Analysis of Agreement Containing Consent Order to Aid Public Comment

In the Matter of Anchor Glass Container Corporation, Lynx Finance GP, LLC, and Lynx Finance, L.P., Docket No. ____

I. Introduction

The Federal Trade Commission has accepted, subject to final approval, a consent agreement with Anchor Glass Container Corporation ("Anchor"), Lynx Finance GP, LLC ("Lynx GP"), and Lynx Finance, L.P. ("Lynx LP") (collectively, "Respondents"). Anchor manufactures and sells in the United States glass containers used for food and beverage packaging and employs workers at multiple facilities within the United States for this purpose. Lynx LP is the indirect owner of 100% of the outstanding shares of Anchor, and Lynx GP is the general partner of Lynx LP.

The consent agreement settles charges that Anchor violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, through its use of post-employment covenants not to compete ("Non-Compete Restrictions"). A Non-Compete Restriction is a term that, after a worker has ceased working for an employer, restricts the worker's freedom to accept employment with a competing business, to form a competing business, or otherwise to compete with the employer.

The complaint alleges that Anchor imposed Non-Compete Restrictions on employees across a variety of positions, including workers whose labor is an important input in the glass container manufacturing process. The complaint alleges that this conduct has a tendency or likelihood to limit workers' mobility, to impede rivals' access to the restricted employees' labor, and thus to harm workers, consumers, competition, and the competitive process. As such, the complaint alleges that Anchor has engaged in an unfair method of competition in violation of Section 5 of the FTC Act. The proposed order has been placed on the public record for 30 days in order to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the consent agreement and the comments received and will decide whether it should withdraw from the consent agreement and take appropriate action or make the proposed order final.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint, the consent agreement, or the proposed order, or to modify their terms in any way.

II. The Complaint

The complaint makes the following allegations.

The glass containers that Anchor manufactures and sells are purchased primarily by companies that sell food, beer, non-alcoholic beverages, and wine and spirits. The glass container industry in the United States is highly concentrated and is characterized by substantial barriers to entry and expansion. Among these barriers, it is difficult to identify and employ personnel with skills and experience in glass container manufacturing.

Anchor has imposed Non-Compete Restrictions on employees across a variety of positions. These restrictions typically required that, for one year following the conclusion of the worker's employment with the Anchor, the worker may not be employed by a competing business in the United States. At the outset of the Commission's investigation, over 300 employees of Anchor were subject to such restrictions, including employees who work with the glass container plants' furnaces and forming equipment and in other glass production, engineering, and quality assurance roles.

The complaint further alleges that Anchor's use of the challenged Non-Compete Restrictions has the tendency or likely effect of harming competition, consumers, and workers, including by: (i) impeding the entry and expansion of rivals in the glass container industry, (ii) reducing employee mobility, and (iii) causing lower wages and salaries, reduced benefits, less favorable working conditions, and personal hardship to employees.

III. Legal Analysis

Section 5 of the FTC Act prohibits "unfair methods of competition."[1] Congress empowered the FTC to enforce Section 5's prohibition on "unfair methods of competition" to ensure that the antitrust laws could adapt to changing circumstances and to address the full range of practices that may undermine competition and the competitive process.[2] The Commission and federal courts have historically interpreted Section 5 to prohibit conduct that is inconsistent with the policies or the spirit of the antitrust laws, even if that conduct would not violate the Sherman or Clayton Acts.[3]

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[1] 15 U.S.C. § 45(a).

[2] *E.g.*, *Atl. Refining Co. v. FTC*, 381 U.S. 357, 367 (1965) ("The Congress intentionally left development of the term 'unfair' to the Commission rather than attempting to define the many and variable unfair practices which prevail in commerce.") (internal citations and quotation marks omitted); *see also* Fed. Trade Comm'n, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*, Commission File No. P221202 (Nov. 10, 2022) [hereinafter "FTC Section 5 Policy Statement (2022)"], at 5 ("Congress struck an intentional balance when it enacted the FTC Act. It allowed the Commission to proceed against a broader range of anticompetitive conduct than can be reached under the Clayton and Sherman Acts, but it did not establish a private right of action under Section 5, and it limited the preclusive effects of the FTC's enforcement actions in private antitrust cases under the Sherman and Clayton Acts.").

[3] *E.g.*, *FTC v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392, 394–95 (1953) ("The 'Unfair methods of competition', which are condemned by [Section] 5(a) of the [FTC] Act, are not confined to those that were illegal at common law or that were condemned by the Sherman Act. Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business.") (internal citations omitted); *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457, 463 (1941) (Commission may "suppress" conduct whose "purpose

The Commission's recent Section 5 Policy Statement describes the most significant general principles concerning whether conduct is an unfair method of competition.[4] A person violates Section 5 by (1) engaging in a method of competition (2) that is unfair—i.e., conduct that "goes beyond competition on the merits."[5] A method of competition is "conduct undertaken by an actor in the marketplace" that implicates competition, whether directly or indirectly.[6] Conduct is unfair if (a) it is "coercive, exploitative, collusive, abusive, deceptive, predatory," "involve[s] the use of economic power of a similar nature," or is "otherwise restrictive and exclusionary," and (b) "tend[s] to negatively affect competitive conditions" for "consumers, workers, or other market participants"—for example by impairing the opportunities of market participants, including potential entrants; interfering with the normal mechanisms of competition; limiting choice; reducing output; reducing innovation; or reducing competition between rivals.[7] The two parts of this test for unfairness "are weighed according to a sliding scale": where there is strong evidence for one part of the test, "less may be necessary" to satisfy the other part.[8] In appropriate circumstances, conduct may be condemned under Section 5 without defining a relevant market, proving market power, or showing harm through a rule of reason analysis.[9]

In addition, the Commission may consider any asserted justifications for a particular practice.[10] Any such inquiry would focus on "[t]he nature of the harm" caused by the method of competition: "the more facially unfair and injurious the harm, the less likely it is to be overcome by a countervailing justification of any kind."[11] Unlike "a net efficiencies test or a numerical cost-benefit analysis," this analysis examines whether "purported benefits of the practice" redound to the benefit of other market participants rather than the respondent.[12] Established limits on defenses and justifications under the Sherman Act "apply in the Section 5 context as well," including that the justifications must be cognizable, non-pretextual, and narrowly tailored.[13]

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and practice . . . runs counter to the public policy declared in the Sherman and Clayton Acts"); *FTC v. Brown Shoe*, 384 U.S. 316, 321 (1966) (Commission's power reaches "practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws"); *E.I. du Pont de Nemours & Co. v. FTC (Ethyl)*, 729 F.2d 128, 136–37 (2d Cir. 1984) (Commission may bar "conduct which, although not a violation of the letter of the antitrust laws, is close to a violation or is contrary to their spirit"); *see also FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986); *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972); *FTC v. R.F. Keppel & Bros., Inc*., 291 U.S. 304, 309–10 (1934).

[4] FTC Section 5 Policy Statement (2022), *supra* note 2.

[5] *Id.* at 8–10.

[6] *Id.* at 8.

[7] *Id.* 8–10.

[8] *Id*. at 9.

[9] *Id.* at 10.

[10] *Id.* at 10–12 ("There is limited caselaw on what, if any, justifications may be cognizable in a standalone Section 5 unfair methods of competition case, and some courts have declined to consider justifications altogether.").

[11] *Id.* at 11.

[12] *Id.*

[13] *Id.* at 11–12.

As described below, the factual allegations in the complaint would support concluding that Anchor's use of the challenged Non-Compete Restrictions is an unfair method of competition under Section 5.

First, Anchor's use of Non-Compete Restrictions is a method of competition. The challenged Non-Compete Restrictions are not mere "condition[s] of the marketplace, not of the respondent's making."[14] Rather, these are contract provisions that Anchor required its employees to enter into, which, by their terms, restricted the employment options available to affected workers and therefore implicated competition for labor.

Second, Anchor's use of the challenged Non-Compete Restrictions "goes beyond competition on the merits"[15] because it is coercive, exploitative, exclusionary, and restrictive as these terms are used in the FTC Section 5 Policy Statement. Non-Compete Restrictions typically result from employers' outsized bargaining power compared to that of employees. And, by reducing workers' negotiating leverage vis-à-vis their current employers, Non-Compete Restrictions tend to impair workers' ability to negotiate for better pay and working conditions.[16] The complaint here also alleges that the challenged Non-Compete Restrictions had a tendency or likely effect of impeding the entry and expansion of rivals, as discussed below. As such, they are exclusionary in a manner that violates the spirit and policies of the Sherman Act.[17] Finally, while competition on the merits "may include, for example . . . attracting employees and workers through the offering of better employment terms,"[18] Non-Compete Restrictions, by contrast, create a legal impediment that restricts workers from leaving their employment even if they find more attractive employment terms elsewhere. For this reason, Non-Compete Restrictions have long been considered proper subjects for scrutiny under the nation's antitrust

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[14] *See id.* at 8.
[15] *See id.* at 8.
[16] *See, e.g.*, Dep't of the Treasury, Report, *Non-compete Contracts: Economic Effects and Policy Implications* (Mar. 2016) at 10, https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Econimic_Effects_and_Policy_Implications_MAR2016.pdf ("When workers are legally prevented from accepting competitors' offers, those workers have less leverage in wage negotiations [with their current employer.]"). The strength of a worker's negotiating position with their current employer is largely based on the suitability of their next-best alternative employer (*i.e.*, the alternative employer that would offer the employee the best combination of wages and working conditions, net of any switching costs). Competing employers who fall within the scope of a Non-Compete Agreement, typically employers in the same industry and geographic area—are often the strongest competitor to a worker's current employer for that worker's labor. Such employers typically place the highest value on the worker's industry-specific skills, and workers generally face lower switching costs when moving to such employers. *See, e.g.*, David J. Balan, *Labor Non-Compete Agreements: Tool for Economic Efficiency, or Means to Extract Value from Workers?* 15 (2021), https://equitablegrowth.org/working-papers/labor-non-compete-agreements-tool-for-economic-efficiency-or-means-to-extract-value-from-workers/ (noting that workers often "are barred by the non-compete from [switching to] the[ir] best available alternative jobs").
[17] *See generally, e.g.*, *ZF Meritor v. Easton Corp.*, 696 F.3d 254, 278–79 (3d Cir. 2012); *McWane, Inc. v. Fed. Trade Comm'n*, 783 F.3d 814, 835 (11th Cir. 2005); *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 328 (1961); *Geneva Pharms. Tech. Corp. v. Barr Labs.*, 386 F.3d 485, 509 (2d Cir. 2004); *see also* FTC Section 5 Policy Statement (2022), *supra* note 2, at 8, 9, 12.
[18] FTC Section 5 Policy Statement (2022), *supra* note 2, at 8–9.

laws.[19]

Third, the factual allegations in the complaint support a finding that Anchor's challenged conduct has the tendency or likely effect of negatively affecting competition in the U.S. glass container industry. Specifically, the complaint alleges that (i) Anchor required employees across a variety of positions, including salaried employees who work with the glass container plants' furnace and forming equipment and in other glass production engineering, and quality assurance roles, to refrain from working for competing glass manufacturing companies for at least one year after the conclusion of their employment, (ii) the ability to identify and employ personnel with skill and experience in glass container manufacturing is a substantial barrier to entry and expansion, and (iii) the challenged restrictions have a tendency or likely effect of impeding the entry and expansion of rivals.

Fourth, the factual allegations in the complaint support a finding that Anchor's challenged conduct has the tendency or likely effect of negatively affecting competitive conditions affecting workers in the U.S. glass container industry. In well-functioning labor markets, workers compete to attract employers, and employers compete to attract workers. For example, workers may attract potential employers by offering different skills and experience levels. Employers may attract potential employees by offering higher wages, better hours, a more convenient job location, more autonomy, more benefits, or a different set of job responsibilities. Because factors beyond price (wages) are important to both workers and employers in the job context, labor markets are "matching markets" as opposed to "commodity markets."[20]

In general, in matching markets, higher-quality matches tend to result when both sides—here, workers and employers—have more options available to them.[21] Having more options on both sides could, for example, allow for matching workers with jobs in which their specific skills are more valued, the hours demanded better fit their availability, or their commutes are shorter and more efficient. Matches could also be better in that various employers' compensation packages, which differ in terms of pay and benefits, are coupled with employees who value those offerings more and will, for example, tend to stay at those jobs longer as a result. Competition for labor allows for job mobility and benefits workers by allowing them to accept new employment, create or join new businesses, negotiate better terms in their current

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[19] *See, e.g.*, *U.S. v. Am. Tobacco Co.*, 221 U.S. 106 (1911); *Newburger, Loeb & Co., Inc. v. Gross*, 563 F.2d 1057, 1082 (2d Cir. 1977); *Bradford v. N.Y. Times Co.*, 501 F.2d 51 (2d Cir. 1974); *Golden v. Kentile Floors, Inc.*, 512 F.2d 838 (5th Cir. 1975); *U.S. v. Empire Gas Corp.*, 537 F.2d 296 (8th Cir. 1976); *Aydin Corp. v. Loral Corp.*, 718 F.2d 897 (9th Cir. 1983); *Consultants & Designers, Inc. v. Bulter Serv. Grp., Inc.*, 720 F.2d 1553 (11th Cir. 1983).

[20] *See generally* David H. Autor, *Wiring the Labor Market*, 15 J. OF ECON. PERSPECTIVES 25–40 (2001); Enrico Moretti, *Local Labor Markets*, in 4b HANDBOOK OF LABOR ECONOMICS 1237–1313 (2011).

[21] *See, e.g.*, Dep't of the Treasury, Report, *The State of Labor Market Competition* (Mar. 7, 2022) at 5–7, https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf; Dep't of the Treasury, Report, *Non-compete Contracts: Economic Effects and Policy Implications*, *supra* note 16, at 3–5, 22–23.

jobs, and generally pursue career advancement as they see fit.[22]

By preventing workers and employers from freely choosing their preferred jobs and candidates, respectively, Non-Compete Restrictions tend to impede and undermine competition in labor markets.[23] Research suggests that Non-Compete Restrictions measurably reduce worker mobility,[24] lower workers' earnings,[25] and increase racial and gender wage gaps.[26] At the individual level, a Non-Compete Restriction can force a worker who wishes to leave a job into a difficult choice: stay in the current position despite being able to receive a better job elsewhere, take a position with a competitor at the risk of being found out and sued, or leave the industry entirely. In this way, Non-Compete Restrictions tend to leave workers with fewer and lower-quality competing job options,[27] thereby reducing workers' bargaining leverage with their current employers and resulting in lower wages, slower wage growth, and less favorable working conditions.[28]

Here, the complaint alleges that the challenged Non-Compete Restrictions have the tendency or likely effect of reducing employee mobility and causing lower wages and salaries, reduced benefits, less favorable working conditions, and personal hardship to employees.

Finally, as the complaint alleges, any legitimate objectives of Anchor's use of the challenged Non-Compete Restrictions could be achieved through significantly less restrictive means, including, for example, by entering confidentiality agreements that prohibit employees and former employees from disclosing company trade secrets and other confidential information. Indeed, Anchor nullified the challenged Non-Compete Restrictions after learning of the Commission's investigation, apparently without incurring any notable impediment to their ability to achieve any legitimate business objectives.

IV. Proposed Order

The proposed order seeks to remedy the Anchor's unfair methods of competition.

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[22] *See, e.g.*, Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants As A Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 407 (2006).

[23] *See, e.g.*, Dep't of the Treasury, Report, *The State of Labor Market Competition*, *supra* note 21, at 5–7.

[24] Matthew S. Johnson, Kurt Lavetti, & Michael Lipsitz, *The Labor Market Effects of Legal Restrictions on Worker Mobility* 2 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455381; Evan Starr, J.J. Prescott, & Norm Bishara, *The Behavioral Effects of (Unenforceable) Contracts*, 36 J. L., ECON., & ORG. 633, 652 (2020); Evan Starr, Justin Frake, & Rajshree Agarwal, *Mobility Constraint Externalities*, 30 ORG. SCI. 961, 963–65, 977 (2019); Matt Marx, Deborah Strumsky, & Lee Fleming, *Mobility, Skills, and the Michigan Non-Compete Experiment*, 55 MGMT. SCI. 875, 884 (2009).

[25] Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Noncompete Agreements*, 68 MGMT. SCI. 143, 144 (2021); Johnson, Lavetti, & Lipsitz, *supra* note 24.

[26] Johnson, Lavetti, & Lipsitz, *supra* note 24.

[27] *See, e.g.*, Jessica Jeffers, *The Impact of Restricting Labor Mobility on Corporate Investment and Entrepreneurship* 21–22 (Dec. 24, 2019), https://ssrn.com/abstract=3040393.

[28] *See, e.g.*, Johnson, Lavetti, & Lipsitz, *supra* note 24; David J. Balan, *Labor Practices Can be an Antitrust Problem Even When Labor Markets are Competitive*, CPI ANTITRUST CHRONICLE (May 2020) at 8.

Section II of the proposed order prohibits the Respondents from entering or attempting to enter, maintaining or attempting to maintain, or enforcing or attempting to enforce a Non-Compete Restriction with an Employee, or communicating to an Employee or a prospective or current employer of that Employee that the Employee is subject to a Non-Compete Restriction.[29] Paragraph IV.A requires the Respondents to take all steps necessary to void and nullify all existing Non-Compete Restrictions with Employees within 30 days after the date on which the proposed order is issued.[30]

The proposed order also contains provisions designed to ensure compliance. Paragraph III.A of the proposed order requires the Respondents to provide written notice to Employees that have or recently had a Non-Compete Restriction that (i) the restriction is null and void, and (ii) the Employees may, after they stop working for Anchor, seek or accept jobs with any other company or person, run their own businesses, and compete with the Anchor.[31] Paragraph III.B requires Respondents to notify new Employees that they will not be subject to Non-Compete Restrictions by including a specified notice in the documentation provided to new Employees upon hire.[32]

Other paragraphs contain standard provisions regarding compliance reports, notice of changes in Respondents, and access for the FTC to documents and personnel.[33] The proposed order's prohibitions apply only to Respondents' Employees within the United States, and the term of the proposed order is twenty years.[34]

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[29] *See* Decision & Order ¶ II.
[30] *Id.* ¶ IV.A.
[31] *Id.* ¶ III.A; App'x B.
[32] *Id.* ¶ III.B.
[33] *Id.* ¶¶ IV–VII.
[34] *Id.* ¶ IX.