IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FEDERAL TRADE COMMISSION 6th Street and Pennsylvania Ave., N.W. Washington, D.C. 20580, Plaintiff-Appellant, vs. H.J. HEINZ COMPANY 600 Grant St., 60th Floor Pittsburgh, PA 15219 and MILNOT HOLDING CORPORATION 100 South Fourth St. St. Louis, Mo 63102 Defendants-Appellees.	Docket No. Civ. Action No. 1:00CV01688 (JR)

EMERGENCY MOTION OF THE FEDERAL TRADE COMMISSION FOR AN INJUNCTION PENDING APPEAL AND TO EXPEDITE APPEAL

RICHARD G. PARKER
Director

DEBRA A. VALENTINE
General Counsel

JOHN F. DALY
Assistant General Counsel for Litigation

RICHARD B. DAGEN
DAVID A. BALTO
JAMES A. FISHKIN
JOSEPH S. BROWNMAN
Attorneys

DAVID C. SHONKA
Attorneys for Plaintiff-Appellant

Federal Trade Commission
Washington, D.C. 20580
Ph. (202) 326-2436
Fax (202) 326-2477

October 23, 2000

TABLE OF CONTENTS

PAGE

Preliminary Statement 1

Statement of Jurisdiction 4

Statement of the Case 4

ARGUMENT 7

I. THE COMMISSION IS LIKELY TO SUCCEED ON THE MERITS OF ITS APPEAL 7

A. The District Court Ignored Controlling Case Law in Denying Injunctive Relief 8

B. The Court Erred In Requiring The FTC To Prove Harm To Retail Consumers . 11

C. The Court Misapplied The Standards Governing The "Efficiencies Defense" . . . 14

D. The Court Applied The Incorrect Standard In Weighing The Equities 15

II. THE COMMISSION WILL SUFFER IRREPARABLE HARM WITHOUT AN EMERGENCY INJUNCTION PENDING APPEAL 17

III. DEFENDANTS WILL NOT SUFFER SUBSTANTIAL HARM FROM AN INJUNCTION PENDING AN EXPEDITED APPEAL 18

IV. AN INJUNCTION PENDING APPEAL IS IN THE PUBLIC INTEREST 19

CONCLUSION 19

TABLE OF AUTHORITIES

CASES **PAGE**

Air Line Pilots Association v. Eastern Air Lines, Inc.,
863 F.2d 891 (D.C. Cir. 1988) 7

AlliedSignal, Inc. v. B.F. Goodrich Co.,
183 F.3d 568 (7th Cir. 1999) 2

Ambach v. Bell,
686 F.2d 974 (D.C. Cir. 1982) 7

American Hospital Supply Corp. v. Hospital Products Limited,
780 F.2d 589 (7th Cir. 1986) 9

Ayuda, Inc. v. Thornburgh,
948 F.2d 742 (D.C. Cir. 1991) 7

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,
509 U.S. 209 (1993) 9

FTC v. Warner Communications,
742 F.2d 1156 (9th Cir. 1984); 15, 16, 17

FTC v. Alliant Techsystems, Inc.,
808 F. Supp. 9 (D.D.C. 1992) 4, 12

FTC v. Cardinal Health,
12 F. Supp. 2d 34 (D.D.C. 1998) 2, 4, 13, 14

FTC v. Elders Grain, Inc.,
868 F.2d 901 (7th Cir. 1989) 4, 13, 15, 16, 17

FTC v. Exxon Corp.,
636 F.2d 1336 (D.C. Cir. 1980) 16

FTC v. Lancaster Colony Corp.,
434 F. Supp. 1088 (S.D.N.Y. 1977) 15

FTC v. PPG Industries, Inc.,
798 F.2d 1500 (D.C. Cir. 1986) 2, 4, 5, 8, 9, 10, 13, 15

FTC v. Procter & Gamble Co.,
386 U.S. 568 (1967) 11

FTC v. Rhinechem Corp.,
459 F. Supp. 785 (N.D. Ill. 1978) 15

FTC v. Staples, Inc.,
970 F. Supp. 1066 (D.D.C. 1997) 2, 4, 14, 16

FTC v. University Health, Inc.,
938 F.2d 1206 (11th Cir. 1991) 4, 9, 10, 14, 15, 17

FTC v. Weyerhaeser, Co.,
665 F.2d 1072 (D.C. Cir. 1981) 18

Foltz v. U.S. News & World Report,
760 F.2d 1300 (D.C. Cir. 1985) 7

Friends for All Children, Inc. v. Lockheed Aircraft Corp.,
746 F.2d 816 (D.C. Cir. 1984) 7

Illinois Brick Co. v. Illinois,
431 U.S. 720 (1977) 12

United States v. Philadelphia National Bank,
374 U.S. 321, 370 (1963) 4, 10

United States v. Baker Hughes, Inc.,
908 F.2d 981 (D.C. Cir. 1990) 8

United States v. El Paso Natural Gas Co.,
376 U.S. 651 (1964) 13

United States v. General Dynamics Corp.,
415 U.S. 486 (1974) 10

United States v. Ivaco,
704 F. Supp. 1409 (W.D. Mich. 1989) 2

United States v. United Tote, Inc.,
768 F. Supp. 1064 (D. Del. 1991) 2, 14

FEDERAL STATUTE AND RULES

28 U.S.C. §§ 1291 and 1292(a)(1) 4

Section 13(b) of the FTC Act, 15 U.S.C. § 53(b) 2

Section 7 of the Clayton Act, 15 U.S.C. § 18, 15 U.S.C. § 21 ..... 2, 4, 12

Fed. R. App. P. 8(a) 1, 4

MISCELLANEOUS

Phillip Areeda, IV Antitrust Law, ¶ 901b2 9

Preliminary Statement

Plaintiff-appellant Federal Trade Commission ("Commission"), seeks emergency relief to enjoin pending appeal a merger of two of the three manufacturers of jarred baby food, H.J. Heinz Company ("Heinz") and Milnot Holding Corporation, the parent of Beech-Nut Corporation (hereafter "Beech-Nut"). The Commission also asks this Court to expedite the appeal and to schedule argument at the earliest possible date. This motion is filed pursuant to Fed. R. App. P. 8(a) and Circuit Rule 27(f) and is properly before this Court.

The Commission sought and was denied an injunction pending appeal in the district court, which nonetheless readily agreed that this case raises "serious legal issues" and that "the Court of Appeals . . . should review what I have done." Appendix H to Federal Trade Commission's Motion for an Emergency Appeal ("App. _") at 6, 15. The court also opined that "expedition was in order." *Id.* at 15. However, it concluded that it was "simply . . . unable and certainly unwilling to schedule anything for the Court of Appeals."[1] *Id.*

For the reasons described in detail below, the Commission asks that the Court grant the relief requested by this motion. The parties otherwise are free to consummate their transaction, combine the companies, close down plants, share confidential business information, and take other steps that could make it impractical to recreate premerger competition if the transaction ultimately is found to be illegal. Only by granting the requested relief can this Court maintain the status quo and assure that its review is meaningful.

---

[1] In its Order denying the injunction pending appeal, the district court observed: "The Defendants have undertaken in open court that they will take no steps to consummate the merger pending a further order of the Court of Appeals provided that the FTC files its anticipated motion for an injunction pending appeal (with a motion for expedited appeal) by Monday, October 23, 2000." App. G.

The decision below warrants scrutiny by this Court. There are effectively only three baby food manufacturers in the United States: Gerber, with a market share of about 65%, Heinz, with 17.4%, and Beech-Nut, with 15.4%. Below, the Commission sought and was denied preliminary injunctive relief under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), pending completion of an administrative adjudication to determine whether Heinz's proposed acquisition of Beech-Nut would violate Section 7 of the Clayton Act, 15 U.S.C. § 18.[2]

The district court found the essential elements of a Section 7 violation, starting with presumptively illegal post-merger concentration levels in the market for the manufacture and sale of jarred baby food in the United States. The Court also found that barriers make "entry difficult and improbable" (App. F at 11), and that neither defendant is a failing firm or anything close to it. The logical conclusions from these findings are that this is a case for the Commission to closely review administratively and that the court below should have entered a preliminary injunction.

The lower court, however, denied the Commission's motion for a preliminary injunction and in so doing departed from settled antitrust jurisprudence. No court has previously approved a merger to duopoly in the presence of significant entry barriers where the acquired firm was not failing. The court neither cited a single case permitting such a merger, nor distinguished those cases condemning them.[3] The court achieved this result by applying a standard that would require

---

[2] Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the FTC to seek, and the district court to grant, preliminary relief pending the completion of administrative proceedings challenging the proposed acquisition. *FTC v. PPG Indus., Inc.*, 798 F.2d 1500 (D.C. Cir. 1986).

[3] Courts have long recognized that mergers in highly concentrated markets must be enjoined in the *absence* of truly extraordinary circumstances justifying such mergers. *E.g., PPG,* 798 F.2d at 1503; *see AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568 (7th Cir. 1999); *FTC v. Cardinal Health,* 12 F. Supp. 2d 34 (D.D.C. 1998); *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997); *United States v. United Tote, Inc.*, 768 F. Supp. 1064 (D. Del. 1991);

the government to show that the merger would ultimately harm retail consumers even though the Commission's complaint alleged harm in an entirely different market -- the manufacture and sale of jarred baby food at the wholesale level. App. B ¶ 12. By incorrectly placing on the government the burden of showing that competition by manufacturers for supermarket shelf space results in quantifiably lower retail prices, the court effectively eliminated upstream intermediaries from the protection of the antitrust laws unless an impact on consumer prices is shown.

The court also held that any anticompetitive effects of the merger were offset by efficiencies that Heinz would realize from the merger. Yet, the court failed to conclude that the efficiencies would benefit anyone but Heinz. To the contrary, the court found that "it remains to be seen" whether Heinz "will use the . . . savings from the merger to mount a vigorous campaign against Gerber." App. F at 23. Finally, the court turned equity on its head by concluding that the equities favored the defendants because the risk that a preliminary injunction *might* lead to their terminating the merger (*id.* at 27)[4] outweighed its finding that:

> [I]f the merger is allowed to proceed before the full-scale administrative proceedings contemplated by the Federal Trade Commission Act can be had, the outcome of such proceedings will not matter, because [Beech-Nut's] Canajoharie plant will be closed, the Beech-Nut distribution channels will be closed, the new label and recipes will be in place, and it will be impossible as a practical matter to undo the transaction.

Id. at 26-27.

United States v. Ivaco, 704 F. Supp. 1409 (W.D. Mich. 1989).

[4] Nothing in the record supports the claim that an injunction would "kill the merger": the record shows that Beech-Nut is not about to look for alternative buyers, and Heinz's officials are eager to consummate the transaction. The district court's concern that the parties might "kill the merger" is based wholly on argument.

Any temporary inconvenience that an expedited appeal may inflict on defendants' merger plans is insignificant in light of the substantial legal issues raised by this appeal and the strong public interest in securing appellate review of the district court's decision.

Statement of Jurisdiction

This is an appeal from the denial of a statutory preliminary injunction sought under Section 13(b) of the FTC Act in aid of an administrative proceeding to determine the legality of defendants' transaction under Section 7 of the Clayton Act, 15 U.S.C. § 18, 15 U.S.C. § 21; *PPG,* 798 F.2d 1500; *FTC v. University Health, Inc.* 938 F.2d 1206, 1209 (11th Cir. 1991).[5]

This Court has jurisdiction over this appeal under 28 U.S.C. §§ 1291 and 1292(a)(1). The order under review denied all relief sought by the Commission in the district court and resolved all issues before that court. The order is also reviewable as an order refusing to grant an injunction. This emergency motion has been filed promptly and is properly before this Court pursuant to Fed. R. App. P. 8(a).

Statement of the Case

The Commission filed its complaint and motion for a preliminary injunction on July 14, 2000. In a five-day evidentiary hearing, the court heard testimony from numerous fact and expert

---

[5] Under Section 13(b) an injunction is appropriate if the Commission "raise[s] questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals." *University Health*, 938 F.2d at 1218; *Cardinal*, 12 F. Supp.2d at 45; *Staples*, 970 F. Supp. at 1072. The Commission "need not prove that the proposed merger would in fact violate Section 7 of the Clayton Act. 'The determination . . . is reserved for the FTC and is, therefore, not before this Court.'" *Cardinal*, 12 F. Supp.2d at 45, *quoting Staples*, 970 F. Supp. at 1070; *accord, e.g., FTC v. Alliant Techsystems, Inc.*, 808 F. Supp. 9, 19 (D.D.C. 1992). Doubts are to be resolved against the transaction and in favor of a preliminary injunction. *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 906 (7th Cir. 1989), *citing United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 362-63 (1963).

witnesses and received over 2000 documents into evidence. On October 18, 2000, the court entered the decision and order that is the subject of this appeal.

The court held that the proposed merger substantially would increase concentration in the market for the manufacture and sale of jarred baby food in the United States. The court noted that the proposed merger would "increase the [Herfindahl-Hirschman ("HHI")] index to 5285, an increase of 510 points . . . five times the 100 point threshold established in the Merger Guidelines." App. F. at 11.[6] The court thus said: "[t]here is no serious dispute, and I find, that the proposed merger would increase concentration in an already highly concentrated market. That showing and my finding establish a prima facie case." *Id.* at 11-12. The Commission's prima facie case was bolstered by proof showing that barriers are high and make entry, in the court's opinion, both "difficult and improbable." *Id.* at 12.

The court denied the Commission a preliminary injunction because, in its view, Heinz and Beech-Nut do not compete significantly against each other at the *retail* level and because the merger might increase *retail* competition between Heinz and Gerber. App. F. at 20. The Commission was contending, however, that the loss of competition was at the *distribution* level and the record is replete with admissions that defendants face a "constant threat" of competition from each other at the distribution level (App. L at 266 (Heinz); App. O at 180 (Beech-Nut))[7] and

---

[6] This Court has previously based its merger analysis upon the HHI. *PPG Indus.*, 798 F.2d at 1503.

[7] The district court found 90% of all supermarkets stock only two brands of baby food, and Gerber is invariably one of the two. App. F at 5, 24. Heinz and Beech-Nut compete vigorously to be the second brand on the shelf. As the head of Heinz Infant Feeding explained, Heinz and Beech-Nut are in a "bidding and promotion war," and one way out was to acquire Beech-Nut. App. K at 359. At the hearing, Beech-Nut's CEO conceded that he is concerned about protecting Beech-Nut's distribution base against inroads by Heinz. App. P at 925.

that they are "engaged in a fight for survival and cannot afford to lose." App. J at 837. While the court recognized that there was strong competition between Beech-Nut and Heinz at that level which resulted in trade spending, such as promotions and allowances, the court held that the loss of this competition was not significant.

Although the court found that Heinz has "tended to follow Gerber prices" (App. F at 4), it dismissed the Commission's central concern that, absent a third competitor, Gerber and Heinz are likely to engage in coordinated actions. It did so in a one-sentence footnote generally citing defendants' expert testimony of "structural market barriers" without explaining why these factors are dispositive. *Id.* at 20 n.7.

In approving the merger, the court also relied on the defendants' asserted efficiencies claims and the "enhanced prospects of the merged entity to introduce innovative products." *Id.* at 20. The court found cost savings of $9.4 - $12 million in a market that it valued at between $865 million to $1 billion. *Id.* at 2, 21. The court made no finding that these cost savings would, in any way, be passed along to purchasers of baby food. *See id.* at 23.

As to the equities, the court found that the Commission's anticipated administrative review of the merger will be futile, absent an injunction, because Beech-Nut's manufacturing facility "will be closed," its "distribution channels will be closed, the new label and recipes will be in place, and it will be impossible as a practical matter to undo the transaction." *Id.* at 27. However, the Court also opined that entering a preliminary injunction would vitiate the defendants' right of appeal because they would likely terminate the transaction. The court concluded:

> Appellate review of my decision in this case is thus, as a practical matter, available only if the motion for preliminary injunction is denied. While this observation does not affect the overall resolution of the instant motion, it is a factor that tips the balance of the equities slightly in favor of denying the motion.

Id. at 27-28. Thus, the court acknowledged that, absent an injunction, further Commission review of the merger would be futile, but it denied an injunction because it perceived that defendants would terminate the transaction rather than pursue an appeal.

ARGUMENT

I. THE COMMISSION IS LIKELY TO SUCCEED ON THE MERITS OF ITS APPEAL.

The district court decision turns on several legally erroneous determinations. Each of these rulings is subject to plenary review by this Court. *Ambach v. Bell,* 686 F.2d 974, 979 (D.C. Cir. 1982), *cert. denied,* 403 U.S. 911 (1971). *Accord Ayuda, Inc. v. Thornburgh,* 948 F.2d 742, 757 (D.C. Cir. 1991); *Foltz v. U.S. News & World Report,* 760 F.2d 1300, 1306 (D.C. Cir. 1985); *Friends for All Children, Inc. v. Lockheed Aircraft Corp.,* 746 F.2d 816, 835 n.32 (D.C. Cir. 1984).

This Court "do[es] not afford deference when the appeal presents a substantial argument that the trial court's decision was premised upon an erroneous legal conclusion." *Ayuda,* 948 F.2d at 757, *citing Foundation on Economic Trends v. Heckler,* 756 F. 2d 143, 152 (D.C. Cir. 1985). "When the district court's estimate of the probability of success depends on an incorrect or mistakenly applied legal premise, 'the appellate court furthers the interest of justice by providing a ruling on the merits . . . .'" *Air Line Pilots Ass'n v. Eastern Air Lines, Inc.,* 863 F.2d 891, 895 (D.C. Cir. 1988), *quoting Natural Resources Defense Council, Inc. v. Morton,* 458 F.2d 827, 832 (D.C. Cir. 1972).

A. The District Court Ignored Controlling Case Law in Denying Injunctive Relief

The district court's decision is contrary to controlling case law, which holds that preliminary injunctive relief is necessary in cases where (1) the government shows (a) that a merger will lead to further increases in concentration in any market that is already highly concentrated; and (b) that high entry barriers make it unlikely that any anticompetitive effects will readily be undone; and (2) where the acquired firm is in no danger of failing. As this Court (per Judge Bork) observed in *PPG* (a case with even lower concentration than the present one):

> The pre-acquisition HHI calculated by the district court shows that the relevant market . . . is already "highly concentrated" and the effect of the acquisition would be a dramatic increase in concentration. Both measures bring the . . . merger well within the range where, absent really extraordinary circumstances, the Department and the Commission will proceed against an acquisition under section 7 of the Clayton Act on the theory that the increased concentration raises a likelihood of "interdependent anticompetitive conduct." . . . The district court also found high market-entry barriers that would prolong high market concentration. *There is no doubt that the pre- and post-acquisition HHI's and market shares found in this case entitle the Commission to some preliminary relief.*

798 F.2d at 1503 (emphasis added).

This Court's decision in *United States v. Baker Hughes, Inc.,* 908 F.2d 981 (D.C. Cir. 1990), does not support a contrary result, as the district court concluded. In that case, this Court sustained the denial of a permanent injunction after a full trial on the merits where the shares in the relevant market were "volatile and shifting" and "easily skewed" (*id.* at 986) and "entry was likely" (*id.* at 987). In those circumstance, high market shares were not an accurate predictor of future competition. None of these factors are present in this case. This Court's decision in *PPG* compels the entry of preliminary relief so the Commission, and ultimately a reviewing court, can fully assess the competitive impact of defendants' proposed merger.

By creating a duopoly in a market where almost all customers require two suppliers, the proposed merger would substantially ease the ability of Gerber and Heinz to coordinate their behavior. "[I]t is easier for two firms to collude without being detected than for three to do so."[8] *American Hospital Supply Corp. v. Hospital Products Limited*, 780 F.2d 589, 602 (7th Cir. 1986). As this Court has held, "where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels." *PPG*, 798 F.2d at 1503; *see University Health*, 938 F.2d at 1218 n.24. The threat is that "firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993). Defendants' expert economist testified to the same effect. App. P at 1106-07.

The district court implicitly recognized the serious threat of coordination in this case by observing that Heinz generally follows Gerber's pricing lead (App. F. at 4) and by noting that both Heinz and Beech-Nut have tempered their competitive efforts in response to competitive pressure from Gerber. *Id.* at 17-19, 23 n.8. Nevertheless, the court seemed to suggest that "structural antitrust doctrine" has limited value. *Id.* at 19. This is incorrect on at least two levels. The first is legal. The experience of this Court, and others as well, is that structure and concentration are good predictors of post-merger effects. *E.g., PPG,* 798 F.2d at 1503; *University Health*, 938 F.2d at 1219-20. These cases should not be so easily ignored, particularly

---

[8] As a leading antitrust treatise observes: "[i]t is a central object of merger policy to obstruct the creation or reinforcement by merger of such oligopolistic market structures in which tacit coordination can occur." Phillip Areeda, IV Antitrust Law, ¶ 901b2 at 9 (1998 rev. ed.).

in the case of a preliminary injunction seeking to preserve the status quo so a full record can be developed.

The second problem with the analysis below is evidentiary. Evidence that price leadership is occurring with three market participants supports the legal conclusion that reducing the market to two players will make the situation worse. Moreover, the Commission went beyond core structural analysis and presented undisputed evidence of substantial entry barriers, which the court accepted. App. F. at 12. But the court ignored the serious competitive significance of the fact that "barriers make concentrated markets more threatening, since there is little chance that other firms (new or old) would be able, in the face of anticompetitive practices, to spur competition." *University Health,* 938 F.2d at 1219. This Circuit has held that it is precisely these situations where preliminary relief is critical. *PPG,* 798 F.2d at 1503.

Equally important, the strong likelihood that Heinz and Gerber would engage in coordinated interaction, as established by the extraordinary concentration levels and high entry barriers, should not as a legal matter be overcome at this preliminary stage by the court's apparent belief that the merger is the only way defendants can challenge Gerber's dominance. The court's unwillingness to allow for a more thorough inquiry into how this very concentrated market will function -- simply in response to defendants' argument that the merger is a necessary predicate to successful competition with Gerber -- turns Section 7 on its head: it permits mergers *because* markets *are* concentrated. This argument would effectively permit every market in which there was a dominant firm to merge into a duopoly and is directly contradictory to the Supreme Court's admonition that "if concentration is already great, the importance of preventing even slight increases in concentration is correspondingly great." *United States v. General Dynamics Corp.,*

415 U.S. 486, 497 (1974), quoting *United States v. Aluminum Co. of America*, 377 U.S. 271, 279 (1964); *see Philadelphia Nat'l Bank*, 374 U.S. at 370 (law and sound antitrust policy prefer "growth by internal expansion . . . to growth by acquisition").

B. The Court Erred In Requiring The FTC To Prove Harm To Retail Consumers

The court denied the Commission a preliminary injunction because it failed to quantify adverse effects in a market (retail) other than the one the Commission identified in its complaint (wholesale). App. F at 12-13. The wholesale focus of the Commission's case could not be more clear. The complaint alleged, *inter alia,* that "[t]he relevant line of commerce (*i.e.*, the product market) in which the competitive effects of the proposed merger may be assessed is the manufacture and sale of jarred baby food." App. B ¶ 12.a. The defendants manufacture jarred baby food and sell it at the *wholesale* level to wholesalers and retailers. As the district court acknowledged, this case is about "distribution competition." App. F at 14. But the court erroneously determined that such competition was only relevant if directly and quantifiably linked to prices at the *retail* level.[9] *Id.* at 11-15. This was legal error.

Section 7 applies to "*any* line of commerce" and does not require the government to show the retail price effects of a merger that lessens competition at the manufacturing and wholesale distribution level.[10] And for good reason. There are thousands of intermediate goods markets

---

[9] Numerous retailers testified that the bidding competition between Heinz and Beech-Nut ultimately benefitted consumers even when it did not directly lead to lower retail prices. App. P at 143-44, 547, 551, 845-46. A Heinz executive testified to the same effect. *Id.* at 619-21.

[10] The district court compounded its error by requiring that the FTC *quantify* the future price effects in a downstream market. *See* App. F at 17. And even when the FTC presented evidence that wholesale competition benefits consumers, the court held that "it is impossible to conclude with any certainty" that any such benefits would be lost as a result of the merger. *Id.*

that could be adversely affected if the government had to show anticompetitive effects not just in those markets, but price effects in all subsequent downstream markets. For example, when an automobile manufacturer obtains a better price on tires through a competitive bid, it is not possible to trace the dollar savings immediately to a lower automobile price for consumers. Yet we know that

> not only are the price benefits of a competitive bid not precisely quantifiable absent competition, but it is authoritatively recognized that competition produces unquantifiable efficiencies in "all elements of a bargain -- quantity, service, safety, and durabily -- and not just the immediate cost."

Alliant, 808 F. Supp. at 23, n.5, *quoting Nat. Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679, 695 (1978). In other words, Section 7 presumes that competition is good, whether the effects are quantifiable or not. Surely the law does not, and should not, permit mergers to monopoly or duopoly in industries that provide components of automobiles simply because the government is unable precisely to trace the savings pocketed by firms or passed on to consumers in every subsequent intermediate or final goods market.[11]

The court imposed impossible burdens on the Commission. It is black letter law that Section 7 "can deal only with probabilities, not with certainties." *E.g., FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967).

[11] As the Supreme Court has recognized in another context, this burden would be enormous, in light of the recognized "uncertainties and difficulties in analyzing price and output decisions" in multi-level industries. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). There, the Court held these difficulties to be so great as to call for a prophylactic rule relieving direct purchasers from adducing evidence about how anticompetitive overcharges are "passed on" – and at the same time limited damage actions to such direct purchasers. It turns antitrust principles on their head to require the government to prove pass-through to ultimate consumers under Section 7, an incipiency statute that is satisfied "where in *any line of commerce* or in *any activity affecting commerce* in any section of the country, the effect of such acquisition *may be* substantially to lessen competition, or *tend to* create a monopoly." 15 U.S.C. § 18 (emphasis added).

The district court's holding would immunize mergers of firms engaged in sales at the wholesale or other intermediate levels of trade, unless the plaintiff carries the dual burden of proving not only a likelihood of adverse effects in the upstream market in which the merger occurs, but also that ultimate consumers would pay higher prices. That holding is contrary to vast numbers of cases involving upstream levels of commerce. For example, in *PPG*, this Court directed the district court to enjoin a proposed merger of two manufacturers of aircraft transparencies (canopies) engaged in design and bid competition to supply aircraft manufacturers. In doing so, this Court did not demand proof that competition between the two firms ultimately affected either the price of aircraft or the price of commercial airline tickets. Rather, once this Court found evidence that the firms bid against each other, the nature of that competition did "not merit further discussion." 798 F.2d at 1505. Likewise, in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964), the Supreme Court recognized that even unsuccessful bidders can have significant influence on the pricing and other business strategies of competing wholesale suppliers; but the Court did not require proof that competition at the upstream level ultimately benefits consumers. In both cases, the transactions were enjoined because they were likely substantially to lessen competition at the wholesale level. Similarly, in *Elders Grain, Inc., supra,* the court affirmed an injunction against two grain mills without requiring that the Commission first show any effect on consumer prices for cereals and other corn products. And in *Cardinal Health, supra,* the court enjoined two mergers between wholesale distributors of pharmaceuticals even though there was no showing that consumers would have to pay higher retail prices.

Here, the Commission introduced unrebutted evidence of bidding competition between Heinz and Beech-Nut for wholesale accounts. Such bidding invariably resulted in lower prices to

supermarkets. The fact that there will be only one brand remaining to bid for the second slot on store shelves post-merger compels the conclusion there will be a significant loss of competition. Indeed, as the district court observed during the closing argument: "I can't disagree with the Commission's position that Heniz and Beech-Nut are competing and that a merger of the two companies will end that competition." App. P at 31.

C. The Court Misapplied The Standards Governing The "Efficiencies Defense"

The district court properly stated that efficiencies can overcome the government's prima facie case where they are "merger-specific and cognizable -- i.e., verified and not the result of anticompetitive reductions in output and services." App. F at 21. The court failed however to address two additional vital requirements: that the efficiencies will (1) produce a significant economic benefit to purchasers (*University Health,* 938 F.2d at 1222-23; *Cardinal Health*, 12 F. Supp.2d at 62; *Staples*, 970 F. Supp. at 1089-91; *United Tote*, 768 F. Supp. at 1084-85); and (2) outweigh the anticompetitive effects of the acquisition and result in a more competitive market (*Cardinal Health*, 12 F. Supp.2d at 64; *Staples*, 970 F. Supp. at 1089-91). As the Eleventh Circuit has held, efficiencies are to be credited where they are "significant" and "ultimately would benefit competition, and hence, consumers." *University Health*, 938 F.2d at 1222-23. Also, they must not be based upon conjecture and speculation. *Id.*

The court's efficiency analysis is silent on whether the claimed efficiencies will enhance competition or benefit anyone other than Heinz. Indeed, the court voiced serious doubts about whether any of these efficiences will improve the competitive landscape or result in lower prices: "[w]hether Heinz will use the considerable cost savings from the merger to mount a vigorous

campaign against Gerber for shelf space and market share remains to be seen." App. F. at 23. "Remains to be seen" is not the standard that the courts or the enforcement agencies have adopted to determine whether efficiencies are sufficient to overcome the anticompetitive aspects of the merger. *See University Health*, 938 F.2d at 1223.

Defendants also did not show, and the court did not find, that the claimed efficiencies outweigh the possible anticompetitive effects of the merger. The "proven" savings of $9.4 to $12 million are incredibly modest. According to the court, the domestic market for 80 million cases of jarred baby food is "$865 million to $1 billion." App. F at 2. Since even a minimal anticompetitive price increase of 2% (about a penny per jar) would overwhelm the "proven" efficiencies, the court's full crediting of such modest efficiencies is stunning, especially in a market where Gerber regularly increases prices, and Heinz follows. *Id.* at 4.

D. The Court Applied The Incorrect Standard In Weighing The Equities

The district court correctly recognized that "if the merger is allowed to proceed before the full-scale administrative proceedings contemplated by the Federal Trade Commission Act can be had, the outcome of such proceedings will not matter," because "it would be impossible as a practical matter to undo the transaction." App. F at 26-27. That is a sufficient equity to support a preliminary injunction. *PPG, supra.* Because of the inherent deficiencies in divestiture orders, Congress gave the Commission power to seek pre-consummation injunctive relief in cases such as this one. *See, e.g., Elders Grain, supra; FTC v. Warner Communications,* 742 F.2d 1156 (9th Cir. 1984)*; FTC v. Rhinechem Corp.*, 459 F.Supp. 785, 790 (N.D. Ill. 1978); *FTC v. Lancaster Colony Corp.,* 434 F. Supp. 1088, 1097 (S.D.N.Y. 1977). Because most acquisitions mean that corporate assets and operations will be commingled and consolidated, the ineffectiveness of

efforts to "unscramble the eggs" following a full administrative adjudication dictates that the public interest in preserving competition can only be safeguarded by a preliminary injunction.

The court, however, erred by holding that that the strong public equity in effective administrative review was trumped by the possibility, which the court treated as a certainty, that defendants would abandon the transaction if a preliminary injunction issued. It is legal error for the court to give dispositive weigh to this quintessential "private" equity: the parties' interest in consummating the merger cannot overcome the strong public equities present here.

The court quoted *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C. Cir. 1980), for the proposition that "as a result of the short life-span of most tender offers, the issuance of a preliminary injunction blocking an acquisition or merger will in all likelihood prevent the transaction from being consummated." App. F at 24. But this transaction is not a tender offer and issuance of a preliminary injunction therefore will not itself "kill this merger."[12] Nor will it interfere with defendants' right of appeal. Just as the Commission may appeal the denial of a preliminary injunction, defendants may appeal the grant of a preliminary injunction. If they have a private deadline for completing the transaction, they can choose to extend it pending appeal. *See n.*5, *supra.* Choosing to abandon the transaction is a private decision that affects only the "corporate interests of Heinz and Milnot," which, as the district court elsewhere recognized, is a private equity that should have no effect on the outcome of this matter. App. F at 26 n.9.

---

[12] Milnot is privately held and, from the perspective of Heinz, this is a small transaction.

The Ninth Circuit, in *Warner Communications,* under similar circumstances granted an injunction but ordered the Commission to expedite its administrative proceeding.[13] 742 F.2d at 1165. Similarly, the Eleventh Circuit observed in *University Health*:

> [T]he FTC only asks for a preliminary injunction; if the appellees can demonstrate the legality of the proposed acquisition to the FTC or, ultimately, the court of appeals, the acquisition will take place. We do not think that this delay, in and of itself, will spell disaster for [the acquired firm] or grave harm to the public. *Rather, we think the public will be best served by enjoinment of this acquisition pending extensive analysis of its competitive effect.*

938 F.2d at 1225 (emphasis added). The district court here committed legal error in according defendants' private equity claim conclusive weight against serious public concerns. *Id.; Warner Communications,* 742 F.2d at 1165.

II. THE COMMISSION WILL SUFFER IRREPARABLE HARM WITHOUT AN EMERGENCY INJUNCTION PENDING APPEAL

The equitable considerations discussed above regarding the need for a preliminary injunction – *i.e.,* the prospect of the immediate and irreversible loss of competition in the market, and the impracticability of "unscrambling the eggs" – constitute serious irreparable injury that, at the very least, amply justifies the modest delay that would be occasioned by an injunction pending appeal. Absent such relief, defendants may close their transaction any time. Beech-Nut's "Canajoharie plant will be closed, the Beech-Nut distribution channels will be closed, the new label and recipes will be in place, and it will be impossible as a practical matter to undo the transaction." App. F at 26-27. Beech-Nut will no longer exist as an independent competitor,

---

[13] The district court in *Staples,* 970 F. Supp. at 1093, likewise recognized that an injunction "will most likely kill the merger" and affect shareholders, but deemed that private equity insufficient to overcome the public interest in enjoining the transaction.

offering price competition, and distinct consumer choice in terms of product quality, and innovation. Competition during the administrative proceeding will be lost.

Also, Heinz will gain immediate access to the most sensitive commercial data, including recipes and trade secrets, business plans, marketing strategies, and details of costs and personnel of Beech-Nut. Even assuming that Heinz does not close Beech-Nut's plant, divestiture cannot repair this damage, since what Heinz learns of Beech-Nut's internal workings cannot be unlearned. As this Court has held, if business sensitive information is transferred, "ultimate divestiture will not fully restore competition." *FTC v. Weyerhaeser, Co.*, 665 F.2d 1072, 1085-86 (D.C. Cir. 1981). Thus, irreparable harm would continue even after divestiture, because Heinz's knowledge of Beech-Nut will provide it with significant competitive advantages which could facilitate future anticompetitive conduct.

III. DEFENDANTS WILL NOT SUFFER SUBSTANTIAL HARM FROM AN INJUNCTION PENDING AN EXPEDITED APPEAL

Defendants will not be irreparably harmed by the brief delay occasioned by this Court's consideration of the Commission's appeal of the district court's order. Indeed, if the Court grants the Commission's request to expedite this appeal, any delay attributable to the grant of injunctive relief will cause little or no damage whatever. An expedited appeal would serve both the public's interest in effective antitrust enforcement and defendants' interest in protecting their commercial relationship.

In *University Health*, the Commission also sought an emergency injunction pending appeal. On April 18, 1991, the Eleventh Circuit entered an order expediting the appeal and directed all parties to file simultaneous opening briefs by April 24, 1991; and short reply briefs by

April 29, 1991. That Court heard oral argument on May 6, 1991. A similar briefing schedule would be appropriate in this case, with argument set at the earliest date convenient to the Court. Such a schedule would impose only a marginal delay upon defendants, yet would give this Court a chance to decide the substantial legal issues posed by the district court's decision. In the interim, the injunction will limit any harm to competition.

IV. AN INJUNCTION PENDING APPEAL IS IN THE PUBLIC INTEREST

For the reasons identified in Parts I-III above, entry of an injunction pending appeal is strongly in the public interest. The district court has committed serious errors of law that warrant careful appellate review; the Commission's ability to obtain effective ultimate relief depends upon entry of emergency relief now; and defendants will not be seriously harmed by the brief delay associated with an expedited appeal. Under these circumstances, the strong public interest in effective enforcement of the merger laws requires entry of an injunction pending appeal.

CONCLUSION

For the foregoing reasons, the FTC's motion for an injunction pending appeal should be granted and the appeal should be expedited.

Respectfully submitted,

RICHARD G. PARKER
Director, Bureau of Competition

DEBRA A. VALENTINE
General Counsel

JOHN F. DALY
Assistant General Counsel for Litigation

RICHARD B. DAGEN
DAVID A. BALTO
JAMES A. FISHKIN
JOSEPH S. BROWNMAN
Attorneys

DAVID C. SHONKA
Attorneys for Plaintiff-Appellant

Federal Trade Commission
Washington, D.C. 20580
Ph. (202) 326-2436
Fax (202) 326-2477