THE CENTER FOR THE ADVANCEMENT OF CAPITALISM

August 29, 2002

Mr. Donald S. Clark, Esq.
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, DC 20580

Re: Proposed consent agreement in the matter of Libbey Inc. and Newell Rubbermaid, Inc., FTC Docket No. 9301.

Dear Mr. Clark:

The Center for the Advancement of Capitalism is once again compelled to oppose a consent agreement negotiated by the Federal Trade Commission. And once again, the facts show the FTC abused its discretion in prosecuting a baseless case that fails to prove any illegal action occurred.

On August 19 the FTC announced a consent agreement in their case against Libbey Inc. and Newell Rubbermaid, Inc. Last year, Newell agreed to sell all stock in a subsidiary, Anchor Hocking Corporation, to Libbey. The FTC challenged the acquisition, saying it violated the Clayton and Federal Trade Commission acts by posing a hypothetical threat to competition in the "food service glassware" market. A federal judge granted the FTC's motion for a preliminary injunction against Libbey's purchase of Anchor.[1] Shortly thereafter Libbey and Newell amended their agreement in an attempt to mollify the FTC. This attempt failed, and the FTC subsequently filed an administrative complaint which resulted in the consent agreement now before the public record.

Because of the FTC's interference, Libbey and Newell called off their deal altogether. Nevertheless, the consent agreement remains, an effort to make sure that Libbey doesn't renew its efforts to purchase Anchor. The agreement requires Libbey to notify the FTC in advance of any effort to acquire stock in Anchor. Newell is likewise required to notify the FTC if they sell any part of Anchor to anyone, not just Libbey. The agreement will remain in effect for ten years.

Further persecution of Libbey and Newell is unjustified. The FTC should be content to have stopped a perfectly lawful merger from taking place. Instead, the FTC is acting the part of the graceless winner, using this agreement to dance on the grave of a dead merger. CAC can see no possible benefit to the public in allowing this agreement to

[1] Federal Trade Commission v. Libbey Inc., et al., No. 02-0060 (RBW), 2002 U.S. Dist. LEXIS 8867 (D.D.C. Apr. 22, 2002).

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be made final. Considering the relatively insignificant nature of the market involved, it baffles the mind that the FTC thought this case worthy of prosecution in the first place.

Indeed, the stated market is so insignificant, CAC questions whether it was narrowly defined by the FTC to advance their interest in these proceedings. The FTC expects the public to believe there is a "food service glassware" industry that must be protected at all costs from Libbey's attempts to monopolize. According to the District Court which granted the injunction, this glassware market consists of tumblers, stemware, platters, candleholders, and similar products.[2] A special class of these items is sold to food service companies, such as restaurants and hotels, because of their higher quality. The worldwide market for "food service glassware" is an estimated $270 million in annual sales. Libbey controls approximately 65% of this market, while Anchor holds about 7%.[3] "Food service" sales are not even a significant part of Anchor's business, amounting to less than 10% of their total sales, or about $18 million annually.[4] This means that, judging by the FTC's market definition alone, this merger should have been exempt from federal review because it failed to meet the Hart-Scott-Rodino threshold of $50 million. This explains the consent agreement: An acquisition of Anchor's food service glassware business would not require pre-merger notification except for the consent agreement's terms.

Yet the now-abandoned acquisition of Newell *was* subject to an HSR pre-merger filing, because Anchor's total value was $332 million.[5] The FTC had more than ample ground to examine the merger as a whole, yet it deliberately chose to arbitrarily focus on a narrow portion of the company's business. This leads CAC to believe that the FTC could find no legitimate grounds (by the FTC's standards of review) to stop this merger, so the Commission decided to invent the "food service glassware" market as a pretext for both destroying this merger and placing both companies under expanded FTC oversight.

It's hard to see how a company can safely control 65% of a market without offending the FTC, yet controlling 72% would be deemed anticompetitive. The FTC says the 7% market share controlled by Anchor is essential to maintaining competition, because Anchor makes glassware which is very similar to Libbey's, and the companies controlling the remaining 28% do not make acceptable substitutes. Libbey and Anchor's customers, the FTC says, simply cannot substitute another company's product in the event—and this is completely hypothetical—that the customers suddenly reject Libbey's products.

It is ridiculous to assume that Libbey's customers—which include companies like Outback Steakhouse, Marriott, and United Airlines—are in need of FTC protection. Extensive competition in the high-quality glassware market is not essential to these customers; even if Libbey's acquisition of Anchor resulted in unbearably higher prices

[2] *Id.*, at *2.
[3] *Id.*, at *5.
[4] *Id.*, at *12.
[5] *Id.*

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for wine glasses, plenty of alternatives exist in the marketplace. The FTC claims food service customers are "unlikely to turn to other existing competitors,"[6] but this is because the customers prefer Libbey's products, not because there is a legal barrier preventing other competitors from offering substitute products. The demands of customers do not constitute a barrier to entry, but the FTC seems incapable of understanding this.

CAC finds the FTC's pathologic obsession with regulating minor product markets disturbing. If the antitrust laws were actually necessary to protect the public interest—and they're not—one would think the FTC could find a better use for their enforcement resources than ensuring firms like Marriott do not pay 10% more for candle holders. There is no possible public interest which is served by this nonsensical consent agreement, and we urge the FTC to immediately dismiss this case.

Respectfully Submitted,

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Director of Federal Affairs
The Center for the Advancement of Capitalism

[6] *Id.*, at *49.

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