

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-5362

September Term, 2000

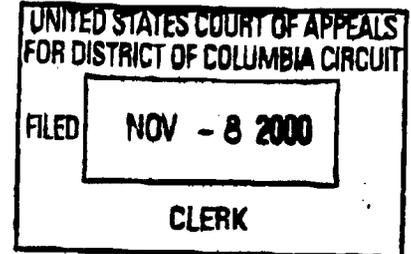
00cv01688

Filed On:

Federal Trade Commission,
Appellant

v.

Heinz, H.J. Co. and Milnot Holding Corporation,
Appellees



BEFORE: Ginsburg, Tatel, and Garland, Circuit Judges

ORDER

Upon consideration of the emergency motion for an injunction pending appeal and to expedite appeal, the responses thereto, and the reply, it is

ORDERED that the motion for an injunction pending appeal and to expedite appeal be granted for the reasons stated in the accompanying memorandum.

The briefing schedule and oral argument date will be set by separate order.

Per Curiam

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No. 00-5362, Federal Trade Commission v. Heinz, H.J. Co., et al.

MEMORANDUM

The Federal Trade Commission (FTC) seeks emergency relief to enjoin, pending an expedited appeal, a merger of two of the three principal manufacturers of jarred baby food -- H.J. Heinz Company and Milnot Holding Corporation, the parent of Beech-Nut Corporation. The district court denied the FTC's request for a preliminary injunction, which would have stayed the transaction until the Commission completed administrative proceedings to determine whether the merger would violate the antitrust laws. Under the FTC Act, the Commission is entitled to such an injunction "[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." 15 U.S.C. § 53(b). We conclude that the FTC has satisfied this Circuit's requirements for relief pending appeal of the district court's denial of the requested injunction. See *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977); D.C. Cir. Rule 8(a)(1).

The FTC has demonstrated a substantial probability of success on the merits. A merger is unlawful under Section 7 of the Clayton Act "where in any line of commerce . . . the effect of such acquisition may be substantially to lessen competition." 15 U.S.C. § 18. The parties agree that the relevant product market is jarred baby food. Gerber Products Company, which has enjoyed a dominant market share for 40 years, currently has approximately a 65% share. Heinz, which is the largest producer of baby food in the world, has 17.4% of the U.S. market, while Beech-Nut has 15.4%. The Herfindahl-Hirschman Index (HHI) for the industry, prior to the merger, is 4775 -- indicative of a highly concentrated industry. See *FTC v. PPG Indus.*, 798 F.2d 1500, 1503 (D.C. Cir. 1986); U.S. Dep't of Justice & FTC, *Revised 1992 Horizontal Merger Guidelines* § 1.51 (rev. 1997) [hereinafter *Revised Guidelines*]. The merger of Heinz and Beech-Nut will increase the HHI by 510 points. This creates, by a wide margin, a presumption that the merger will lessen competition at the retail level. See *Revised Guidelines* § 1.51 (stating that HHI increase of more than 100 points, where post-merger HHI exceeds 1800, is "presumed . . . likely to create or enhance market power or facilitate its exercise"); see also *United States v. Baker Hughes Inc.*, 908 F.2d 981, 983 & n.3 (D.C. Cir. 1990); *PPG Indus.*, 798 F.2d at 1503 (holding that pre- and post-acquisition HHIs lower than those at issue here "entitle the Commission to some preliminary relief"). Moreover, it is indisputable that the merger will eliminate competition between the two merging parties at the wholesale level, where they are currently the only competitors for what the district court described as the "second position on the supermarket shelves." See also 9/21/00 Closing Arg. Tr. at 31 (district court statement that "I can't disagree with the Commission's position that Heinz and Beech-Nut are competing and that a merger of the two companies will end that competition"). Nor are the usual rebuttals to a prima facie

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case available here: The district court found that new entry is "difficult and improbable," and that neither appellee is a "failing firm." As far as we can determine, no court has ever approved a merger to duopoly under similar circumstances.

To rebut this evidence that the merger will have anticompetitive effects, appellees contend that those effects will be offset by efficiencies resulting from the union of the two companies. This is a novel defense, which the Supreme Court has not addressed since the 1960s (and then, unfavorably), *see, e.g., FTC v. Proctor & Gamble Co.*, 386 U.S. 568, 580 (1967), which this court has never addressed, and as to which the antitrust enforcement agencies have only recently clarified their views. *See Revised Guidelines* § 4 (1997). Moreover, although there is much to be said for recognizing an efficiencies defense in principle, the high concentration levels present in this case complicate the determination of whether it should be permitted here. *See PHILLIP E. AREEDA ET AL., ANTITRUST LAW* ¶ 971f (1998) (supporting efficiencies defense but requiring "extraordinary" efficiencies where the "HHI is well above 1800 and the HHI increase is well above 100"); *Revised Guidelines* § 4 (stating that "[e]fficiencies almost never justify a merger to monopoly or near-monopoly"). Balanced against the FTC's strong evidence that the merger will lessen competition, appellees' claim, that post-merger efficiencies will permit so much increased retail competition between the merged entity and Gerber as to outweigh any anticompetitive effects, is sufficiently uncertain to give the FTC a substantial probability of success on the merits. *See Holiday Tours*, 559 F.2d at 843-44 (holding that appellant need not show "50% plus" likelihood of success to justify relief).

We also find that a consideration of the consequences of denying versus granting interim relief weighs in favor of a grant. *See D.C. Cir. Rule 8(a)(1)*. The district court found that if the merger were allowed to proceed, subsequent administrative proceedings on the merits "will not matter" because Beech-Nut's manufacturing facility "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." Hence, even if the merger were ultimately found to violate the Clayton Act, it would be impossible to recreate pre-merger competition. On the other hand, although the appellees state that if an injunction pending appeal is granted they *may* abandon the merger, they do not unequivocally state that they *will* do so. Indeed, appellees acknowledge that there is no other alternative buyer for Beech-Nut. Moreover, even if the current merger plans were abandoned, the evidence does not establish that the efficiencies the appellees urge could not be reclaimed by a renewed transaction following success on appeal.

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In light of this weighing of the consequences of a decision regarding interim relief, we conclude that the FTC's showing on the merits is sufficient to establish that the public interest would be furthered by an injunction pending appeal. *See Holiday Tours*, 559 F.2d at 843 ("The necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other factors."); *see also Serono Lab., Inc. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998). The public interest in enforcement of the antitrust laws is strong; any injury to competition from going forward with the merger would plainly be irreversible, while the same cannot be said for any loss to competition from its delay. The appellees' efficiencies defense may yet carry the day, but only the grant of interim relief will both afford this court an opportunity to determine whether that should be the case and protect the public interest in the event that it is not.