

SCHEDULED FOR ORAL ARGUMENT ON FEBRUARY 12, 2001

No. 00-5362

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

FEDERAL TRADE COMMISSION,
Appellant,

v.

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

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

**BRIEF OF AMICUS CURIAE
CITIZENS FOR A SOUND ECONOMY FOUNDATION
IN SUPPORT OF APPELLEES**

C. Boyden Gray
William J. Kolasky
Jeffrey D. Ayer
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

Robert H. Bork*
1150 Seventeenth Street, N.W.
Washington, DC 20036
(202) 862-5851

* counsel of record

Attorneys for Amicus Curiae
Citizens for a Sound Economy Foundation

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:

Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

H.J. Heinz Company
600 Grant Street
Pittsburgh, PA 15219

Milnot Holding Corporation
100 South Fourth Street
St. Louis, MO 63102

Amici States
National Association of Attorneys General
750 First Street, N.E.
Suite 1100
Washington, DC 20002

Amicus Citizens for a Sound Economy Foundation
1250 H Street, N.W.
Suite 700
Washington, DC 20005

B. Rulings under review

References to the rulings at issue in the present appeal are as follows:

FTC v. H.J. Heinz Co., No. 00CV01688 (JR) (D.D.C. Oct. 18, 2000)

(Robertson, J.) (order denying appellant's motion for preliminary injunction).

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 CORPORATE DISCLOSURE STATEMENT

Citizens for a Sound Economy Foundation (CSEF) is a non-profit, grassroots organization devoted to educating the public about the benefits of the free-market system and a less intrusive government. As a non-profit, no one has stock or ownership interests in it. Consequently, it is neither a privately nor publicly held company. CSEF has no parent organization.

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES	i
RULE 26.1 CORPORATE DISCLOSURE STATEMENT	iii
TABLE OF AUTHORITIES	v
INTEREST OF AMICUS CURIAE	1
STATEMENT OF CASE AND FACTS	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. Section 7 of the Clayton Act mandates a comprehensive, totality-of-the-circumstances inquiry regarding the competitive effects of a proposed merger, both at the preliminary-injunction and at the permanent-injunction stage	3
A. The Supreme Court and this Court have interpreted §7 to require a comprehensive, totality-of-the-circumstances inquiry	3
B. In a preliminary-injunction proceeding under §13(b) of the FTC Act, just as in a full permanent-injunction proceeding, a reviewing court should engage in the same totality-of-the-circumstances inquiry	9
II. Under §7 of the Clayton Act, a merger to duopoly that allows two smaller firms to compete more effectively against a dominant firm should be upheld	14
CONCLUSION	19

TABLE OF AUTHORITIES

CASES

	<u>PAGE</u>
<i>Brown Shoe Co. v. United States</i> , 370 U.S. 294 (1962)	4, 17
<i>Doran v. Salem Inn, Inc.</i> , 422 U.S. 922 (1975)	9
<i>FTC v. Cardinal Health, Inc.</i> , 12 F. Supp. 2d 34 (D.D.C. 1998)	12
* <i>FTC v. PPG Indus., Inc.</i> , 798 F.2d 1500 (D.C. Cir. 1986)	<i>passim</i>
<i>FTC v. Staples, Inc.</i> , 970 F. Supp. 1066 (D.D.C. 1997)	12
<i>FTC v. Swedish Match</i> , ___ F. Supp. 2d ___, Civ. No. 00-1501 (TFH) (D.D.C. Dec. 14, 2000)	12
<i>United States v. Aluminum Co. of Am.</i> , 377 U.S. 271 (1964)	4
* <i>United States v. Baker Hughes Inc.</i> , 908 F.2d 981 (D.C. Cir. 1990)	<i>passim</i>
* <i>United States v. General Dynamics Corp.</i> , 415 U.S. 486 (1974)	<i>passim</i>
<i>United States v. Philadelphia Nat'l Bank</i> , 374 U.S. 321 (1963)	4, 17
<i>United States v. Von's Grocery Co.</i> , 384 U.S. 270 (1966)	4

STATUTES

	<u>PAGE</u>
*15 U.S.C. §18 (Clayton Act §7)	<i>passim</i>
*15 U.S.C. §53(b)(2) (FTC Act §13(b))	<i>passim</i>

Fed. R. Civ. P. 52(a) 7

MISCELLANEOUS

	<u>PAGE</u>
Robert H. Bork, <i>The Antitrust Paradox</i> (revised ed. 1993)	16
95 Cong. Rec. 11,488 (1949) (statement of Rep. Celler)	17
Hearing on H.R. 2734 Before a Subcomm. of the Comm. on the Judiciary, 81st Cong. 6 (1950) (statement of Sen. O'Connor)	17
David Segal, <i>Wrestling for Glory in the Antitrust Arena</i> , Wash. Post, June 12, 1998, at F1	14
<i>Staples Inc.: Company and Office Depot Call Off Plan to Combine</i> , Wall St. J., July 3, 1997, at B4	13

INTEREST OF AMICUS CURIAE

Citizens for a Sound Economy Foundation (CSEF) is a non-profit, grassroots organization devoted to educating the public about the benefits of the free-market system and a less intrusive government. CSEF's members are hundreds of thousands of everyday citizens who are committed to improving the well-being of American consumers through common-sense economic policies. CSEF believes that a strong and vibrant free-market economic system offers the best hope for creating opportunity and improving the quality of life of every American.

The issues at stake in this case — particularly the standards used to govern the review of horizontal mergers under §7 of the Clayton Act and §13(b) of the FTC Act — are of direct concern to CSEF and its members. The FTC's proposed interpretations of the Clayton Act and FTC Act would effectively prohibit companies from entering into some mergers that would directly benefit American consumers. Because of the importance of these issues, CSEF submits this brief to assist the Court in its resolution of this case.

STATEMENT OF CASE AND FACTS

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

SUMMARY OF ARGUMENT

The FTC advances two important propositions in this appeal: first, that review of a merger at the preliminary-injunction stage is qualitatively different from review of a merger at the permanent-injunction stage, and second, that a merger to duopoly should be enjoined even where that merger would allow two smaller firms to compete more effectively against a dominant firm. Both points are fundamentally wrong.

First, §7 of the Clayton Act mandates a comprehensive, totality-of-the-circumstances inquiry regarding the competitive effects of a proposed merger. Since the Supreme Court's decision in *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), the federal courts, including this Court in *United States v. Baker Hughes Inc.*, 908 F.2d 981 (D.C. Cir. 1990), have repeatedly emphasized that the §7 inquiry requires consideration of all of the potential procompetitive *and* anticompetitive effects of a proposed merger.

The mere fact that a proposed merger is being reviewed at the preliminary-injunction stage does not alter the standard a court should use in evaluating the merger. In a preliminary-injunction proceeding under §13(b) of the FTC Act, just as in a full permanent-injunction proceeding, a reviewing court must engage in the totality-of-the-circumstances inquiry mandated by *General Dynamics* and *Baker Hughes*. The FTC's proposed rule for §13(b) proceedings — that a preliminary

injunction against a merger is required upon a showing of high market shares and high barriers to entry and in the absence of a "failing firm" defense — is unsupported by the text of the statute, case law, or sound antitrust policy.

Second, the FTC is wrong to suggest that a merger to duopoly should be enjoined even where that merger would allow two smaller firms to compete more effectively against a dominant firm. In such cases, oligopolistic conduct is unlikely to occur, and the merger therefore will not "substantially . . . lessen competition" in the relevant market. On the contrary, the merger will enhance competition by creating a viable competitor to the dominant firm.

ARGUMENT

- I. Section 7 of the Clayton Act mandates a comprehensive, totality-of-the-circumstances inquiry regarding the competitive effects of a**

market after the merger and their prospective market shares. Both this Court and the Supreme Court, however, have held that §7 mandates a broad totality-of-the-circumstances inquiry into all of the proffered procompetitive and anticompetitive effects of a proposed merger. That settled law should be reaffirmed here.

It is true that, in a series of decisions in the 1960s, the Supreme Court seemed to suggest that the government could prevail on a §7 claim simply by demonstrating that the merged firm would have more than a negligible market share (as the FTC argues here). *See, e.g., Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); *United States v. Aluminum Co. of Am.*, 377 U.S. 271 (1964); *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966).

In *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), however, the Court "cut . . . back sharply" on its earlier §7 precedents and abandoned the approach under which statistics alone could essentially condemn a merger. *See United States v. Baker Hughes Inc.*, 908 F.2d 981, 990 (D.C. Cir. 1990) (thus characterizing *General Dynamics*). The Court in *General Dynamics* upheld a merger in the coal-mining industry that resulted in the top two firms controlling almost 53% of a relevant market. *See General Dynamics*, 415 U.S. at 494 n.5. The Court conceded that "the statistical showing proffered by the Government in this case, the

accuracy of which was not . . . contested by the [merging firms], would . . . have sufficed to support a finding of 'undue concentration' *in the absence of other considerations.*" *Id.* at 497-98 (emphasis added). Nevertheless, the Court, adopting a totality-of-the-circumstances approach to the statute, concluded that the merger would not have caused the requisite substantial lessening of competition under §7. In reaching its conclusion, the Court relied on four factual findings made by the trial court: that the trend toward consolidation in the coal industry was misleading because it was largely attributable to changes in demand, that the merging companies were complementary in nature, that the merging companies were only rarely competitors, and that one company's coal reserves were so low that its potential to compete in the future was far lower than current market-share statistics would indicate. *See id.* at 492-93. On the basis of these subsidiary findings, the Court upheld the trial court's "ultimate finding" that the merger would result in no substantial lessening of competition. *Id.* at 498.

In *United States v. Baker Hughes Inc.*, 908 F.2d 981 (D.C. Cir. 1990), this Court embraced the *General Dynamics* methodology and elaborated on its application. The case involved a challenge by the Antitrust Division to a merger between two firms that manufactured and sold hardrock hydraulic underground drilling rigs. The merger, which reduced the number of the firms in the market from

four to three, produced a firm with a market share of approximately 58%. *See id.* at 983 n.3.

The Court began by noting that "[t]he basic outline of a section 7 horizontal acquisition case is familiar." *Id.* at 982. First, the government must show that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area, which gives rise to a presumption that the transaction will substantially lessen competition. *See id.* Second, in order to rebut that presumption, the merging firms must present evidence that the transaction will increase competition. *See id.* (citing, *inter alia*, *General Dynamics*, 415 U.S. at 496-504). Third, the government must carry the ultimate burden of persuasion by proving that the anticompetitive effects of the merger would substantially outweigh the procompetitive effects. *See id.*

There was no real doubt in *Baker Hughes* that the government had successfully carried its initial burden of demonstrating that the merger would significantly increase concentration in the hydraulic-rigs market. *See id.* at 983. The district court, however, found that the merging firms had rebutted the government's prima facie showing by demonstrating, first, that market-share statistics in the hydraulic-rigs market were "volatile and shifting" because the market was so small, and second, that consumers of hydraulic rigs were sufficiently sophisticated that competition would

exist even in a highly concentrated market. *See id.* at 986. The district court ultimately found that the government had failed to prove that the merger's procompetitive effects would be substantially outweighed by its anticompetitive effects. *See id.*

This Court affirmed. The Court made clear that it would assess the district court's findings by applying the "clearly erroneous" standard of Fed. R. Civ. P. 52(a). *See id.* at 987. Moreover, the Court rejected the government's legal argument that merging firms could rebut the government's prima facie showing only by demonstrating that there would be quick and effective entry by competitors. *See id.* at 984. The Court pointed out that, in *General Dynamics* itself, the Supreme Court emphasized "the comprehensive nature of a section 7 inquiry" and relied on a variety of non-entry factors in concluding that the defendants had rebutted the government's prima facie case. *Id.* This Court further noted that in the wake of *General Dynamics*, several lower courts had relied on non-entry factors in concluding that merging firms had rebutted the presumption of reduced competition. *See id.* The Court also cited a number of antitrust treatises, and even the Department of Justice's own Merger Guidelines, that listed factors other than ease of entry (including efficiencies) that could be used in rebuttal. *See id.* at 985-86.

The Court then considered, and rejected, the government's alternative argument that merging firms should be required to make a "clear showing" that the merger was not likely to substantially lessen competition in order to rebut the government's prima facie case. Although the Court conceded that the Supreme Court's 1960s cases could be read to support the government's clear-showing rule, it noted that *General Dynamics* "at the very least lightened the evidentiary burden on a section 7 defendant." *Id.* at 991. Moreover, the Court pointed out that a clear-showing rule would improperly shift the ultimate burden of persuasion to the defendants, *see id.*, and would grossly inflate the role of statistics in §7 cases, *see id.* at 992.

In sum, *General Dynamics* and *Baker Hughes* make clear that a reviewing court should examine *all* of the potential competitive effects of a proposed merger before passing on the merger's validity under §7. The district court in this case did precisely that, and properly so.

- B. In a preliminary-injunction proceeding under §13(b) of the FTC Act, just as in a full permanent-injunction proceeding, a reviewing court should engage in the same totality-of-the-circumstances inquiry.**

Section 13(b) of the FTC Act provides that the FTC is entitled to obtain a preliminary 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)(2). The standard outlined in §13(b) largely tracks the traditional standard for obtaining a preliminary injunction, which requires that the plaintiff demonstrate, *inter alia*, a likelihood of success on the merits. *See, e.g., Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975). The FTC contends that it "satisfied all the criteria for obtaining a preliminary injunction in this case" simply by virtue of the fact that "it demonstrated . . . that the merger will lead to further increases in concentration in a market that is already highly concentrated; that high barriers to entry in that market make it unlikely that any anticompetitive effects will readily be undone; and the acquired firm is in no danger of failing," regardless of the other types of evidence that the defendants introduced to rebut the FTC's prima facie case. Br. of Appellant 25. In essence, therefore, the FTC asks this Court to instruct lower courts not to engage in a totality-of-the-circumstances inquiry at the preliminary-injunction stage, but instead to hold that the FTC is automatically

entitled to a preliminary injunction upon a showing of high market shares and high barriers to entry and in the absence of a "failing firm" defense. Nothing in the text of §13(b), however, suggests that the inquiry as to the likelihood of success on the merits should be qualitatively different from the inquiry made at the permanent-injunction stage — particularly when the so-called "preliminary" injunction proceedings occur after extensive discovery and are indistinguishable from a full trial on the merits.

The FTC's novel interpretation of §13(b) — which it appears not to have pressed below — finds no support in the case law and is senseless as a matter of antitrust policy. The only case that the FTC cites in support of its reading is *FTC v. PPG Industries, Inc.*, 798 F.2d 1500 (D.C. Cir. 1986). In that case, this Court considered a §13(b) challenge by the FTC to a merger between the largest and second-largest manufacturers of transparencies for aircraft windshields, which would have produced a firm with a combined market share of approximately 53% — some two-and-a-half times larger than its nearest competitor. *See id.* at 1502-03. After the district court ruled in the FTC's favor, the merging firms contended on appeal that the district court improperly defined the relevant market. *See id.* at 1503. Reviewing the district court's factual findings under the "clearly erroneous" standard, this Court affirmed, upholding the district court's market definition. *See id.* at 1505.

The FTC's argument in this case ultimately turns on a single sentence of the Court's opinion in *PPG*:

The pre-acquisition HHI calculated by the district court shows that the relevant market, as the court defined it, is already "highly concentrated" and the effect of the acquisition would be a dramatic increase in concentration. . . . The district court also found high market-entry barriers that would prolong high market concentration. *There is no doubt that the pre- and post-acquisition HHI's and market shares found in this case entitle the Commission to some preliminary relief.*

PPG, 798 F.2d at 1503 (emphasis added). The FTC now suggests that the italicized sentence stands for the proposition that high market shares are sufficient to establish an entitlement to a preliminary injunction *regardless of any rebutting evidence of procompetitive effects, however compelling*. That is incorrect. The italicized sentence simply reiterates the settled principle that high market shares are sufficient to establish an entitlement to a preliminary injunction *in the absence of any compelling rebutting evidence of procompetitive effects*. Indeed, the flaw in the FTC's reading is underscored by the fact that the *PPG* Court expressly cited *General Dynamics* for the proposition that, in some circumstances, statistics reflecting past market shares do not accurately indicate future market shares. *See id.* at 1504. The Court proceeded to reject the merging firms' argument that the market-share statistics in that case belied the realities of the prospective market, noting that the district court had addressed, and rejected, the same argument and concluding that "we certainly

cannot say that its finding was clearly erroneous." *Id.* Contrary to the FTC's novel reading of the *PPG* opinion, therefore, it is clear that the *PPG* Court did not establish any kind of rule that statistics alone are sufficient to require a preliminary injunction in §13(b) cases.

The FTC's reliance on *PPG* to avoid the holding of *Baker Hughes* is therefore unavailing. What is more, *Baker Hughes* itself demonstrates that the FTC's reading of *PPG* is incorrect. In *Baker Hughes*, the Court noted that "[i]t is a foundation of *section 7 doctrine*, disputed by no authority cited by the government, that evidence on a variety of factors can rebut a prima facie case." 908 F.2d at 984 (emphasis added). In stating this basic principle, the Court did not draw a distinction between §7 cases at the preliminary-injunction stage and §7 cases at the merits stage. It thus comes as no surprise that, in the last three reported opinions in §13(b) cases from the District Court for the District of Columbia, the reviewing judges have expressly engaged in the *Baker Hughes* totality-of-the-circumstances inquiry, not the truncated inquiry pressed here by the FTC. *See FTC v. Swedish Match*, ___ F. Supp. 2d ___, Civ. No. 00-1501 (TFH), slip op. at 27 (D.D.C. Dec. 14, 2000); *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 54 (D.D.C. 1998); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1083 (D.D.C. 1997).

The FTC's proposed rule also makes no sense as a matter of antitrust policy.

First, the FTC's rule would effectively bar defendants from introducing certain types of evidence — such as customer testimony or evidence of merger-specific efficiencies — at the preliminary-injunction stage, even when that evidence was readily available. (Strangely, the FTC's rule would seem to permit defendants to introduce evidence as to entry barriers and the "failing firm" defense; the FTC provides no explanation for this distinction.) As a result, district courts would have to ignore probative evidence of procompetitive effects. Second, the FTC's rule would make it far easier for the FTC to obtain preliminary injunctions and thereby throw mergers into in-house administrative proceedings, a step that often kills off mergers due to the time and cost involved. *See, e.g., Staples Inc.: Company and Office Depot Call Off Plan to Combine*, Wall St. J., July 3, 1997, at B4 (reporting that Staples and Office Depot abandoned merger within 48 hours of issuance of preliminary injunction in §13(b) proceeding). Indeed, the FTC has not identified *a single case* in which merging firms have prevailed at the administrative stage after losing at the preliminary-injunction stage. Finally, the FTC's rule would require different quantum of proof in §7 proceedings depending on whether the FTC or the Antitrust Division of the Department of Justice has decided to pursue the action. It would be arbitrary, and indeed entirely irrational, for the availability of injunctive relief in a §7 proceeding to turn on the identity of the enforcement agency pursuing the action — which is

about as random as the flip of a coin. *See generally* David Segal, *Wrestling for Glory in the Antitrust Arena*, Wash. Post, June 12, 1998, at F1 (noting that FTC and Antitrust Division frequently "squabble over who gets to oversee" antitrust cases and adding that "the lore is that if one agency has recently scored a huge coup, the other is likely to be in a very aggressive mood").

In sum, the FTC's suggestion that the inquiry at the preliminary-injunction stage is somehow *substantively* different — in a manner that wholly redounds to the FTC's favor — is utterly without legal or logical support.

II. Under §7 of the Clayton Act, a merger to duopoly that allows two smaller firms to compete more effectively against a dominant firm should be upheld.

The FTC suggests that this Court should reject appellees' argument that a merger to duopoly would actually increase competition in the baby-food market, reasoning that accepting such an argument would "turn[] Section 7 on its head, by permitting mergers *because* markets *are* concentrated." Br. of Appellant 55. Although it is certainly true that some mergers to duopoly may have anticompetitive effects (and that virtually all such mergers will give rise to a prima facie case), the merger of two smaller firms that will enable them to compete more effectively against a firm that has monopoly or near-monopoly power in the market is not barred by §7,

Where the firm produced by a merger between the two smallest firms in a three-firm market would still be the smaller of the two firms in the new two-firm market, an increase in oligopolistic conduct is unlikely to occur. Oligopolistic conduct — that is, conduct that leads to reduced output and higher prices — can take one of two forms: noncollusive and collusive. As a threshold matter, there is reason to doubt whether any significant noncollusive oligopolistic conduct *ever* occurs in two-firm markets. See Robert H. Bork, *The Antitrust Paradox* 221 (revised ed. 1993). Even if it does, however, both noncollusive and collusive oligopolistic conduct are less likely to occur in cases in which the merged firm will still have a far lower market share than the dominant firm, since the merged firm will be more likely to prefer to build market share at competitive prices than to maintain its current market share at supracompetitive prices, especially if the merged firm has additional incentives to build market share (for example, where, as here, the market is stagnating or declining) and if the merged firm's marginal cost of building market share is low (for example, where, as here, the merged firm has excess capacity).

Both the legislative history of §7 and the case law bear out the common-sense intuition that a reviewing court should allow a merger between two smaller firms that would create a stronger competitor against a dominant firm (more specifically, a firm that was dominant before the merger and that will remain dominant after the merger).

When enacting §7 of the Clayton Act in its present form, members of both the House and Senate specifically noted that a merger between smaller firms can lead to increased competition and is therefore consistent with §7. *See* 95 Cong. Rec. 11,488 (1949) (statement of Rep. Celler) ("[T]here is nothing whatsoever that will prevent those corporations — you call them small corporations — from merging. . . . In the case you have indicated there would be an increase in competition — not a suppression of competition."); Hearing on H.R. 2734 Before a Subcomm. of the Comm. on the Judiciary, 81st Cong. 6 (1950) (statement of Sen. O'Connor) ("Obviously, those mergers which enable small companies to compete more effectively with giant corporations generally do not reduce competition but rather intensify it. . . . Congress has made it abundantly clear that it is not the purpose of this law to prevent mergers of this type."). Moreover, even in its most pro-government §7 opinions from the 1960s, the Supreme Court recognized that §7 "would not impede, for example, a merger between two small companies to enable the combination to compete more effectively with larger corporations dominating the relevant market." *Brown Shoe*, 370 U.S. at 319; *accord Philadelphia Nat'l Bank*, 374 U.S. at 370-71.

In sum, in cases such as this one involving the merger of two smaller firms in order to compete more effectively against a dominant firm, mergers from three firms

to two are unlikely to lead to decreased competition through oligopolistic conduct, and in fact are more likely to lead to increased competition through a reduction in monopolistic or near-monopolistic behavior. In any event, there is certainly no basis in such a circumstance to conclude that the merger is likely *substantially to lessen* competition, as is required under §7. Especially where, as here, the merging firms in such a case have introduced additional, unrebutted evidence of procompetitive effects (including evidence of structural barriers to oligopolistic conduct), a reviewing court should find that the firms have rebutted the government's prima facie case, and therefore uphold the merger.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted.

C. Boyden Gray
William J. Kolasky
Jeffrey D. Ayer
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000



Robert H. Bork*
1150 Seventeenth Street, N.W.
Washington, DC 20036
(202) 862-5851

* counsel of record

Attorneys for Amicus Curiae
Citizens for a Sound Economy Foundation

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 Amicus Curiae Citizens for a Sound Economy Foundation is proportionally spaced, has a typeface of 14 points, and contains 4,037 words.



Jeffrey D. Ayer

CERTIFICATE OF SERVICE

I hereby certify that, on this 29th day of December, 2000, I served two copies of the foregoing Brief of Amicus Curiae Citizens for a Sound Economy Foundation on the following by hand delivery:

David C. Shonka, Esq.
Federal Trade Commission
500 Pennsylvania Avenue, N.W.
Washington, DC 20580
Attorney for Appellant Federal Trade Commission

Edward R. Henneberry, Esq.
Howrey Simon Arnold & White, LLP
1299 Pennsylvania Avenue, N.W.
Washington, DC 20004
Attorney for Appellee H.J Heinz Company

Mark Kovner, Esq.
Kirkland & Ellis
655 Fifteenth Street, N.W.
Washington, DC 20005
Attorney for Appellee Milnot Holding Corporation

Ellen S. Cooper, Esq.
Assistant Attorney General of Maryland
200 St. Paul Place
Baltimore, MD 21202
Attorney for Amici States



Jeffrey D. Ayer