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No. 00-5362

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

FEDERAL TRADE COMMISSION,
Plaintiff-Appellant,

vs.

H.J. HEINZ COMPANY, *et al.*
Defendants-Appellees.

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

BRIEF OF THE GROCERY MANUFACTURERS OF AMERICA, INC., THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE MANUFACTURERS ALLIANCE/MAPI, INC., AS AMICI CURIAE IN SUPPORT OF THE DEFENDANTS-APPELLEES

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Dated: December 29, 2000

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and amici

All parties, intervenors, and amici appearing before this Court are listed as follows:

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Milnot Holding Corporation
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St. Louis, MO 63102

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Grocery Manufacturers of America, Inc. (GMA) is a non-profit corporation whose members manufacture, distribute, and sell a wide range of grocery products. GMA has no parent organization and has no publicly traded stock.

The National Association of Manufacturers (NAM) is a non-profit organization whose members manufacture, distribute and sell a wide range of products. NAM has no parent organization and has no publicly traded stock.

The Manufacturers' Alliance/MAPI, Inc. (MAPI) is a non-profit business league whose members manufacture, distribute and sell products in a wide range of industries, or provide related services such as telecommunications, power distribution, and software service. MAPI has no parent organization and has no publicly traded stock.

STATUTES AND REGULATIONS

All applicable statutes, etc., are contained in the Brief for the Appellant, Federal Trade Commission.

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INTERESTS OF *AMICI CURIAE*

The Grocery Manufacturers of America, Inc. ("GMA"), the National Association of Manufacturers ("NAM"), and the Manufacturers Alliance/MAPI, Inc. ("MAPI"), respectfully submit this brief in support of the District Court's judgment.

GMA is the world's largest association of food, beverage, and consumer brand companies. The organization applies legal, scientific, and political expertise from its member companies to vital public policy issues affecting the industry, and speaks for food and consumer brand manufacturers at the state, federal, and international levels on legislative and regulatory issues.

NAM is the nation's largest and oldest multi-industry trade association, representing 14,000 member companies and 350 member associations serving manufacturers and employees in every industrial sector. NAM's mission is to enhance the competitiveness of manufacturers and improve living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth, and to increase understanding among policy-makers, the media and the general public about the importance of manufacturing to America's economic strength.

MAPI is a policy research organization comprising 450 companies encompassing the full range of manufacturing industries, such as automotive, aerospace, computer, electronics, chemical, machinery, and pharmaceutical. MAPI's members include manufacturers of a wide range of consumer products and businesses that provide related services such as telecommunications, power distribution, and software service. Through its extensive publications program, MAPI acts as national spokesperson for policies that stimulate technological advancement and economic growth for the benefit of industry and the public interest.

Amici have a significant interest in ensuring that merger analysis is conducted sensibly under the antitrust laws. In today's global, technology-based economy manufacturers in many fields, including grocery products, face an ever-increasing challenge to generate cost-saving efficiencies in order to remain competitive. Often, mergers and acquisitions provide the chief means by which firms can realize these efficiencies. Amici understand uniquely that merger-related efficiencies have allowed manufacturers to compete more effectively in increasingly specialized and sophisticated markets, making mature markets more responsive to consumers' needs. These efficiencies should not be discounted by courts applying Section 7 of the Clayton Act.

Amici also recognize that each market is unique, and that each grocery product is offered in its own competitive setting. As markets evolve and producers become more specialized, competitive dynamics change. Sound antitrust policy requires that enforcers and courts account for specific market realities on a detailed, case-by-case basis in assessing the likely competitive effects of a proposed transaction.

All parties have consented to the filing of this brief.

STATEMENT OF CASE AND FACTS

Amici adopt the statements of case and facts contained in the brief of appellees H.J. Heinz Company and Milnot Holding Corporation.

SUMMARY OF ARGUMENT

In order to be granted a preliminary injunction in this case, the FTC, like any other plaintiff, must show a likelihood of success on the merits. The FTC argues that, in evaluating its likelihood of success, the District Court should have considered only a limited portion of the evidence presented -- that reflecting market concentration, barriers to entry, and the lack of any likelihood that the acquired firm would have failed in the marketplace without the merger. Well established principles of equity and interpretations of the Clayton Act run to the contrary. The District Court properly and thoroughly analyzed the market realities and correctly concluded, based on its assessment of the facts, that the Heinz/Beech-Nut merger would increase competition. In so doing, the Court relied upon powerful record evidence relating to market factors present in the jarred baby food industry that affect competition, customer support for the transaction, and the substantial efficiencies likely to be realized by the merged firm.

In response, the FTC urges this Court to adopt a preliminary injunction standard under Section 13(b) of the Clayton Act that over-emphasizes market concentration statistics and provides little room, if any, for consideration of the market realities that Judge Robertson's well-supported analysis deemed crucial to understanding the merger's likely competitive effects. Under the FTC's approach, the District Court in a Section 13(b) proceeding presumably must conduct an abbreviated hearing, limiting its analysis to concentration, entry, and the likelihood that the acquired firm will otherwise fail in the market. Appellant's Brief at 24. While these factors are all relevant to the Court's analysis, they are not comprehensive. Alternatively, the Commission argues that, when concentration levels are high, the District Court should only consider evidence of "extraordinary" efficiencies. *Id.* at 43-45. In either event, the District Court would be compelled to disregard defendants' evidence of actual competitive effects. Any such standard would, at best, unduly hamper that court's ability to carry out its statutory obligation to assess the Commission's "likelihood of ultimate success." 15 U.S.C. § 53(b). At worst, it may produce inappropriate and competition-reducing results.

In this case, concentration statistics overstate the degree of competition between the merging parties. They also fail to reflect the substantial efficiency gains, as well as the benefits of creating a second national brand out of two "also ran" baby food suppliers. A shift from one to two major competing brands in grocery products sectors often lowers prices significantly and increases output, variety, and quality. The FTC's excessive reliance on concentration statistics ignores the very "market realities" that led the District Court to find that the merger will enhance competition. *FTC v. H.J. Heinz Co.*, 116 F. Supp. 2d 190, 201 (D.D.C. 2000). The Commission is fond of characterizing this transaction as a merger from "three to two." However, as Judge Robertson's opinion suggests, the merger more closely resembles a shift from one to two.

The antitrust laws do not compel the courts to disregard probative evidence of likely competitive effects. In the administration of Section 7 of the Clayton Act, Congress left it to the courts to determine which mergers may tend – in the statutory language – "substantially to lessen competition." 15 U.S.C. § 18. In delegating this crucial evaluative role to the courts, Congress expressly rejected the use of "mathematical tests," such as those the FTC now advances. *Brown Shoe Co. v. United States*, 370 U.S. 294, 319 (1962). When evaluating the FTC's likelihood of success in proceedings under Section 13(b) of the Clayton Act, courts consider the probable competitive effects of the proposed transaction. *See, e.g., FTC v. Tenet Healthcare Corp.*, 186 F.3d 1045, 1054 (8th Cir. 1999). Thus, as in most areas of antitrust law, the courts engage in a "totality of the circumstances" approach that allows a court to choose among the parties' "competing predictions" of the merger's competitive effect. *United States v. Baker Hughes Inc.*, 908 F.2d 981, 988 (D.C. Cir. 1990) ("Predicting future competitive conditions in a given market, as the statute and precedents require, calls for a comprehensive inquiry.").

That this merger occurs in a highly concentrated industry should not change the analysis. Concentration data provide but one tool for diagnosing competitive effects. The modern trend of antitrust policy is to embrace the use of other diagnostic techniques for predicting a merger's market impact. Recognizing the limitations of concentration data, antitrust enforcement agencies today apply a fuller, comprehensive inquiry to mergers to duopoly, as well as any other merger. Here, the District Court engaged in the correct analysis and simply concluded that the FTC failed to demonstrate a likelihood of success on the merits.

ARGUMENT

I. THE DISTRICT COURT PROPERLY EVALUATED EFFICIENCIES AND MARKET FACTORS AFFECTING COMPETITION IN THE JARRED BABY FOOD INDUSTRY

In rendering its decision, the District Court properly analyzed the merger's competitive effects by taking into account not only concentration levels, but the competitive dynamics of the baby food industry. Not only did Judge Robertson conclude that the merger was unlikely to lessen competition, he found the transaction was likely to enhance it. In so doing, he appropriately considered evidence illuminating the realities of the baby food market, as well as evidence of probable efficiencies that would boost competition in the market. Indeed, on the record before it, the Court's findings were unremarkable.

The FTC itself has long recognized that "market share and market concentration data may either understate or overstate the likely future competitive significance of a firm or firms in the market." U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 1.52 (rev. ed. 1997) (hereinafter "*Revised Merger Guidelines*"). The Supreme Court clearly so held in *United States v. Gen. Dynamics Corp.*: "statistics concerning market share and concentration . . . [are] not conclusive indicators of anticompetitive effects." 415 U.S. 486, 498 (1974). Thus, only an inquiry into the specific realities of the relevant market being analyzed in an antitrust case can assure an accurate assessment of likely competitive effects of a horizontal merger.

In this case, over reliance on concentration data tends to obscure, rather than illuminate, the transaction's likely effects. Concentration statistics do not reflect the ability of firms in the baby food industry to generate merger-specific efficiencies. Moreover, they tend to overstate the level and significance of competition between the non-leading firms.

A. The Merger's Efficiencies Benefit Customers by Lowering Costs and Creating a Stronger Competitor

It is the experience of GMA, NAM, and MAPI members that the ability to realize efficiencies drives most mergers in the grocery industry. There are many examples of manufacturers realizing substantial cost savings from consolidation of manufacturing facilities.[1] Antitrust enforcement that disregards these efficiencies runs the risk of depriving manufacturers, and ultimately consumers, of the benefits of these cost savings.

The FTC effectively proposes two alternative standards for assessing efficiencies in this matter: 1) that they not be considered at all in the context of a preliminary injunction request under section 13 (b) of the Clayton Act, Appellant's Brief at 25; and 2) that they be counted only to the extent they are "extraordinary," due to the concentrated nature of the industry. *Id.* at 45.[2] Both standards would impede the Court's accurate assessment of the government's likelihood of success on

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1 *See, e.g., New York v. Kraft Gen. Foods, Inc.*, 926 F. Supp. 321, 351 (S.D.N.Y. 1995); *United States v. Archer-Daniel-Midlands Co.*, 781 F. Supp. 1400, 1407 (S.D. Iowa 1991) (in post-transaction challenge of deal between ADM and Nabisco, court found ADM achieved significant cost savings through plant rationalization); *see also*, Timothy J. Muris, *The Government and Merger Efficiencies: Still Hostile After All These Years*, 7 Geo. Mason L. Rev. 729, 731, 734-5 (1999).

2 "Here, because the efficiencies are not extraordinary, the district court should have preserved the Commission's chance to fully evaluate defendants' efficiencies claims in a proceeding on the merits." *Id.*

the merits. Instead, Amici respectfully urge this Court to apply the same standard adopted by other courts and set forth in the FTC's own *Merger Guidelines*, which treat efficiencies not as an extraordinary and independent factor but as an integral element of the analysis of the merger's competitive effects.[3]

In this transaction, the District Court did not treat efficiencies as a defense to an otherwise anticompetitive merger. Rather, the Court correctly viewed the efficiencies as a basis for predicting that the merger would yield no anticompetitive effects. Judge Robertson found that the Heinz/Beech-Nut merger will create substantial "merger-specific and cognizable" efficiencies. *H.J. Heinz Co.*, 116 F.

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[3] *Tenet Healthcare*, 186 F.3d at 1054 ("[T]he district court should . . . have considered evidence of enhanced efficiency in the context of the competitive effects of the merger."); *FTC v. Butterworth Health Corp.*, 1997-2 Trade Cas. (CCH) ¶ 71,863 (6th Cir. 1997) ("The FTC argues that the district court committed legal error by allowing the hospitals to rebut the FTC's *prima facie* case with evidence that the merger would give rise to consumer savings. We reject this argument.") *FTC v. University Health, Inc.*, 938 F.2d 1206,1222 (11th Cir. 1991) ("We conclude that in certain circumstances, a defendant may rebut the government's *prima facie* case with evidence showing that the intended merger would create significant efficiencies in the relevant market"); *United States v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121, 137 (E.D.N.Y. 1997); *United States v. Country Lake Foods, Inc.*, 754 F. Supp. 669 (D. Minn. 1990); *United States v. Carilion Health Sys.*, 707 F. Supp. 840 (W.D. Va.), *aff'd without op.*, 892 F.2d 1042 (4th Cir. 1989); *Revised Merger Guidelines*, § 4; *see also* 1 FTC Staff Report, *Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace*, Overview at 2 (May 1996) (hereinafter "*FTC Staff Report*") ("Efficiencies evidence relevant to the central question of merger analysis – that is, the probable competitive effect of the transaction – [should] be admissible in court.").

Supp. 2d at 198-99. Even the "Commission [did] not seriously dispute the proposition that the merger will result in better recipes for former Heinz buyers and value pricing for former Beech-Nut buyers." *Id.* As the District Court found, "[t]hose consumer benefits will be immediate and virtually automatic." *Id.* Judge Robertson also found that "[w]hen the efficiencies of the merger are combined with the new platform for product innovation, . . . it appears more likely than not that Gerber's own predictions of more intense competition . . . will come true." *Id.*

These findings are consistent with other grocery products cases, where courts similarly found that merger-related efficiencies can enhance smaller firms' ability to compete. In *New York v. Kraft General Foods, Inc.*, the court hired renowned economist Dr. Alfred Kahn to assist it in evaluating the likely competitive effects. Dr. Kahn concluded that "the acquisition contributed to the rejuvenation of Nabisco as a competitor." 926 F. Supp. at 351. Retailers similarly testified that the merger would "likely . . . strengthen, not weaken, competition in RTE [ready-to-eat] cereals because it makes Post a stronger competitor to Kellogg and General Mills," and consequently, the combined firm would be "more able to challenge them effectively." *Id.* As a result, the court found "no reasonable probability" that the acquisition of a non-leading brand by another non-leading brand would have "anticompetitive . . . effects." *Id.*

This is consistent with Amici's experience. Our economy derives vital force from manufacturers' ability to provide higher quality, lower-priced goods through merger-related efficiencies.[4] As the FTC's *Merger Guidelines* explain, "the primary benefit of mergers to the economy is their potential to generate such efficiencies." U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines*, § 4 (1992) (hereinafter "*1992 Merger Guidelines*"). For this reason, a 1996 FTC Staff Report recognized that "[e]fficiencies likely to be obtained through a merger may increase the competitiveness of the merged firm and improve (or not impair) the competitive performance of the market(s) in which the merged firm operates, ultimately resulting in lower prices, increased output and/or higher quality goods or services for consumers and other buyers." FTC Staff Report, Ch. 2 at 25. From the general perspective of manufacturing industries, these merger-related efficiencies can have a positive economic impact by enabling newly combined entities to improve existing product offerings and to introduce innovative and higher-quality products at competitive prices. Such factors must be taken into account in merger analysis to ensure that U.S. industry is able to compete effectively in increasingly global markets.

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[4] The potential for efficiency-enhancing mergers is particularly pronounced in grocery products mergers. *See, e.g.*, William MacLeod, *Statement of Grocery Manufacturers of America, Inc.*, before the Federal Trade Commission Hearings on Global and Innovation-Based Competition, (Nov. 7, 1995), <http://www.ftc.gov/opp/global/macleod.htm>.

Indeed, the *Merger Guidelines* support, rather than contradict, Judge Robertson's finding that merger-related efficiencies can prevent oligopoly pricing and can lead to "more intense competition:"

> [M]arginal cost reductions may make coordination less likely or effective by enhancing the incentive of a maverick to lower price or by creating a new maverick firm . . .; marginal cost reductions may reduce the merged firm's incentive to elevate price.

1992 *Merger Guidelines*, § 4; 116 F. Supp. 2d at 199.

Antitrust enforcement that disregards these efficiencies risks denying consumers the procompetitive benefits of efficient transactions and impairing the competitiveness of American firms. As FTC Chairman Robert Pitofsky once observed, "few would argue that the [early] failure of United States enforcement agencies and courts to take into account efficiency, productivity and innovation considerations in merger analyses was the principal cause of American firms' difficulties in international trade." Robert Pitofsky, *Proposals for Revised United States Merger Enforcement in a Global Economy*, 81 Geo. L.J. 195, 198 (1992). Thus, courts, antitrust enforcers, and academic commentators widely recognize that efficiencies should play a central role in analyzing mergers. *See, e.g., Baker Hughes*, 908 F.2d at 985 (it is "hornbook law" that proof of "efficiencies" may overcome the government's *prima facie* case); *see also* William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. Econ. Perspectives 43, 52-58 (Winter 2000) (reviewing trend toward greater concern with efficiency effects in merger analysis and other areas of antitrust law).

B. <u>Market Concentration Statistics Do Not Accurately Reflect the Market Realities of Mergers in the Jarred Baby Food Industry</u>

In this case, simple concentration statistics do not accurately reflect the dynamics of competition between the mergering parties in the jarred baby food market. Judge Robertson found that few retailers stock all three brands of baby food. 116 F. Supp. 2d at 193. Moreover, the trial record establishes that Heinz and Beech-Nut rarely compete against each other. As the District Court noted, the "FTC adduced no evidence of direct price competition between Heinz and Beech-Nut." *Id.* at 196. Thus, it is not surprising that the two firms have statistically insignificant cross-elasticities. *Id.*

Concentration statistics also may fail to reflect fully the dynamics of "distribution" competition (i.e., bidding to be the alternative brand stocked by a grocery store) for products like baby food. Retailers do not often risk "replacing an existing product with one that may not sell as well." *Comments Regarding Slotting Allowances and Other Grocery Marketing Practices*, Statement of D. Sussman, Ahold U.S.A. <http://www.ftc.gov/bc/slotting/comments/005aholdusa.pdf>. In this case, the FTC introduced no evidence concerning the frequency or effect of wholesale bidding competition in the baby food market. The District Court made no conclusion that the merger would result in harm to distribution competition.

Market realities apparently prevented the FTC from demonstrating an adverse effect on wholesale or retail competition. They also prompted customers to affirmatively support this merger. *Cf. United States v. Syufy Enters. Inc.*, 903 F.2d 659, 669 (9th Cir. 1990) (the "most telling evidence" of firm's "inability to set prices" comes from customers, who would be the "supposed victims.").[5]

Similar market realities were present in *Kraft*. There, the court addressed competition in the cereal aisle, and reached conclusions similar to Judge Robertson's based largely on customer evidence. As the court explained,

> Plaintiff offered no evidence that retailers object to, or have been harmed by, the Acquisition. By contrast, Post presented testimony by representatives of two of Post's largest customers, Safeway and The Kroger Co., in support of the Acquisition.

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[5] *United States v. Baker Hughes, Inc.*, 731 F. Supp. 3, 12 (D.D.C.) ("[v]ery few customers . . . have turned up by the government's thorough investigation who are willing to express any objections to this acquisition"), *aff'd*, 908 F.2d 989 (D.C. Cir. 1990); *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285, 1299 (W.D. Mich. 1996) ("the FTC has turned up remarkably little . . . opposition"), *aff'd*, 121 F.3d 708 (6th Cir. 1997); *FTC v. Great Lakes Chem. Corp.*, 528 F. Supp. 84, 95 (N.D. Ill. 1981) (denying a preliminary injunction where "buyers see only procompetitive benefits from the proposed acquisition and urge that it be permitted") (citation omitted).

> Neither retailer has seen any decrease in competitive activity in the [Ready-to-Eat ("RTE")] cereal industry since Post acquired the former Nabisco RTE cereal assets . . . . They testified that trade dealing, couponing, and price competition between RTE cereal manufacturers have increased since 1992 . . . .
>
> These retailers testified that they believe that Post's acquisition of Nabisco cereals will not harm them in any way. . . . They do not expect the acquisition to facilitate collusion in the RTE cereal industry or to give Post any power to increase the price of RTE cereals.

Kraft, 926 F. Supp. at 351. In light of the evidence before it, the District Court did not abuse its discretion in denying an injunction in this case.

II. SECTION 7 CONTEMPLATES A COMPREHENSIVE, TOTALITY OF THE CIRCUMSTANCES APPROACH TO MERGER ANALYSIS

On appeal, the government argues that the District Court should have considered nothing beyond concentration statistics, potential entry into the market, and whether the acquired firm would likely fail without the merger. The FTC's argument misapprehends established antitrust law and overemphasizes the significance of concentration. The Supreme Court has directed courts to evaluate "demonstrable economic effects" rather than engage in "formalistic line drawing," in deciding antitrust cases. *See Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 58 (1977). Following this guidance, Judge Robertson found that concentration statistics "inaccurately predict[] the merger's probable effect" and that the merger's only demonstrable economic effect was "more intense competition" against Gerber, the leading brand in the market. 116 F. Supp. 2d at 198-99. This is precisely the fact-intensive, careful inquiry that is contemplated by the case law and is carried out in day-to-day practice by the federal district courts adjudicating government claims under Section 7.

A. The District Court Correctly Engaged in a Comprehensive, Totality-of-the-Circumstances Analysis

Section 7 prohibits mergers and acquisitions that substantially lessen competition. Congress specifically rejected the test the FTC now urges by refusing to "adopt a definition of the word 'substantially,' whether in quantitative terms of sales or assets or market shares or in designated qualitative terms." *Brown Shoe*, 370 U.S. at 319 (the legislative history "reflects a conscious avoidance of exclusively mathematical tests"). By not defining Section 7's key operative terms, Congress vested courts with broad responsibility to determine which mergers pose unacceptable competitive hazards on a case-by-case basis.[6] The open texture of the antitrust laws

6 *See, e.g., United States v. Archer-Daniels-Midland Co.*, 584 F. Supp. 1134 (S.D. Iowa 1984) ("Congress was painting with a broad brush when it prohibited [mergers that tend] substantially to lessen competition. The language was deliberately couched in general and flexible terms. Its vague contours are characteristic of the antitrust statutes. It is a judicial responsibility to contribute to the fashioning of a coherent body of substantive law out of the Congressional policy and language."); *cf. Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1988) (the term "restraint of trade . . . invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890"); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978) (Congress "expected the

authorize courts to interpret them in the common law tradition, by "recognizing and adapting to changed circumstances and the lessons of accumulated experience." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1999).

The importance of Section 7's deliberately evolutionary quality, which envisions reassessment and refinement of doctrine as economic conditions and learning change, is exemplified by courts' treatment of concentration statistics. While early merger cases tended to focus chiefly on market shares, the Supreme Court "cut [those cases] back sharply," as economic learning undermined their "theoretical underpinnings."[7] *See id.* at 21; *Baker Hughes*, 908 F.2d at 990. As a result, courts now "reject" the argument that "horizontal mergers are unlawful without regard to competitive effect." *United States v. Rockford Mem'l Corp.*, 898 F.2d 1278, 1283

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courts to give shape to the [antitrust laws'] broad mandate by drawing on common-law tradition").

[7] The initial emphasis on concentration statistics was principally due to acceptance of two now-widely discredited propositions. *First*, early decisions suggested that preservation of small competitors was an end unto itself. Courts soon recognized, however, the cost to consumer welfare from this approach far outweighed its benefits. *Second*, early decisions suggested that concentration necessarily yields express or tacit collusion. But courts soon recognized that other factors can prevent collusion and that mergers can sometimes reduce the likelihood of collusion. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) (explaining the difficulties of colluding); 4 Areeda & Hovenkamp, *Antitrust Law* ¶ 927 ("efficiency-creating mergers [among weaker rivals] would create additional firms capable of lowering price and expanding out profitably and thus increase the likelihood of departures from oligopoly pricing.")

(7th Cir. 1990) (Posner, J.). Instead, they require a direct examination of competitive effects, even at the preliminary stages under Section 13(b). Where defendants show that "high market concentration . . . does not correlate positively with higher prices," they have "demonstrated good reason to question the applicability of the traditional presumption that a significant increase in market concentration will lead to higher prices in connection with the merger . . . ." *Butterworth Health Corp.*, 946 F. Supp. at 1295.

In *General Dynamics*, the Supreme Court recognized that market shares and market concentration are not necessarily dispositive in assessing competitive effects. 415 U.S. at 498. In *Baker Hughes*, this Court acknowledged the evolution of merger analysis away from sole reliance on market shares and concentration statistics to a broad "totality of the circumstances [assessment], weighing a variety of factors to determine the effects of a particular transaction." *Baker Hughes*, 908 F.2d at 984; *see also Kaiser Aluminum & Chem. Corp. v. FTC*, 652 F.2d 1324, 1340 & n.12 (7th Cir. 1981). As the *Baker Hughes* Court stated: "*General Dynamics* began a line of decisions differing markedly in emphasis from the Court's antitrust cases of the

1960s. Instead of accepting a firm's market share as virtually conclusive proof of market power, the Court carefully analyzed defendants' rebuttal evidence."[8]

Baker Hughes recognized that, in the wake of this evolution, concentration statistics are no more than "a convenient starting point for a broader inquiry in future competitiveness." *Id.* at 984. Indeed, it is "hornbook law" that a defendant "can rebut a prima facie case" through "a variety of factors." *Id.* at 985. Moreover, a defendant has wide latitude in rebutting the prima facie case, and can do so either "by affirmatively showing why a given transaction is unlikely to substantially lessen competition, or by discrediting the data underlying the initial presumption in the government's favor." *Id.* at 991.

Fundamentally, *Baker Hughes* establishes a procedure that "allows both sides to make competing predictions about a transaction's effects," and requires the district court to choose between them based on the record. *Id.* at 991. Each side is given a fair chance to present evidence, and the government can only win if its "case satisf[ies] some minimum threshold of persuasiveness and [is] better than the defendant's case." *Rockford Mem'l Corp.*, 898 F.2d at 1286.

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[8] *See also FTC v. Nat'l Tea Co.*, 603 F.2d 694, 700 (8th Cir. 1979) ("In *General Dynamics*, the Court simply recognized that while market share is an important indicator of a firm's future competitive strength, other factors may discount its significance.").

The District Court's careful examination of the record reflected a sure grasp of the realities of the baby food market. After holding a five day hearing, absorbing testimony from multiple fact and expert witnesses, and reviewing numerous exhibits and extensive briefing, Judge Robertson correctly perceived the competitive dynamics of the industry. Both sides presented their views as to the merger's effect on the market. In holding that the merger "will actually increase competition," Judge Robertson found that the defendants' view of the post-merger world most accurately reflects true market realities.[9] 116 F. Supp. 2d at 200.

B. Horizontal Mergers are Properly Examined Under the Same Analytical Framework Regardless of Concentration Levels

The FTC argues that approving the Heinz/Beech-Nut merger would constitute an unprecedented development in modern antitrust policy. In mapping the terrain of merger control, the Commission delimits a forbidden zone that it labels "mergers to duopoly." The Commission suggests that no sensible conception of antitrust policy, except perhaps in the case of failing firms, could ever permit business managers to enter this prohibited sector.

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9 This finding cannot seriously be challenged on review, since "the clearly erroneous rule . . . applies to ultimate as well as underlying facts, including economic judgments." *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1385 (7th Cir. 1986).

Economic logic and modern federal enforcement practice belie the Commission's arguments. Merger jurisprudence and enforcement policy since the early 1970s have reduced the federal antitrust enforcement agencies' reliance on concentration data to inform the core task of merger analysis -- predicting future competitive effects. The de-emphasis of structural criteria reflects the awareness of courts and enforcement agencies that using a wider array of diagnostic tools often increases the accuracy of the predictive process.

By adopting a richer analytical methodology, the enforcement agencies have approved a number of transactions that the application of simple, structural models would have forbidden. By taking careful account of specific industry circumstances, the U.S. merger control system has permitted a number of mergers that combined the assets of two of the three participants in a relevant market. The following examples are illustrative.

1. <u>Commercial Aircraft: *Boeing-McDonnell Douglas*</u>

In July 1997, the FTC permitted the Boeing Company to acquire the McDonnell Douglas Corporation ("MDC").[10] The FTC imposed no conditions on the merger, which combined two of the world's three producers of large commercial airliners. Boeing's share of current sales was roughly 64 percent, and MDC's share

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[10] *Acquisitions-Boeing,* 5 Trade Reg. Rep. (CCH) ¶ 24,295 (FTC July 1, 1997).

was 6 percent. Airbus accounted for the remaining 30 percent. In explaining its decision not to prosecute, the FTC noted that the acquired firm (MDC) was not a failing company, the market featured "extremely high barriers to entry," and there was "only one other significant rival" (Airbus).[11] The FTC allowed the merger to proceed because it concluded that MDC had lost the ability to compete effectively for future sales.

In subsequent presentations, FTC officials have said the Commission's decision involved the routine application of the principle of *General Dynamics,* and that the merger was not a matter of reducing the number of players from "three to two" but, in light of MDC's diminishing capability, involved a move from "two to two."[12] In seeking to persuade the European Union not to interfere with the merger,

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[11] Statement of Chairman Robert Pitofsky and Comm'rs Janet D. Steiger, Roscoe B. Starek III and Christine A. Varney in the Matter of The Boeing Company/McDonnell Douglas Corporation, File No. 971-0051 (July 1, 1997) <http://www.ftc.gov/opa/1997/9707/boeingsta.htm>.

[12] *See* Robert Pitofsky, Staples and Boeing: *What They Say About Merger Enforcement at the FTC* (Sept. 23, 1997) (explaining role of *General Dynamics* to FTC's decision in *Boeing*; stating that "[i]n a sense the merger did not reduce existing players from three to two; rather the market already consisted of only two significant players") <http://www.ftc.gov/speeches/pitofsky/staplesspc.htm>.

The Boeing/McDonnell Douglas merger exemplifies the reasons why mere increases in concentration do not warrant automatic condemnation of mergers. In many markets, competition now occurs between a small number of highly specialized firms uniquely capable of meeting consumers' demand. In these markets, mergers representatives of the U.S. government (including the assistant attorney general for antitrust) told the European competition authorities that the merger would generate important efficiencies by preventing the exploitation of existing MDC customers in the aftermarket for parts and service for MDC commercial airliners.[13]

Several features of the U.S. deliberations over the Boeing-McDonnell Douglas merger stand out. The FTC permitted the industry's dominant firm to acquire one of the two remaining participants in a sector characterized by high entry barriers. The decision not to prosecute depended significantly upon perceptions of customers about the transaction's likely competitive effects.[14] The FTC majority, despite a strenuous dissent by one commissioner, concluded that, as in *General Dynamics*, shares of current sales overstated the acquired firm's competitive capability. Instead of a move

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that increase concentration can create more effective competitors and result in lower prices. In Boeing/McDonnell Douglas, MDC, although the third largest manufacturer, was not an effective competitor in the commercial aircraft market. By combining with Boeing, MDC's commercial assets were put to better use, which enabled Boeing/McDonnell Douglas to better compete against Airbus.

13 Commission Decision of 30 July 1997 declaring a concentration compatible with the Common Market and the functioning of the EEA Agreement (Case No. IV/M.877-Boeing/McDonnell Douglas), 1997 O.J. (L 336) 10, ¶ 12.

14 *See* Pitofsky, Boeing and Staples, *supra* note 12 (citing the "virtually unanimous testimony of about 40 purchasers of aircraft that Douglas' prospects for future aircraft sales were close to zero.").

from three firms to two firms, the FTC viewed the merger as yielding no change in the competitive status quo.

The District Court's decision in the instant case used the same type of discriminating inquiry that led the FTC majority to allow Boeing to buy MDC with no restrictions. To some extent, Judge Robertson relied on different qualitative variables. Like the FTC in *Boeing*, however, the judge focused carefully on non-market share factors and relied on the testimony of affected customers to predict the merger's competitive effect. Both the FTC in *Boeing* and Judge Robertson in this case refused to be trapped in an analytical framework that emphasized concentration and entry conditions to the exclusion of all other informative variables. The FTC said the Boeing merger was a merger of two to two, not three to two. Judge Robertson, in effect, concluded that the Heinz merger at worst involves a merger from two to two, and likely means moving from one to two. There is no reason to believe that the trial court's competitive effects inquiry is any less precise or well-informed than the FTC's ultimate judgment in the Boeing case.

2. **<u>Branded Butter: *Dairy Farmers of America*</u>**

In *United States v. Dairy Farmers of America*, the Justice Department permitted the merger of two of three significant producers of branded butter supplying retailers in the greater New York and Philadelphia metropolitan areas.[15] Under the Capper-Volstead Act, 7 U.S.C. § 291, firms that qualify as agricultural cooperatives are allowed to "federate," i.e., jointly price and market, without fear of antitrust challenge. The merger eliminated the only producer of branded butter not covered by the Act. Accordingly, the government was concerned that the two remaining producers would be able to collude without fear of antitrust prosecution.[16] Those concerns were resolved when the parties agreed to a consent decree that prevented Dairy Farmers from, among other things, exercising its Capper-Volstead rights. *Id.* No divestiture was required and thus, a consolidation from three firms to two was allowed to proceed.

3. Defense Industry Mergers

In a number of instances since 1990, the federal antitrust agencies have permitted mergers to duopoly among defense suppliers. All of the relevant market segments have featured high entry barriers. The federal antitrust authorities have permitted mergers to duopoly in defense industry segments involving medium-to-

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15 *See* Verified Compl. at 2, Civ. Action No. 00-1663 (E.D. Pa. Mar. 31, 2000).

16 U.S. Dep't of Justice Press Release, *Justice Department Resolves Lawsuit Against Dairy Farmers of America, Inc. and SODIAAL North America Corporation* (May 18, 2000).

heavy expendable space launch vehicles,[17] reconnaissance satellites,[18] and military tracked vehicles.[19] The antitrust agencies also have permitted a dramatic process of consolidation in the market for the production of air-to-air missiles, first a merger to duopoly and then a merger to monopoly.[20]

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17 A series of mergers have resulted in only two remaining firms: Boeing and Lockheed Martin. The most significant events included Martin Marietta's purchase of the Space Systems Division of General Dynamics, Lockheed's merger with Martin Marietta, and Boeing's purchase of McDonnell Douglas. *See In re Martin Marietta Corp.*, 1994 FTC LEXIS 109 (June 22, 1994) (consent order allowing Martin Marietta to acquire the General Dynamics Space Systems Division); *In re Lockheed Corp.*, 1995 FTC LEXIS 447 (May 9, 1995) (consent order allowing merger between Lockheed and Martin Marietta). The FTC took no action in the Boeing-McDonnell Douglas transaction.

18 Consolidation has left only two firms, Boeing and Lockheed Martin. Significant events include Martin Marietta's acquisition of the aerospace assets of General Electric, Lockheed's merger with Martin Marietta, Boeing's purchase of the aerospace assets of Rockwell, and Boeing's purchase of the satellite assets of Hughes. The government took no action in the Martin Marietta-General Electric merger. The FTC allowed the combination of the assets in question subject to consent orders in the Lockheed-Martin Marietta merger, *see In re Lockheed Corp., supra*; in the Boeing-Rockwell merger, *see In re Boeing Co.*, 1997 FTC LEXIS 64 (Mar. 5, 1997); and in the Boeing-Hughes merger, *see In re Boeing Co.*, File No. 001 0092 (Sept. 27, 2000) (proposed consent order), <http://www.ftc.gov/os/2000/09/boeingdo.htm>.

19 In 1994, FMC and Harsco Corp. formed a joint venture, United Defense LP, to produce combat tracked vehicles. The joint venture partners sold United Defense to the Carlyle Group in 1997. General Dynamics and United Defense today are the only U.S. producers of combat tracked vehicles. The federal antitrust agencies took no action concerning these transactions.

20 In 1992, Hughes Aircraft bought the Missiles Division of General Dynamics and reduced from three to two the number of U.S. producers of air-to-air missiles. The federal antitrust agencies took no action in this matter. In 1997, Raytheon

In a number of the three-to-two or two-to-one transactions that gained federal antitrust approval, the government accepted settlements designed to cure perceived competitive problems. In the same period, the government also challenged defense industry mergers in highly concentrated defense sectors.[21] What is apparent in the government's enforcement policy is a refusal to rely upon an inflexible rule that renders mergers to duopoly – or even monopoly – unthinkable. Instead, the federal antitrust agencies have made discriminating assessments of each transaction based on a careful analysis of the industry context and the views of the Department of Defense, the main purchaser of weapon systems. A policy that absolutely forbade mergers to duopoly (or even to monopoly) would have barred many of the transactions that the enforcement authorities have permitted. This pattern of activity underscores the importance of careful, context-based evaluation of the competitive effects of each transaction – exactly the approach that Judge Robertson used in the instant case.

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purchased Hughes, reducing to one the number of firms producing air-to-air missiles. The Justice Department permitted the merger to monopoly subject to a consent decree. *See* Robert Kramer, *Antitrust Considerations in International Defense Mergers* 2-3 (May 4, 1999) (speech by the Chief, Litigation II Section, Antitrust Div., Department of Justice) <http://www.usdoj.gov/atr/public/speeches/2649.htm>.

[21] *See* William E. Kovacic, *Competition Policy in the Postconsolidation Defense Industry*, 41 Antitrust Bull. 421 (Summer 1999) (describing U.S. government efforts to block mergers between Olin and Alliant Techsystems and between Lockheed Martin and Northrop Grumman).

4. <u>Greeting Cards: *American Greetings*</u>

The Justice Department recently cleared a merger of American Greetings Corp. and Gibson Greetings Inc., two of the three major branded producers of greeting cards. Although the Department did not publicly explain its reasoning in allowing the merger to proceed, American Greetings executive vice president Jeffrey Petit indicated that the merger would allow American to "increase the distribution of our products into more retail channels and better compete in the marketplace." Marcia Pledger, *American Greetings Gets OK From FTC to Buy Competitor*, Plain Dealer, Mar. 2, 2000, at 2c. The merged entity has also been touted as a stronger number two competitor to industry leader Hallmark. *Id.*

5. <u>Summary</u>

In this case, the FTC suggests that mergers to duopoly are a competitive abyss. To avoid the abyss, the Commission proposes that District Courts navigate with simple structural instruments that mainly measure concentration and entry conditions. Modern merger control experience shows that the "abyss" can be traversed safely, and competitive dangers avoided, by the use of more sophisticated navigational tools. By relying on a diverse collection of reliable navigational tools, Judge Robertson reached the proper destination.

CONCLUSION

Judge Robertson properly engaged in a comprehensive, totality-of-the circumstances analysis of the Heinz/Beech-Nut merger, recognizing that unique market realities govern the baby food market. The resulting finding that the merger will "more likely than not" lead to "more intense competition" is well-supported in the record. The court appropriately considered the evidence concerning the lack of existing competition today and the potential for substantial, "merger-specific and cognizable" efficiencies that will give rise to undisputed "immediate and virtually automatic" consumer benefits. 116 F.2d at 199. In deciding that the FTC's purely "structural case" is an "inaccurate predictor" of the merger's competitive effect, Judge Robertson was well within his discretion in denying the FTC's motion for a preliminary injunction.

For the foregoing reasons, the decision of the District Court should be affirmed.

Respectfully submitted,

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Dated: December 29, 2000

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(A)(7)(c) AS TO WORD COUNT

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the Brief of Amici Grocery Manufacturers of America, Inc., National Association of Manufacturers, and The Manufacturers Alliance/MAPI Inc. proportionally spaced, has a typeface of 14 points, and contains 6,841 words.

JAMES H. SKILES

CERTIFICATE OF SERVICE

I hereby certify that, on this 29th day of December, 2000, I served two copies of the foregoing Brief of Amici Grocery Manufacturers of America, Inc., National Association of Manufacturers, and The Manufacturers Alliance/MAPI Inc. on the following by hand delivery:

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Amici Grocery Manufacturers of America, Inc., the National Association of Manufacturers, and the Manufacturers Alliance/MAPI, Inc., hereby certify that the filing of a separate brief on their behalf is necessary to provide the Court with unique perspectives on issues relating to mergers and acquisitions in manufacturing industries in general, and in the grocery products manufacturing industry in particular, and to adequately represent their interests in ensuring proper enforcement of the antitrust laws in manufacturing industry cases. Amici's experience and perspectives are unique, and will not adequately be represented by the parties or other amici curiae.

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