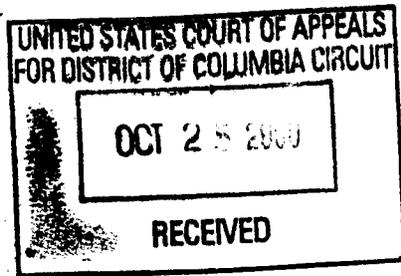

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT



No. 00-5362

FEDERAL TRADE COMMISSION,

Plaintiff-Appellant,

v.

H.J. HEINZ COMPANY, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**OPPOSITION OF APPELLEE H.J. HEINZ COMPANY TO EMERGENCY
MOTION OF THE FEDERAL TRADE COMMISSION FOR AN
INJUNCTION PENDING APPEAL**

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October 25, 2000

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici. All parties, intervenors and amici appearing before the district court and this Court are listed as follows:

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Federal Trade Commission
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(B) Rulings Under Review. References to the rulings at issue in the present motion are as follows:

FTC v. H.J. Heinz, Co., No. 00-1688 (JR) (D.D.C. Oct. 18, 2000) (Robertson, J.) (Order Denying Plaintiff-Appellant's Motion for Preliminary Injunction) (Appendix Tab A).

FTC v. H.J. Heinz, Co., No. 00-1688 (JR) (D.D.C. Oct. 19, 2000) (Robertson, J.) (Order Denying Plaintiff-Appellant's Motion for Injunction Pending Appeal) (Appendix Tab D).

(C) Related Cases. This case has not previously been before this Court and there are no related cases pending in this or any other court.

RULE 26.1 STATEMENT

H. J. Heinz Company and its subsidiaries manufacture and market an extensive line of processed food products throughout the world.

H.J. Heinz Company has outstanding securities in the hands of the public.

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Appellee H.J. Heinz Company (“Heinz”) opposes the Federal Trade Commission’s (“FTC”) emergency motion for an injunction pending appeal.¹ After a five day evidentiary hearing with an exhaustive record and full briefing and argument, Judge Robertson properly denied the FTC’s request for a preliminary injunction, holding that under Section 7 of the Clayton Act, the FTC was unlikely to prevail on the merits. Applying the antitrust analysis set forth in *United States v. Baker Hughes*, 908 F.2d 981 (D.C. Cir. 1990), the district court found that the evidence shows that the FTC’s structural case “. . . inaccurately predicts the merger’s probable effect on future competition” and that Heinz’s acquisition of Milnot “will actually increase competition” in jarred baby food and provide, for the first time, effective competition to Gerber, the entrenched dominant brand. HZ APP A at 25.²

The FTC has already delayed the closing of this transaction for almost nine months. Having failed to demonstrate to the Court below that it is entitled to either a preliminary injunction or an injunction pending appeal, the FTC now asks this Court, on the same evidentiary record, to further delay this acquisition. A grant of such relief turns the Clayton Act on its head, and, on no different showing than made below, hands the FTC an undeserved “victory” that will effectively kill this acquisition. This appeal can indeed go forward – and on an expedited basis – but it should proceed in the context of a transaction approved by the trial court, not as one enjoined.

The FTC has failed to demonstrate a sufficient probability of success on the merits to warrant an injunction pending appeal. In the end, this case turns on the factual findings of the

¹ Defendants have agreed to refrain from closing the transaction until this Court rules on the emergency motion for an injunction pending appeal.

² Appendices to Opposition of Appellee H.J. Heinz Company to Emergency Motion of the Federal Trade Commission For An Injunction Pending Appeal (hereinafter “HZ APP”).

district court that the acquisition will be procompetitive and enhance effective competition against industry giant Gerber. The FTC does not and cannot challenge these well-supported findings as clearly erroneous, but instead improperly tries to ignore or circumvent them. These critical findings, based on the unique circumstances of this market reflected in the record, are fatal to the FTC's request to enjoin a transaction that will enhance competition, efficiencies, and consumer welfare.

Indeed, in its effort to run away from the district court's findings, the FTC is forced to beat a tactical retreat from its theory of the case below. Abandoning any concern about consumer welfare, the FTC now argues wrongly that the district court erred in failing to address the effect of the acquisition on competition at the wholesale or distribution level (that is, the sale of baby food to supermarkets and other outlets), instead focusing on the impact on consumers at the retail level. The district court considered – and, on this record, correctly rejected – the “consumer harm” argument the FTC presented below, and the FTC cannot be heard to raise a new argument for the first time on appeal simply because it has no basis to disturb the district court's rejection of its prior contention. In any event, the FTC's newly minted argument is inconsistent both with fundamental principles of antitrust law and with the district court's findings on wholesale or distribution competition.

Coupled with the FTC's loss on probability of success on the merits, the equities in this case tilt decidedly in favor of the appellees. Further delay occasioned by even an expedited appeal will likely end this transaction, foreclosing the benefits to the public expressly found by the district court in this case. Nor will the FTC or the public interest be adversely affected if the injunction pending appeal is denied because, even if the acquisition is consummated, the critical assets (namely, the Beech-Nut brand, recipes, and its plant) will not be dissipated during the

pendency of the appeal. Since the continued delay in closing is harming the parties and consumers, and the collapse of this transaction will only serve to enhance Gerber's entrenched monopoly, the FTC's motion should be denied.

I. PROCEDURAL HISTORY

On February 28, 2000, Heinz and Milnot reached an agreement on the acquisition of Milnot and its Beech-Nut baby food business for \$185 million. The agreement is terminable on November 1, 2000. HZ APP B at ¶ 2. Pursuant to the Hart-Scott-Rodino Act, 15 U.S.C. § 18a, Heinz and Milnot filed official notification of the acquisition on February 20, 2000. HZ APP A at 6. On April 28, 2000, the FTC issued a Second Request for Information, with which the defendants complied on June 8 and 9, 2000. *Id.*

The FTC voted 3-2 on July 7, 2000 to file the present action and seek a preliminary injunction under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). HZ APP A at 6. On July 14, 2000, the Commission filed a complaint and motion for a preliminary injunction in the district court. HZ APP A at 6. Judge James Robertson held five days of evidentiary hearings in late August and early September, and the parties made closing arguments on September 21, 2000. *Id.*

On October 18, 2000, Judge Robertson issued an order and extensive opinion denying the FTC's motion for a preliminary injunction. On October 19, 2000, the district court denied the FTC's emergency motion for an injunction pending appeal. The same day, the FTC filed a notice of appeal. The FTC filed a motion for an injunction pending appeal in this Court on October 23, 2000. Appellees Heinz and Milnot oppose the FTC's present motion.

II. FACTUAL BACKGROUND

The salient facts are set forth in the district court's opinion. HZ APP A. Not much has changed regarding jarred baby food competition for many decades. Gerber, the largest domestic

manufacturer, has enjoyed a dominant 60-70% market share for some 40 years. HZ APP A at 2. Gerber enjoys unparalleled brand recognition, with brand loyalty greater than that of any other product sold in the United States. *Id.* at 5. Gerber is sold in virtually every food store in the United States (100% ACV – a statistical measure of distribution), *Id.* at 5-6, and ten percent of those stores carry Gerber exclusively. *Id.* at 24. Given its dominance, Gerber does not strive for further gain in market share because, as Gerber put it, the effort “becomes so costly you get no return out of it.” *Id.* at 4.

Meanwhile, Heinz and Beech-Nut, despite all their efforts over the decades, are not able to build market share, either against one another or against Gerber. *Id.* at 3-4. They both have been stuck at about a 15 percent share. *Id.* at 2.³ Neither has an ACV greater than 45 percent, and their sales are concentrated in different regions of the country. *Id.* at 6. Beech-Nut’s business “is stagnant or declining without any realistic prospect of change.” *Id.* at 3. Virtually all supermarkets carry no more than two brands of baby food – Gerber and either Heinz or Beech-Nut. *Id.* at 5. Heinz and Beech-Nut are almost never on the same store shelf. *Id.* at 13.

In terms of interaction between Heinz and Beech-Nut, the district court found “that they do not constrain one another’s retail or consumer prices.” *Id.* at 13. The Commission similarly failed to adduce credible evidence to show that competition between Heinz and Beech-Nut for shelf space caused any effect on consumer prices. *Id.* at 16-17. Just as importantly, the district court unequivocally found that “as the market is now configured, neither Heinz nor Beech-Nut is

³ Gerber has taken advantage of the fact that both Heinz and Beech-Nut are in limbo during the pendency of this of this litigation, and has made recent gains at the expense of both Heinz and Beech-Nut. The latest 12-week data through October 7, 2000 indicates that Beech-Nut baby food sales volume is down 8.6% versus the same period last year, and the Heinz volume is down 6.2%. The latest 4-week figures are more alarming, showing Beech-Nut consumption down 15.4% and Heinz off 12.2% HZ APP B ¶ 5.

strong enough to compete successfully in [the areas of innovation or product differentiation]” *Id.* at 17.

Juxtaposed against a future that would be the same as the last 40 years, the district court found as a matter of fact “that consummation of the Heinz/Beech-Nut merger will actually increase competition in jarred baby food in the United States.” *Id.* at 25-26. The district court found that “consumer benefits will be immediate and virtually automatic.” *Id.* at 23. Referring to Gerber documents describing the reactions of its key business personnel to the announcement of the proposed Heinz/Beech-Nut merger, the district court found it “more likely than not that Gerber’s own predictions of more intense competition (citations omitted), will come true.” *Id.*

Efficiencies from the merger, combined with the new platform for product innovation, will drive this increased competition into the jarred baby food market. Heinz manufactures 12 million cases of baby food per year with 150 employees. *Id.* at 21. Beech-Nut, with its very out-dated plant, which cannot be improved absent prohibitive expense, manufactures 10 million cases with 320 employees. *Id.* at 3, 21. Consolidation of the Beech-Nut production into Heinz’s modern facility will “reduce the cost of processing the volume of baby food now produced by Beech-Nut by some 43 percent.” *Id.* at 22. The district court credited “powerful evidence” in the record about the efficiencies realized by the merger, and about the enhanced prospects of the merged entity to introduce innovative products to compete with Gerber. *Id.* at 22. The FTC does not dispute these findings of fact in its motion papers.

III. THE MOTION FOR AN INJUNCTION PENDING APPEAL SHOULD BE DENIED

A. Standards for Issuing an Injunction Pending Appeal

Notably absent from the FTC’s motion is any discussion of the requirements for an injunction pending appeal. In seeking an injunction pending appeal pursuant to Fed. R. App. P.

8, the movant must show that “exercise of the court’s extraordinary injunctive powers is warranted.” *Cuomo v. United States Nuclear Regulatory Comm’n*, 772 F.2d 972, 974 (D.C. Cir. 1985). To determine whether an injunction pending appeal should be entered, the court is “guided by the same standards that control the issuance of a preliminary injunction.” *Louisville & Northern R.R. v. Sullivan*, 617 F.2d 793, 799 (D.C. Cir. 1980); *see also Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977); *Quaker Action Group v. Hickel*, 421 F.2d 1111 (D.C. Cir. 1969). These well established criteria are: (1) the likelihood of plaintiff’s success on the merits; (2) the threat of irreparable injury to the plaintiff in the absence of an injunction; (3) the possibility of substantial harm to other interested parties from a grant of injunctive relief; and (4) the interests of the public. *See Virginia Petroleum Jobbers Ass’n v. Federal Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Wisconsin Gas Co. v. FERC*, 758 F.2d 669 (D.C. Cir. 1985); *National Ass’n of Farmworkers Orgs. v. Marshall*, 628 F.2d 604 (D.C. Cir. 1980). The FTC’s motion fails to satisfy any of these four elements.

Likewise, this Court’s task in reviewing a request for an injunction pending appeal parallels its review of a district court’s decision whether to grant or deny a preliminary injunction. *See Louisville & N.R.R.*, 617 F.2d at 799. Thus, the court will not enter an injunction pending appeal unless the lower court’s denial of an injunction was, under a highly differential standard, “clear error” or “abuse of discretion.” *See Warner-Lambert Co. v. Shalala*, 202 F.3d 326, 328 (D.C. Cir. 2000); *City of Las Vegas v. Lujan*, 891 F.2d 927, 931-32 (D.C. Cir. 1989); *Virginia Petroleum*, 259 F.2d at 925. The court gives “special deference” to the district court’s findings of fact and reviews them under the “clearly erroneous” standard. *City of Las Vegas*, 891 F.2d at 931; *Sea Containers, Ltd. v. Stena AB*, 890 F.2d 1205, 1208-09 (D.C. Cir. 1989) (“The appellate court does not sit to retry the facts; we look only for assurance that the district court’s

findings are not clearly erroneous.”). In addition, this Court has recognized the wide “latitude the district court properly enjoys in balancing the four factors that traditionally constitute the preliminary injunction calculus.” *City of Las Vegas*, 891 F.2d at 931-32.

B. Under the Governing Standard, the FTC Has Failed to Justify an Injunction Pending Appeal

1. The FTC Cannot Demonstrate A Likelihood of Success on the Merits

The insurmountable hurdle that the FTC cannot overcome in its motion is a showing of a likelihood of prevailing on the merits of the appeal. “Without such a substantial indication of probable success, there would be no justification for the court’s intrusion into the ordinary processes of administration and judicial review.” *Virginia Petroleum*, 259 F.2d at 925; *Washington Metro Area Transit Comm’n*, 559 F.2d at 843; *FTC v. Tenneco Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,470 at 71,805 (D.C. Cir. 1977).

Given this standard, it is hardly surprising that the FTC has cited no merger case in this Circuit in which an injunction pending appeal was entered without a finding of likelihood of success on the merits.⁴ See e.g., *Baker Hughes*, 908 F.2d at 992; *White Consolidated Indus., Inc. v. Whirlpool Corp.*, 619 F. Supp. 1022, 1028 (N.D. Ohio 1985) (accepting that “if the closing should not be enjoined, then it is improper ... to order a stay pending appeal.”), *aff’d*, 781 F.2d 1224 (6th Cir. 1986); see also 11 Charles Wright, et al. *Federal Practice & Procedure* § 2904, at 513 (2d ed. 1995) (“There is, of course, a considerable reluctance in granting an injunction pending appeal when to do so, in effect, is to give the appellant the ultimate relief he is seeking.”)

⁴ Those rare merger cases in which an injunction pending appeal is granted underscore the point. In both *FTC v. Weyerhaeuser Co.*, 648 F.2d 739 (D.C. Cir. 1981), *vacated*, 665 F.2d 1072 (D.C. Cir. 1981) and *FTC v. PPG Industries, Inc.*, 798 F.2d 1500 (D.C. Cir. 1986), the district court found the FTC had, unlike here, demonstrated a substantial likelihood of success on the merits, yet ultimately denied the preliminary injunction based on equities.

Baker Hughes is directly on point. In that case, the district court found that past market shares did not accurately depict present and likely future competition in the market, and denied the preliminary injunction. Subsequently, in denying the government's motion for an injunction pending appeal, the district court explained that the government failed to present any "factual or legal basis to support the extraordinary remedy of a long-term injunction or stay pending resolution of [the] appeal." *United States v. Baker Hughes Inc.*, No. 90-5060 (D.D.C. Mar. 8, 1990) HZ APP. C. (Tab C). This Court then agreed, finding that the government failed to "***demonstrate the requisite likelihood of success on the merits to warrant an injunction pending appeal.***" HZ APP J, (emphasis added).

No different result should pertain here. In denying the FTC's motion for injunction pending appeal, the district court explicitly noted that "once I have found that the likelihood of success on the merits is as low as I think it is, there is really no basis for me to issue that injunction." HZ APP K at 4. The court continued, "[i]t seems to me that the defendants have an opinion and an order in their hands which ought to . . . get them past an appeal. *Id.* at 5.

a. The District Court Applied the Correct Legal Standards

The district court held "the Commission is entitled to injunctive relief '[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest.'" HZ APP A at 7, quoting 15 U.S.C. § 53(b). Following *United States v. Philadelphia National Bank* and the Supreme Court's subsequent controlling decision in *United States v. Marine Bancorporation*, the district court held the FTC could establish a prima facie case "by demonstrating that the merger will result in a firm that controls an undue percentage share of the relevant market and increases the concentration of firms in the market." HZ APP A at 8. And following the same Supreme Court

precedents, the district court also properly held “[o]nce the FTC has made that prima facie showing, the burden shifts to defendants to rebut the presumption of unlawfulness that arises.” *Id.* Citing *Baker Hughes*, the district court correctly concluded “[t]he defendant’s burden is one of production: a ‘clear’ showing that the merger is unlikely to lessen competition is unnecessary,” and “[t]he ultimate burden of persuasion rests with the Commission throughout.” HZ APP A at 8.

Applying these standards, the district court found the FTC established a prima facie case based on the level of concentration in the industry, largely driven by Gerber’s 70% share. Following *Baker Hughes*, the court also held that defendants successfully rebutted the prima facie case, finding the evidence “shows that the Commission’s prima facie case inaccurately predicts the merger’s probable effect on future competition.” *Id.* at 18, (citing *Baker Hughes*, 908 F.2d at 990.)⁵

The FTC’s argument in this Court distills to one assertion – parties to a merger cannot rebut a prima facie case with non-entry factors. Yet, as held in *Baker Hughes*, “[t]he Supreme Court has adopted a totality-of-the-circumstances approach to the statute, weighing a variety of factors to determine the effects of particular transactions on competition.” *Id.* at 984. That is precisely what the court did in this case. “That the government can establish a prima facie case through evidence on only one factor, market concentration, does not negate the breadth of this

⁵ The FTC notes that “structure and concentration are good predictors of post-merger effect” citing to *FTC v. PPG Industries, Inc.*, 798 F.2d 1500 and rely heavily on that case throughout. However, it is noteworthy that the *PPG* decision was handed down prior to the precedent set by *Baker Hughes* in this Circuit. Further, in *PPG* the court found a likelihood of success for the FTC, as defendants presented *no* evidence of procompetitive impact to rebut the FTC’s prima facie case based upon market concentration.

analysis. Evidence of market concentration simply provides a convenient *starting point* for a broader inquiry into future competitiveness.” *Id.* (emphasis added).⁶

Baker Hughes is unequivocal on this point: “[i]n the wake of *General Dynamics*, the Supreme Court and lower courts have found section 7 defendants to have successfully rebutted the government’s prima facie case by presenting evidence on a variety of factors other than ease of entry.” *Baker Hughes*, 908 F.2d at 985. “These factors include, but are not limited to, ... the misleading nature of the statistics underlying the government’s prima facie case,” the “industry structure,” “excess capacity,” “elasticity of industry demand,” “product differentiation,” and the “prospect of efficiencies from the merger.” *Id.* at 984-985.

In fact, the D.C. Circuit ten years ago expressly *rejected* the objection the FTC raises here holding: “[t]he government inexplicably imbues the entry factor with talismanic significance. If, to successfully rebut a prima facie case, a defendant must show that entry by competitors will be quick and effective, then other factors bearing on future competitiveness are all but irrelevant.” *Baker Hughes*, 908 F.2d at 984.

Thus, the district court’s decision lies in the mainstream of merger jurisprudence.⁷ What is unique in this case is not the law applied by the court, but the extraordinary facts regarding the baby food market. Because of the unique market composition, the unprecedented efficiencies

⁶ In fact, in *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), the Supreme Court “cautioned” lower courts and government antitrust agencies that statistical data are “not conclusive indicators of anticompetitive effects,” and that “only a further examination of the particular market — its structure, history, and probable future — can provide the appropriate setting for judging the probable anticompetitive effect of the merger.” 415 U.S. at 498 (citation omitted). The district court did just this, pointing first to the market’s “structure, history, and probable future,” and next considering the “efficiencies” and “innovations” that result from the merger.

⁷ Nor is it unprecedented for courts to approve mergers with concentration levels for higher than in this case. In *Baker Hughes*, for example, the change in HHI was 1425, more than twice the change here. 908 F.2d at 983, n.3; (The proposed Heinz/Beech-Nut transaction would increase the HHI by 510). And in *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285, 1294 *aff’d*, 121 F.3d 708 (6th Cir. 1997) (W.D. Mich. 1996), a merger of four firms to two that was cleared, the change in HHI was over three times the change in this case.

that will be realized by this combination, the transaction was found to be pro-competitive and, in effect, will take the market from one to two national players. The district court denied the FTC's motion for failure to meet its burden to adduce evidence that could contradict the facts established by defendants. This failure is no less a stumbling block to its present request for an injunction pending appeal, and the motion should, accordingly, be denied.

b. The District Court Correctly Considered the Effects of the Merger in the Relevant Market

In an extraordinary about-face, the FTC contends that the district court focused on the wrong market and somehow erred in linking "distribution competition" with "consumer competition." FTC Br. at 11. Yet, the FTC argued repeatedly in briefs and at the hearing that rivalry between Heinz and Beech-Nut for distribution would adversely affect consumers through higher prices at the retail level. To now assert that competition at wholesale should be divorced entirely from competition at retail is disingenuous and represents nothing more than a tactical ploy to disregard the district court's findings of fact. The FTC cannot now avoid the consequences of the factual record.

Contrary to the FTC's new theory, the Commission's complaint in this case was not limited to "distribution competition," but rather alleged:

The 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 prepared baby food and segments thereof, *specifically jarred baby food*.

HZ APP E at ¶12.a (emphasis added). This allegation is by no means limited to a "wholesale" market, and the FTC cannot, at this juncture, amend its complaint. *See Marymount Hospital v. Shalala*, 19 F.3d 658, 663 (D.C. Cir. 1994) (arguments not raised below are waived); *Roosevelt v. E.I. DuPont deNemours & Co.*, 958 F.2d 416, 419 & N.S. (D.C. Cir. 1992). Nor was isolation of such a market contemplated by the FTC, since the focus of the FTC's case – both in its briefs

(until now) and at trial – has been that competition between Heinz and Beech-Nut for distribution benefits consumers, and the elimination of that competition will harm consumers.

The testimony the FTC elicited from its own expert at the hearing confirms the thrust of the FTC case:

Q. Let's go to competitive effects. To put things in a *framework* before we start our *competitive effects analysis*, can you tell the Court, based on the evidence you reviewed, how you see the competitive interaction now between Gerber, Heinz and Beech-Nut?

A. *Gerber, Heinz and Beech-Nut are currently involved in active competition to obtain consumers* – to please consumers in terms of the quality they provide, and they pursue different strategies with respect to price. . . . In addition to that consumer level competition, there's very intense *distribution competition* between Beech-Nut and Heinz, and that affects the consumer competition as well. So it *is not like that's isolated by itself, but it flows over into the consumer competition as well.*

HZ APP F at 238-239 (emphasis added). Similarly, in its post-trial memorandum, the FTC argued that “it is clear that retail pricing is affected by competition at the wholesale level.”

And it is precisely this contention of the FTC that the district court addressed in its opinion. Contrary to the FTC's suggestion, the district court correctly considered the effect of the merger on competition at wholesale (“Distribution Competition”) and retail (“Consumer Competition”) level. HZ APP A at 13-17. This district court explicitly recognized that the “[t]he commission attempted to show that trade [retailer]spending competition between Heinz and Beech-Nut benefits consumers.” HZ APP A at 15. Such trade spending can be “fixed” or “variable.” With regard to fixed trade spending the court found that the FTC's argument “failed completely” as a matter of fact. *Id.* With regard to variable trade spending, the court explicitly found, as a fact, that “the merger will not change the need for such spending.” *Id.* at 16.

Having considered competitive effects at both levels of competition in detail, and in particular, the benefits accruing from the efficiencies, new product innovation and lower prices, the court concluded:

I find it more probable than not that consummation of the Heinz/Beech-Nut merger will actually increase competition in *jarred baby food* in the United States.

HZ APP A at 26 (emphasis added).⁸ The court's conclusion, like the FTC's present complaint, was correctly applicable to competition at both the distribution and consumer levels.

Moreover, the court's findings that the merger will increase competition at both levels of competition was supported by the testimony of retailers who overwhelmingly rejected the FTC's novel theory of retailer injury. For example, David Dean, a Vice President of Albertson's (the second largest grocery retailer in the U.S.) testified that, in considering whether to support the Heinz/Beech-Nut acquisition, he took into account the fact that so-called bid competition between Heinz and Beech-Nut would "go away" but that Albertson's believed that:

Gerber's so strong and Beech-Nut and Heinz are really so ineffective at competing against Gerber that if you get a powerhouse like Heinz to support the category it creates some innovation and puts some aggressive pricing and marketing programs together that the category is going to benefit. And if the category benefits and we get more consumers in there, we're going to sell more baby food. . . . Really what we're interested in is category growth. We want to see more products move off the shelf.

HZ APP G at 19-20. Numerous other retailers provided comparable testimony and affidavits. For example, Roger Davidson of Ahold, USA, (owner of Giant Foods, Stop & Shop and others)

⁸ Nor do the cases cited by the FTC breathe any life into its new claim that the effect on consumer level competition is irrelevant to this transaction. Here, because the district court properly defined the relevant product market as jarred baby food, necessarily the effect on the end consumer must be analyzed. In both *PPG* and *FTC v. Elders Grain, Inc.*, 868 F.2d 901 (7th Cir. 1989), the impact on the end user was in fact the relevant inquiry. *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964), involved a regulated commodity and indeed, the court took into account the effect on consumers in the State of California. Finally, in *United States v. Cardinal Health*, 12 F.Supp.2d 34 (D.D.C. 1998), although the government did not have to prove consumers would have to pay higher prices for pharmaceuticals, nevertheless, the court took into account pricing in the downstream markets.

testified that “I expect to see more competition in the category. . . . I think if Heinz is able to consolidate with Beech-Nut . . . that they will become a viable competitor to Gerber . . . as a result, we’ll see more promotions, lower costs to retailers, and ultimately lower retails for consumers.” Indeed, the FTC stood virtually alone defending Gerber from increased competition.

The FTC is wrong as a matter of law as well as a matter of evidence. As the district court correctly noted in its opinion, the antitrust laws were designed to protect consumers.

[T]he economic concept of competition, rather than any desire to preserve rivals as such, is the lodestar that shall guide the contemporary application of the antitrust laws [T]his principle *requires the district court . . . to make a judgment whether the challenged acquisition is likely to hurt consumers*

Hospital Corp. of Am. v. FTC, 807 F.2d 1381, 1386 (7th Cir. 1986) (Posner, J.); Tab A at 25. *See also NCAA v. Board of Regents*, 468 U.S. 85, 107 (1984) (“Congress designed the Sherman Act as a ‘consumer welfare prescription.’”), (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979)).

In sum, the FTC’s attempt to change theories at this juncture is unavailing. Its rejection of its mission to protect consumers because it lost on the facts underscores the lack of merit in its case. Moreover, the court’s findings on competition both at wholesale and retail are fully supported by the record.

c. The District Court Properly Weighed The Efficiencies

There can be little dispute that efficiencies and innovations are proper factors to be considered under the *Baker Hughes* “totality of the circumstances” analysis. Notably, the agency’s Merger Guidelines parallel the precise approach the district court followed: “market share and concentration data provide only the *starting point* for analyzing the competitive impact of a merger.” 1992 Horizontal Merger Guidelines § 2.0 (1992). As the district court explained,

the FTC itself “amended its Merger Guidelines in 1997 to provide that ‘efficiencies are properly considered in merger analysis.’” Tab A at 18, citing *Baker Hughes*, at 985.

The district court had before it “powerful evidence,” on efficiencies including analyses and opinions of an efficiencies expert who reviewed efficiency claims for years at the FTC where he was Assistant Director for Accounting in the Bureau of Accounting; the Heinz operations executive; and the former Director of the FTC’s Bureau of Economics and a principal drafter of the Revised Merger Guidelines. The FTC does not dispute that the efficiencies are merger-specific and cognizable.⁹ It claims instead that the district court misapplied the “efficiencies defense” standards by not addressing whether the efficiencies will produce a significant economic benefit to purchasers and whether the efficiencies will outweigh any anticompetitive effects and result in a more competitive market. The district court, however, clearly made findings addressing these issues. HZ APP A at 14. It is the FTC that misapplies and mischaracterizes the record and the district court’s efficiencies analysis and findings.

The district court specifically found the merger’s efficiencies will result in “the kinds of efficiencies recognized by the Commission’s Horizontal Merger Guidelines.” HZ APP A at 22. Further, considering the particular facts before it, the efficiencies “will enable Heinz to provide the best of the two companies’ recipes, . . . and to apply its value pricing strategy to the entire

⁹ Further, the district court recognized the magnitude of the merger’s efficiencies and cited the testimony of David Painter, a defense expert who previously evaluated efficiencies at the Commission. Mr. Painter “found the variable manufacturing cost savings that *will be achieved* in the merger ‘substantial, significant . . . among the largest that I have ever seen certainly in a manufacturing segment.’” HZ APP A at 21. Further, the conversion cost savings would reach 43 percent, a level of savings Mr. Painter found to be “extraordinary.” HZ APP A at 22.

The FTC’s critique of the magnitude and scope of the efficiencies – “incredibly modest” – is disingenuous, contrary to the record, and symptomatic of the commission’s approach. Specifically, the FTC compares savings [of costs] to total market revenues – basically comparing apples to oranges. When the cost savings are properly applied to the relevant number of baby food cases sold, the analysis shows that a 20+ percent variable cost savings per case is likely to come from shifting Beech-Nut product into the Heinz plant. Therefore it will become profitable to lower the price, to sell more, post-merger and thereby pass on to consumers the efficiencies. Baker Tr. at 994-998. (HZ APP I)

combined production volume” and these “*consumer benefits will be immediate and virtually automatic.*” HZ APP A at 22-23. (emphasis added). Reading a line of the court’s opinion entirely out of context, the FTC disingenuously suggests that the Court failed to conclude that the efficiencies resulting from the merger would be passed on to consumers. Reading the full passage, however, undermines this strained assertion. The Court found that:

Whether 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. When the efficiencies of the merger are combined with the new platform for product innovation, however, *it appears more likely than not that Gerber’s own predictions of more intense competition will come true.*

HZ APP A at 23 (citations omitted) (emphasis added).¹⁰ Instead of attempting to rebut the defendants’ proof and the record, the FTC has chosen to argue it did not exist.

Further, the court found it “*more probable than not* that the consummation of the Heinz/Beech-Nut merger will actually increase competition in jarred baby food in the United States.” HZ APP A at 25-26 (emphasis added). The court, after comparing the defendants’ efficiency and innovations evidence with the FTC’s structural analysis, stated:

My conclusion in this case . . . credits powerful evidence in the record about the efficiencies realized by the merger, and about the enhanced prospects of the merged entity to introduce innovative products to compete with Gerber. That evidence . . . shows that the Commission’s prima facie case inaccurately predicts the mergers’ probable effects . . .

HZ APP A at 20 (emphasis added).

Contrary to the FTC’s argument that the burden is on the defendants to prove “certainties,” the district court properly analyzed the issue under the Section 7 “probabilities” standard. HZ APP A at 25-26; *see also* HZ APP A at 9 (“The defendants’ burden is one of

¹⁰ This finding similarly is grounded in the record whether Heinz’s efficiency savings will benefit purchasers. Professor Baker conducted simulation and elasticity analyses, calculated the cost savings, and continued his analysis by reviewing his conclusions along with those of a third party, Booz Allen. Professor Baker also analyzed the cost savings and structure to evaluate incentives post-merger and to determine the cost savings benefits will go to (be passed on to) consumers in the form of lower prices. HZ APP I at 995-97.

production: a ‘clear’ showing that the merger is unlikely to lessen competition in unnecessary.”), (citing *Baker Hughes*, 908 F.2d at 984, for the proposition that “Section 7 involves *probabilities*, not certainties or possibilities.”)

The FTC mischaracterizes or ignores the district court’s findings to avoid an order that allows an efficiency-enhancing, procompetitive merger to proceed. This approach parallels the FTC’s approach at trial – do nothing to rebut defendants’ showings and analyses, but instead fall back on a structural argument long ago abandoned as the only and final measure of a merger’s potential effects.

d. The District Court Correctly Concluded that No Likelihood of Post Merger Collusion Exists in the Baby Food Market

Based on the “powerful evidence” of efficiencies and innovation to fuel competition with Gerber, the district court rejected the FTC’s prediction of tacit collusion in the post-merger baby food market. HZ APP A at 20 & n.7; Tab I at 1010-23. Specifically, the district court relied on the facts presented by Professor Baker in his report and testimony that collusion is even less likely to occur after the merger: “The Commission’s argument that further concentration in the baby food industry will increase the likelihood of collusion was effectively rebutted by Professor Baker’s testimony regarding the structural market barriers to collusion in the market.” *Id.* The district court credited Professor Baker’s testimony that even post-merger, collusion remains unlikely because the firms cannot deter deviation and it will be more difficult to reach consensus on price and market shares. HZ APP A at 1010-17. Further, the court accepted Professor Baker’s conclusion that the efficiencies resulting from the merger give Heinz every incentive to act as a “maverick” under the Merger Guidelines, competing against Gerber and undermining coordination. HZ APP A at 14, 23; HZ APP I at 969, 1012-13.

In this respect, the district court's conclusion is in perfect harmony with the holding of the United States Court of Appeals for the Third Circuit that the "two brand" competitive landscape of the baby food industry is not prone to collusion. *See In re Baby Food Antitrust Litig.*, 166 F.3d 112, 132 (3d Cir. 1999). Accordingly, the Court should defer to the district court's findings of fact that the merger does not make the prospect of collusion any more likely and conclude that the FTC has not shown a likelihood a success on the merits.

2. The Balance of Equities and the Public Interest Decidedly Favors Appellees

As the district court recognized, issuance of injunctive relief would effectively defeat the transaction, which is terminable on November 1, 2000. HZ APP A at 27; *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1093 (D.D.C. 1997) (preliminary injunction "will most likely kill the merger"). An interim injunction (even pending an expedited appeal) would likely force the parties to abandon the transaction. HZ APP B at ¶ 9.

This merger has already been under FTC investigation and a litigation cloud for almost nine months. During this time, the parties have been operating in limbo. Beech-Nut customers are uncertain about the prospects for the business, and Beech-Nut volume has eroded substantially versus a year ago. HZ APP B at ¶ 5. Similarly, the Heinz baby food business is faltering due to uncertainty, and the aggressive plans for new product innovations and other competitive initiatives are on hold until the transaction is closed. HZ APP B at ¶ 8. At the same time, Gerber – the entrenched dominant brand – is pursuing a strategy to take advantage of the uncertainty hounding the competition. HZ APP A at 23, HZ APP B ¶ 6. The longer the merger is kept "on hold," the longer the competitive effectiveness of the merging companies is compromised. Under the circumstances, the FTC's assertion that further delay will not harm the parties or the public is disingenuous. It is clear that the only party that would benefit from

further delay is Gerber. The perpetuation and enhancement of a monopoly is both counter to the purpose of the Clayton Act, and antithetical to the public interest.

This transaction, once consummated, will introduce strong, national competition to the industry giant – Gerber – by bringing to the market a high quality, value-priced product, to be complemented by innovation initiatives funded from the cost savings and efficiencies realized from consolidation. HZ APP A at 20. The district court correctly recognized that consumers stand to benefit from increased competition. *Id.* at 23. Thus, far from harming the FTC or the public (let alone “irreparably”), allowing the merger to proceed without additional delay would further the FTC’s own enforcement interests in promoting competition. *See* United States Dep’t of Justice & Federal Trade Comm’n, *1992 Horizontal Merger Guidelines* § 0.1 (1992) (“[T]he Agency seeks to avoid unnecessary interference with ... mergers that are either competitively beneficial or neutral.”).¹¹

At the same time, the FTC will suffer no harm if its motion is denied.¹² The critical assets involved in this transaction – the Beech-Nut brand and baby food plant – will not be dissipated while the appeal is pending. The brand will be used and the Beech-Nut plant will continue to operate for several months. HZ APP B at ¶ 8. The availability of such relief compels the denial of the FTC’s motion for an injunction pending appeal. *Ashland Oil, Inc. v.*

¹¹ The FTC’s contention that the district court erred by giving dispositive weight to the private equities is thus misplaced. In fact, Judge Robertson explicitly stated in his opinion that he gave “no weight to the private equities arguments raised by Heinz and Milnot.” HZ APP A at 26, n.9.

¹² The FTC suggests that “unscrambling eggs” is a sufficient equity to support an injunction, citing to cases such as *Elders Grain, FTC v. Warner Communications*, 742 F.2d 1156 (9th Cir. 1984), *FTC v. Rhinechem*, 459 F. Supp. 785 (N.D. Ill. 1978), *FTC v. Lancaster Colony Corp.*, 434 F. Supp. 1088 (S.D.N.Y. 1977). None of those cases, however, involved a situation where injunctive relief would deny the public procompetitive benefits from consummation of the transaction. In fact, in *Warner*, the court noted that public equities “may include beneficial economic effects and procompetitive advantages for consumers.” 742 F.2d at 1165. While those equities were not found in *Warner*, the existence of such procompetitive benefits, explicitly found by the district court here, undermines the request for an injunction pending appeal.

FTC, 409 F. Supp. 297, 307 (D.D.C.); *aff'd*, 548 F.2d 977 (D.C. Cir. 1976); *Wisconsin Gas*, 758 F.2d at 674.

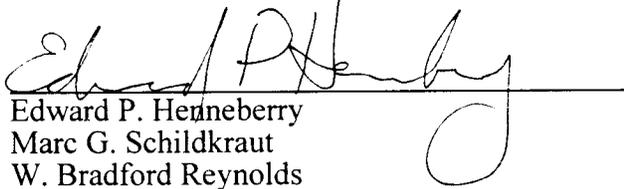
In fact, the risk of disentanglement falls most directly on the shoulders of the acquiring company, not on the FTC, since it is Heinz who would bear the burden of a reversal on appeal. *See FTC v. Tenneco, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,470, at 71,805 (D.C. Cir. 1977) (denying injunction pending appeal, stating that parties to the merger will bear the risk of “the decision to proceed with the acquisition pending a determination of its legality” and “the risk of possible divestiture in the future”).

In the end, accepting the FTC’s argument would mean an injunction should be granted pending appeal in virtually every merger case. As discussed, however, injunctions pending appeal are commonly *denied* in merger cases. To rule otherwise would effectively render § 13(b) of the Clayton Act a nullity, since it would allow the FTC to delay acquisitions to the point of collapse without ever having to sustain its burden of proving a likelihood of success on the merits.

IV. CONCLUSION

For all of the foregoing reasons, in addition to the reasons relied upon by the district court to deny the preliminary injunction, the Commission’s motion for an injunction pending appeal should be denied. Nonetheless, the appeal should go forward on an expedited basis.

Respectfully submitted,


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Dated: October 25, 2000

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition of Appellee H.J. Heinz Company to Emergency Motion for the Federal Trade Commission for An Injunction Pending Appeal was served by hand this 25th day of October, 2000 upon each of the parties listed below:

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