam would substantially lessen competition in each of the regional markets for Standard Cans.

IV. SPECIALTY CANS

The second relevant line of commerce in which to analyze the Acquisition is an assortment of specialty aluminum beverage cans (“Specialty Cans”), which come in a variety of dimensions that differ from Standard Cans. Specialty Cans include 7.5-ounce and 8-ounce slim cans, which are narrower and shorter than Standard Cans; 12-ounce sleek cans, which are narrower and taller than standard 12-ounce cans; 16-ounce cans, which have the same diameter as Standard Cans but are taller; 24-ounce cans, which are wider and taller than Standard Cans; and other aluminum cans in non-standard shapes and sizes. Specialty Can sales have been growing as beverage producers seek to package their products in new shapes and sizes to reach different consumers and consumption occasions.

Beverage producers package in different types of Specialty Cans for different reasons. For example, carbonated soft drink producers package some of their products in 7.5-ounce slim cans specifically to reach consumers who want a smaller portion in an attractive, sub-100 calorie package. Popular with producers of flavored malt beverages are 8-ounce slim cans. Energy drink producers package in 16-ounce and other “sleek” cans in order to differentiate their products and convey a premium image in ways

¹ [2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines § 5.3.](#)

Analysis to Aid Public Comment

that cannot be achieved by using Standard Cans. Some tea and energy drink producers further differentiate their products and convey value by packaging in large 24-ounce cans.

Although one type of Specialty Can is not typically a substitute for another, it is appropriate to group or cluster the different Specialty Cans together for the purposes of market definition analysis because each of the products in the assortment is offered under similar competitive conditions. As such, grouping the many different types of Specialty Cans into a single cluster enables a more efficient evaluation of competitive effects.

Beverage producers would not substitute Standard Cans, glass bottles, plastic bottles, or other container types for Specialty Cans in sufficient quantities to defeat a hypothetical, small but significant and non-transitory increase in the price of Specialty Cans. Beverage producers package in specific shapes and sizes of Specialty Cans to maximize sales and attract certain customers who would not purchase their products in a different package type. Moreover, beverage producers have made substantial investments in infrastructure that are used to fill Specialty Cans and that cannot be used to fill PET bottles or glass bottles.

The relevant geographic market in which to analyze Specialty Cans is the United States. A national market is appropriate because each Specialty Can type is produced at only a small number of locations nationwide, and Specialty Cans are shipped over much longer distances than Standard Cans, often over 1,000 miles. Specialty Cans of particular shapes and sizes are produced at only a few locations in the United States because their volumes are only a small fraction of the volume of Standard Cans, and it is not cost-effective to spread such small volumes across a large number of plants.

Ball and Rexam are the two largest suppliers of Specialty Cans in the United States with shares of approximately 56% and 21%, respectively, across all Specialty Can sizes. Absent the proposed remedy, the Acquisition would increase HHIs for Specialty Cans by 2,284 points to 6,267 in the United States. As a result, there is a presumption that the proposed merger of Ball and

Analysis to Aid Public Comment

Rexam would substantially lessen competition in the national market for Specialty Cans.

V. EFFECTS OF THE ACQUISITION

Absent relief, the Acquisition would likely cause significant competitive harm in the markets for the manufacture and sale of Standard Cans and Specialty Cans to beverage producers. The Acquisition would eliminate substantial direct competition between Ball and Rexam for the sale of Standard Cans and Specialty Cans. In individual contract negotiations with Ball and Rexam, beverage producers have been able to secure better prices and other terms by switching, or threatening to switch, their business from one supplier to the other. In some of these negotiations, no other suppliers besides Ball and Rexam have submitted a bid, and beverage producers have therefore depended on the competition between Ball and Rexam to obtain a contract with favorable terms. The Acquisition would also increase the ease and likelihood of anticompetitive coordination between the only two remaining independent beverage can suppliers, Ball and Crown Holdings, Inc. Thus, the Acquisition would likely result in higher prices and a reduction in quality, selection, service, and innovation.

VI. ENTRY

Entry in the manufacture of Standard Cans and Specialty Cans would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the likely competitive harm from the Acquisition. Considerable entry barriers exist in the manufacture of Standard Cans and Specialty Cans, including, but not limited to, substantial capital costs needed to construct a new aluminum can plant and significant volume requirements necessary to run a plant efficiently. For Standard Cans, a consistent decline in demand has created a further disincentive to entry, which has led to a steady removal of capacity for over 20 years. With respect to Specialty Cans, a new entrant would be at a significant disadvantage if it were to construct new Specialty Can lines compared to incumbent suppliers (led by Ball and Rexam) that can convert Standard Can lines to Specialty Can production at lower cost.

Analysis to Aid Public Comment

The threat of vertical integration by beverage producers is also unlikely to deter or counteract the competitive harm from the Acquisition. A single beverage can plant requires an annual production volume in the billions of cans to run profitably, which would preclude all but the very largest beverage producers from contemplating vertical integration. Moreover, it is difficult for even the largest beverage producers to make a credible threat of vertical integration because their filling plants are spread throughout the United States in a way that they could never fully supply internally. As a result, even a large, vertically integrated beverage producer would have to continue buying at least some beverage cans from existing suppliers, but at a higher price since it would receive a smaller volume discount, which would further disincentivize vertical integration. Coupled with the significant capital costs and technical requirements needed to build a new beverage can plant, vertical integration would not be a credible threat for the vast majority of beverage producers.

VII. THE PROPOSED CONSENT AGREEMENT

The proposed Consent Agreement remedies the competitive concerns raised by the Acquisition by requiring Ball to divest seven beverage can plants and one can end plant in the United States to Ardagh. Divestitures of Rexam's Bishopville, SC and Olive Branch, MS can plants preserve competition for Standard Cans in the South/Southeastern United States. Divestitures of Rexam's Fremont, OH and Chicago, IL can plants preserve competition for Standard Cans in the Midwest. Divestiture of Rexam's Fairfield, CA can plant preserves competition for Standard Cans on the West Coast. Divestitures of Rexam's Winston-Salem, NC, Whitehouse, OH, and Chicago, IL can plants preserve competition in Specialty Cans in the United States. Finally, divestiture of Rexam's Valparaiso, IN can end plant ensures that Ardagh will be able to manufacture lids for all of its Standard Cans and Specialty Cans produced in the United States.

As part of the Consent Agreement, Ball is also divesting Rexam's U.S. headquarters in Chicago, IL and Rexam's U.S. Technical Center in Elk Grove, IL to Ardagh. In addition, Ball has agreed to sell to Ardagh ten beverage can plants and two can end plants in Europe; two beverage can plants in Brazil; and other

Analysis to Aid Public Comment

innovation and support functions in Germany, the United Kingdom, and Switzerland to resolve competitive concerns in Europe. Divestiture of the Ball and Rexam assets to a single, global buyer is important to preserve competition for many multinational customers.

The Consent Agreement requires Ball to transfer all customer contracts currently serviced at the beverage can plants that are being divested to Ardagh. Additionally, in order to fully service the customer contract with Arizona Beverage Co. (“Arizona”) and to ensure the viability of certain divestiture assets, the Consent Agreement requires Ball to purchase a supply of beverage cans sufficient to service Arizona’s requirements for the remaining duration of that agreement or until Ardagh enters into a separate customer agreement with Arizona.

The Consent Agreement also requires Ball to provide support services for up to 18 months, including support for potential line conversions from Standard Cans to Specialty Cans, at Ardagh’s request. In addition, Ball must provide Ardagh with a royalty-free, perpetual license to use patents and technologies necessary to operate the divested can business. Ball and Rexam must also help facilitate the employment of certain key employees by Ardagh.

The Consent Agreement incorporates a proposed Order to Maintain Assets to ensure the continued health and competitiveness of the divested assets. The Consent Agreement also provides that the Commission may appoint a Monitor Trustee to monitor Ball and Rexam’s compliance with their obligations pursuant to the Consent Agreement, and oversee the integration of the Rexam and Ball assets into Ardagh. The Commission has selected ING to serve as Monitor Trustee in this matter until integration of the divested assets is completed. The European Commission has also selected ING to oversee the divestiture, which makes the Monitor Trustee uniquely capable of monitoring the global transition of all assets acquired by Ardagh. The Consent Agreement also provides for appointment of a Divestiture Trustee to effectuate the divestitures if Ball fails to carry out the sale of assets and its related obligations.

Analysis to Aid Public Comment

Through the proposed divestitures, Ardagh will become the third-largest beverage can manufacturer in the United States and the world. Ardagh will own beverage can plants that span a broad geographic footprint, offer a well-balanced product mix, and have flexible manufacturing capabilities. Ardagh is an ideal buyer of the divested assets because it has existing long-standing relationships with key beverage customers through its glass bottle business, and existing experience with metal container manufacturing through its food can business. Furthermore, the fact that Ardagh does not currently produce aluminum beverage cans means that the divestiture will not create competitive issues of its own. Accordingly, Ardagh's acquisition of the divested assets will preserve the competition that would have otherwise been lost through Ball's acquisition of Rexam.

* * *

The sole purpose of this Analysis is to facilitate public comment on the proposed Consent Order. This Analysis does not constitute an official interpretation of the proposed Consent Order, nor does it modify its terms in any way.

Complaint

IN THE MATTER OF

HEIDELBERGCEMENT AG
AND
ITALCEMENTI S.P.A.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. C-4579; File No. 151 0200
Complaint, June 17, 2016 – Decision, August 15, 2016

This consent order addresses the \$4.2 billion acquisition by HeidelbergCement AG of certain assets of Italcementi S.p.A. The complaint alleges that the proposed transaction, 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, as amended, 15 U.S.C. § 45, by substantially lessening competition in certain regional markets in the United States for the manufacture and sale of portland cement. The consent order requires the divestiture of one party's cement operations in each of the relevant markets.

Participants

For the *Commission*: Peter Colwell, Joseph R. Neely, and James E. Southworth.

For the *Respondents*: David Wales, Jones Day LLP; Mark W. Nelson, Cleary Gottlieb Steen & Hamilton LLP.

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act ("FTC Act"), and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent HeidelbergCement AG ("Heidelberg"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Respondent Italcementi S.p.A. ("Italcementi"), a corporation subject to the jurisdiction of the Commission, in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the