UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, Plaintiff,	)	**FILED UNDER SEAL**
v.	)	Civ. No. 1:00CV01688 (JR)
H.J. HEINZ COMPANY, *et al.*, Defendants.	)	

POST TRIAL MEMORANDUM IN SUPPORT OF THE FEDERAL TRADE COMMISSION'S MOTION FOR PRELIMINARY INJUNCTION

DEBRA A. VALENTINE
General Counsel

RICHARD G. PARKER
Director, Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

RICHARD DAGEN
DAVID SHONKA
DAVID BALTO

Attorneys
Federal Trade Commission
Washington, D.C. 20580
(202) 326-2628

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INTRODUCTION AND SUMMARY

The central issue presented by this merger can be simply stated: Is the proposed baby food duopoly, with two firms controlling 98 percent of the market, likely to be more competitive than the present three-firm structure, which the Third Circuit recently concluded is "highly competitive"?[1] The law presumes that it will not, and the evidence presented by the Federal Trade Commission demonstrates that the presumption is correct. It is well established that when a merger results in undue concentration in the market, it "must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1962).

Millions of parents rely on prepared baby food for their infants and toddlers. The U.S. market for prepared baby food is $800 million, over 75 percent of which is jarred baby food. The issues raised by this merger deserve full consideration by the FTC in an administrative proceeding. Preliminary injunctive relief pursuant to Section 13(b) of the FTC Act is fully warranted to protect the public interest until that proceeding is completed.[2] Consumers deserve no less.

The unrefuted – and often unchallenged – evidence demonstrates that this merger poses serious and substantial risks to competition. The defendants do not contest much of that

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[1] *In re Baby Food Antitrust Litigation*, 166 F.3d 112, 126 (3d Cir. 1999).

[2] 15 U.S.C. § 53(b). Under Section 13(b), the Court's "task is not to make a final determination on whether the proposed [acquisition] violates Section 7, but rather to make only a preliminary assessment of the [acquisition]'s impact on competition." *FTC v. University Health*, 938 F.2d 1206, 1218 (11th Cir. 1991); *FTC v. Warner Communications, Inc.,* 742 F.2d 1156,1162 (9th Cir. 1984); *see FTC v. Cardinal Health, Inc.,* 12 F. Supp.2d 34, 45 (D.D.C. 1998); *FTC v. Staples, Inc.,* 970 F. Supp. 1066, 1070-71 (D.D.C. 1997). This Court need not resolve all conflicts of evidence or analyze extensively all antitrust issues. Such final resolution is the province of the administrative proceeding. *Warner Communications*, 742 F.2d at 1164.

evidence. They agree that jarred baby food is a relevant product in which to assess the effects of the proposed merger. They concede that barriers to entry into the jarred baby food market are extraordinarily high, and no entry is likely in the foreseeable future to dissipate anticompetitive harm. And whether the relevant geographic market is considered to be national, regional, or metropolitan areas, defendants do not dispute that they can bid for business anywhere, and that they can and do ship baby food throughout the United States. Finally, defendants do not dispute that the proposed merger will increase market concentration to extraordinarily high levels – to levels that far exceed the range that the Court of Appeals for this Circuit has found to be "overwhelming."[3] *FTC v. PPG Indus.*, 798 F.2d 1500, 1505-06 (D.C. Cir. 1986). Based on the major structural change threatened by this merger alone, the FTC has established its prima facie case under governing law. *Cardinal Health, Inc.,* 12 F. Supp.2d 34; *Staples,* 970 F. Supp. 1066. Indeed, no court has ever allowed a merger with concentration levels and barriers to entry such as those that exist here.[4]

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[3] The U.S. Department of Justice and the Federal Trade Commission Horizontal Merger Guidelines (April 2, 1992) ("*Merger Guidelines*") measure concentration using the Herfindahl-Hirschman Index ("HHI"). A merger that results in an HHI over 1800 indicates a highly concentrated market; an increase in the HHI of 50 points in a highly concentrated market raises significant antitrust concerns. Where the post-merger HHI is over 1800 and the increase in the HHI is over 100 points, it is presumed that the merger will be anticompetitive. *Merger Guidelines,*§ 1.51, at 16-17. In this merger the HHI would increase by almost 600 points to over 5400 in a national jarred baby food market.

[4] In this memorandum we refer to the Memorandum in Support of Plaintiff's Motion for Preliminary Injunction as "FTCB"; the Reply Memorandum in Support of Plaintiff's Motion for a Preliminary Injunction as "FTCRB"; the Plaintiff's Proposed Findings of Fact as "PFF"; the Plaintiff's Proposed Conclusion's of Law as "PCL"; and the Defendants' Memorandum of Law in Opposition to the Commission's Motion for a Preliminary Injunction as "DB."

As described below, based on the "overwhelming" level of concentration and the compelling evidence of likely anticompetitive effects, the Commission has met its burden under Section 13(b) by raising questions going to the merits of this proposed merger so serious and substantial that a preliminary injunction is required.[5] This merger poses a significant threat of both unilateral and coordinated anticompetitive effects. In a market in which most retailers want to carry only two brands of baby food, one of which is Gerber, there is now intense competition between Heinz and Beech-Nut for the second slot on retailers' shelves. After the merger that competition will disappear, and so will the benefits that it generates for retailers and consumers in the form of lower prices, higher quality, and innovation. With competitive pressure from Beech-Nut eradicated, several unilateral anticompetitive effects are likely:

- In the numerous metropolitan markets where Heinz and Beech-Nut compete head-to-head, there will be increased prices and a reduction in direct to consumer promotion. Moreover, absent this merger, increased distribution competition between Heinz and Beech-Nut likely would provide additional millions of consumers with access to all three brands, as the two firms gain retail accounts in the other's traditional distribution territories.

- By eliminating its closest and only rival for the second baby food slot on grocers' shelves, Heinz will be able unilaterally to eliminate the benefits of intense competition with Beech-Nut to gain or retain that slot. The bid competition between the firms involves many millions of dollars in "trade spending" to win retail accounts – payments to retailers, discounts and allowances, coupons for consumers, and other marketing expenditures. Some of these sums, such as coupons, go directly to consumers; others get passed on to consumers by retailers. With Beech-Nut out of the way, Heinz no longer will have to offer these concessions to win the second baby food slot on grocers' shelves.

- The merger would reduce competitive pressures to innovate. Heinz and Beech-Nut have competed to gain access to retailers' shelves in part by developing new products and new packaging, improving product quality and safety, and increasing services to retailers. Heinz no longer will have to do that to gain distribution.

[5] *See* fn 2.

- C The merger would remove the competitive pressures of Beech-Nut's potential introduction of a private label baby food, which would threaten Heinz's value positioning. By eliminating Beech-Nut and its excess capacity, Heinz removes that threat as well as its own incentive to develop a private label to preempt Beech-Nut.

- C Consumers will also suffer a reduction in choice from the three distinct brands that currently exist. Both the Heinz value-priced brand and the premium Beech-Nut brand will disappear, to be replaced by a single "rationalized" baby food line to be produced by Heinz. The high-quality production from Beech-Nut's plant will no longer exist, to be replaced by Heinz's historically trouble-plagued production. *See Seeburg Corp. v. FTC,* 425 F.2d 124, 128 (6th Cir. 1970) ("It is the purpose of Section 7 to preserve buyers the choice" arising from competing offers).

Coordinated anticompetitive effects are also a serious concern. No environment could be more conducive to coordinated interaction than a duopoly. As this Court has observed, a duopoly provides "a fertile medium for interdependent anticompetitive conduct" and "the relative lack of competitors eases coordination of actions, explicitly or implicitly, among the remaining few to approximate the performance of a monopolist." *FTC v. PPG Indus., Inc.*, 628 F. Supp. 881, 885 & n.9 (D.D.C.), *aff'd in part*, 798 F.2d 1500 (D.C. Cir. 1986). And because of the substantial entry barriers in this market it is without doubt that this duopoly is forever.

Under Section 7, a merger may be illegal if the remaining firms will be more likely to engage in conduct that is likely to result in higher prices, even if that conduct, in itself, would be entirely lawful.[6] That kind of competitive problem is a major concern raised by this merger. It is

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[6] As the leading antitrust treatise observes, Section 7 "is concerned with far more than 'collusion' in the sense of an illegal conspiracy; it is very much concerned with 'collusion' in the sense of tacit coordination not amounting to conspiracy." Phillip Areeda, IV Antitrust Law ¶ 916, at 85 (rev. ed. 1998). *See Cardinal*, 12 F. Supp. 2d at 65 ("Although the Court is not convinced from the record that the Defendants actually engaged in wrongdoing, it is persuaded that in the event of a merger, the Defendants would likely have an increased ability to coordinate their pricing practices."); *Merger Guidelines*, § 2.1.

brought about by a tightening of oligopoly market conditions, and it lies at the heart of the purpose of Section 7. Such coordination:

> is feared by antitrust policy even more than express collusion, for tacit coordination, even when observed, cannot easily be controlled directly by the antitrust laws. It is a central object of merger policy to obstruct the creation or reinforcement by merger of such oligopolistic market structures in which tacit coordination can occur.[7]

The parties themselves believe that tacit coordination can occur.[8] For example, in an attempt to increase profits as part of its turnaround strategy in 1998, Beech-Nut management proposed to "Send a clear signal to Gerber (and to a lesser extent Heinz) that the competitive environment is less hostile." PFF 347. Heinz was aware of this strategy because Beech-Nut's intent was restated in a Debt Offering Memorandum that Heinz in fact obtained. PFF 351. Fortunately for consumers, the competition between Beech-Nut and Heinz to be carried as the second baby food on retailers' shelves precluded this strategy from succeeding. As the FTC's expert testified this competition is the linchpin that deterred coordination. Tr. 197-98; 282 (Hilke); PX 782 at ¶ 84 (Hilke report). Absent such competition, however, there will be little to prevent Heinz from acting on its incentives to increase prices and increase profitability.

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[7] Areeda, IV Antitrust Law, ¶ 901b2 at 9. *See also Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 229-30 (1993)("[i]n the § 7 context, it has long been settled that excessive concentration, and the oligopolistic price coordination it portends, may be the injury to competition the Act prohibits"); *Hospital Corp. of Am. v. FTC*, 807 F.2d 1381, 1386 (7th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987).

[8] The Third Circuit has recognized the vulnerability of this industry as well. In a price fixing case against these defendants, the court stated: "We are cognizant that the baby food industry is highly concentrated with only three companies controlling the nationwide manufacture and distribution of their baby food products. We realize that such a scenario could facilitate explicit or tacit price-fixing." *In re Baby Food Antitrust Litigation*, 166 F.3d 112, 138 (3d Cir. 1999).

To rebut the presumption of illegality, defendants must demonstrate that the "overwhelming" level of concentration is misleading. No court has ever approved a merger that would result in a duopoly in the presence of significant entry barriers. Thus, the defendants must ask this court to rewrite over a century of antitrust law to approve this presumptively illegal merger. Although defendants may suggest that the opinion in *United States v. Baker Hughes,* 908 F.2d 981 (D.C. Cir. 1990), somehow changes the governing law, the ultimate holding of *Baker Hughes* is that "a defendant seeking to rebut a presumption of anticompetitive effect must show that the prima facie case inaccurately predicts the relevant transaction's probable effect on future competition." *Id.* at 991. Defendants clearly fail to make such a showing.

Defendants rely on four contrived arguments for approving the merger: (1) that Beech-Nut and Heinz are geographically-constrained rivals unable to expand into each other's traditional distribution territories; (2) to the extent they overlap, those overlaps are not important because Heinz and Beech-Nut are not found on the same shelves; (3) bidding competition to be the second baby food on grocers' shelves is not worth protecting because it is just a sideline that does not affect consumers; and (4) even if there were some anticompetitive effects, those should be tolerated because this merger is the only means to take on Gerber's alleged monopoly. Defendants also argue that their alleged efficiencies will be passed on to consumers even in a duopoly. But defendants' arguments are inconsistent with the "business realit[ies]" as described in scores of their everyday documents – which expose "how the market is perceived by those who strive to profit in it." *FTC v. Coca-Cola Co.*, 641 F. Supp. 1128, 1132 (D.D.C. 1986), *vacated mem. as moot*, 829 F.2d 191 (D.C. Cir. 1987) (transaction abandoned). What defendants are really asking this Court to do is to ignore the evidence of intense competition,

common sense, the usual economic principles that apply to merger analysis, the legal precedent that has never permitted a merger to duopoly in a market that is nearly impenetrable by new entry, and help them re-engineer the market to their liking so they won't have to compete as hard.

The suggestion that Heinz and Beech-Nut are locked into core areas reflects an outdated snapshot view of competition and does not comport with the competition reflected in defendants' documents. A rising tide of retailer consolidation has forced these companies to compete more and more aggressively against one another, bringing consumers better prices, innovation, and increased choice of products. These mergers have enhanced the ability of Beech-Nut and Heinz to effectively invade each other's traditional distribution territories, making competition increasingly nationwide.

PFF 60, 138-43. Indeed, an October 1999 map shows Heinz invading Beech-Nut territories and vice versa. PFF136. For example, Heinz's acquisition of the Albertson's account enabled it to invade Beech-Nut's traditional strongholds in Chicago, Philadelphia, and California. If this merger is blocked these firms will continue to expand their territories, offering consumers greater choice and competition. This court recently enjoined a merger where "absent the merger, the firms [were] likely, and in fact have planned, to enter more of each other's markets, leading to a deconcentration of the market, and, therefore, increased competition . . . ." *Staples,* 970 F. Supp. at 1082.

The competition between Heinz and Beech-Nut for placement on the supermarket shelf occurs on an ongoing basis as retailers seek better deals, and as Heinz and Beech-Nut each try to displace the other from existing accounts as the second brand. PFF 112. This competition

leads to increased "trade spending" in the form of discounts, allowances, and other promotions that accrue to the benefit of consumers.[9] PFF 174. For example, Beech-Nut bid $ million in trade spending over three years to try to get the Albertson's account; Heinz won the account with a bid of $ million. PFF 173. Both firms have competed aggressively against one another for shelf space on numerous other occasions.[10] Large sums of trade spending are involved. For example, Beech-Nut's total trade spending is about $28 million per year. Tr. at 899-900 (Meader). This bid competition benefits consumers even if the two brands do not end up on the same supermarket shelves. Moreover, there are numerous metropolitan areas where Heinz and Beech-Nut have a substantial presence and compete from different supermarkets and the amount of commerce in these markets exceeds $100 million. PFF 82.

Fundamentally, the parties' argument that bid competition doesn't matter misperceives the nature of competition. Even if a firm is not the successful bidder, the fact that it bids is an important form of competition. In many instances Heinz or Beech-Nut must increase discounts

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[9] In an effort to minimize the importance of bidding competition, at trial the defendants engaged in an lengthy discourse about the difference between "fixed" and "variable" promotional payments. However, both Mr. Meader and Ms. Quinn acknowledged that variable trade payments are likely to benefit consumers, and variable payments constitute a major portion of the total. PFF 174, 177, 178. The defendants are also wrong to imply that fixed trade payments do not benefit consumers. PFF 188. Fixed vs variable is a distinction without a difference. As Mr. Davidson of Ahold and Mr. Long of Winco testified that even fixed payments result in lower consumer prices and other benefits. Tr. 143-44 (Long); 844-46 (Davidson). Regardless of how these payments are classified, consumers ultimately benefit in the form of lower prices or better services. PFF 192. Moreover, this Court has enjoined mergers that would have diminished similar types of distribution competition. *See Coca-Cola,* 641 F. Supp. at 1139 n.24.

[10] *E.g.*, PFF 141, 173.

or allowances in order to avoid losing a contest.[11] The record shows that defendants bid aggressively to steal accounts from each other. In addition, the presence of a potential bidder is an important factor in formulating bids. Bids are developed in anticipation of the rival bidder's likely proposal, and if Heinz no longer has a rival for the second slot as a result of this merger, its bidding strategy certainly will be altered. Many courts have held that Section 7 prevents a diminution of bidding competition. *See United States v. El Paso Natural Gas Co.,* 376 U.S. 651 (1964); *FTC v. Alliant Techsystems Inc.,* 808 F. Supp. 9 (D.D.C. 1992); *United States v. United Tote, Inc.,* 768 F. Supp. 1064, 1071 (D. Del. 1991)(unsuccessful bids led to lower prices). Moreover, even without a bid, both firms are under constant pressure to perform due to the ever-present threat that the other will take away an account.[12]

The claim that this merger is the only way to take on Gerber's alleged monopoly is also hard to square with either the facts or law.[13] Both firms are able to compete effectively against Gerber as independent firms. Beech-Nut challenges Gerber on quality and reputation as well as price. Heinz competes more aggressively on price. *E.g.,* PFF 243 (Gerber responding to Heinz promotions); PFF 246 (Gerber responds aggressively to perceived threats to its share; Gerber responded with 18-29 months of heavy promotional spending in response to Beech-Nut's comparative advertising; Gerber also spent heavily against Beech-Nut's favored position in

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[11] PFF 155.

[12] PFF 119

; PFF 222

[13] Even if Gerber were a monopolist and had engaged in exclusionary conduct, that would not justify an anticompetitive merger. *See* FTCRB at 8-9; PCL ¶ 118 n.14.

Publix's Baby Club program); PFF 263 (Gerber responded to Beech-Nut's increased promotion at Wegman's, which in turn was spurred by Heinz's proposal). Where both Heinz and Beech-Nut are in active distribution, Gerber's share position is weaker. PFF 83; PX 780. During the last two years of intensified Heinz/Beech-Nut competition, Gerber reports gains for Heinz and Beech-Nut and losses for Gerber in key consumer purchase measures. PFF 84; PX 702 at 101; Tr. 1150-51 (Hilke). In the recent price fixing case the Third Circuit described the competition among Heinz, Beech-Nut, and Gerber as "intense efforts on the part of three large and strong competing companies" and found that the U.S. baby food market is a "highly competitive industry." *In re Baby Food Antitrust Litigation*, 166 F.3d at 124, 126.

Moreover, no court has approved a merger simply because it would permit the combined firm to compete more effectively against a larger rival. The courts have uniformly rejected this defense in markets, like this one, with significant entry barriers because, as the Supreme Court has acknowledged, "if concentration is already great, the importance of preventing even slight increases in concentration is correspondingly great." *United States v. General Dynamics Corp.*, 415 U.S. 486, 497 (1974).[14] In sum, there is no basis for defendants' request that they be allowed to restructure this industry because of Gerber's size.

Defendants' proffered efficiencies cannot salvage the likely anticompetitive effects of this merger. The law requires that these efficiencies be verifiable, cognizable, merger-specific, and sufficient to outweigh the anticompetitive effects of the merger.[15] They fail on all counts. The alleged efficiencies are not verifiable since they are based on the generous and unsupported

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[14] *See* FTCB at 11 n.23 (and cases cited therein); FTCRB at 4-5 (collecting cases).

[15] See discussion *infra*; PCL ¶ 122 *et seq.*

assumption that the merged firm will keep all the Heinz and Beech-Nut customers. They are not cognizable because they result from a reduction in consumer choice and quality. Their postulated value is dwarfed by the potential anticompetitive effects of the merger. Even assuming that defendants achieve the variable cost savings they assert and pass through 50 percent of them, and assuming that anticompetitive effects to be expected in a 3-2 merger never materialize, defendants' own studies show that the projected benefit to consumers would be very small. And finally, there are less anticompetitive means for efficiencies to be achieved.

Most important, there is no guarantee that consumers will ultimately benefit from any of the alleged efficiencies. Defendants' promises that the merged firm will pass on the cost savings, however well-intentioned, are not sufficient. No court has approved an otherwise illegal merger based on defendants' promises of future conduct. Defendants' own business plan, DX 1, sets out a framework indicating that Heinz's profits will be higher if it charges higher prices and does not pass on cost savings. *See* PX 809. Dr. Hilke testified that the merged firm would have even greater incentives to price at the higher Beech-Nut price and not pass on the efficiencies from the merger. The antitrust laws rest on the premise that rivalry spurs cost savings and their pass-through to consumers. The serious loss of rivalry this merger entails would substantially diminish defendants' incentives to pass on efficiencies. The Merger Guidelines therefore instruct that efficiencies will "almost never justify a merger to monopoly or near-monopoly." *Merger Guidelines* § 4; *see Staples*; *Cardinal Health*.

Ultimately, even if these efficiencies might provide some temporary spur to competition, the ability and incentives to coordinate in a duopoly protected by impregnable entry barriers is undeniable. And a "merger is forever." Tr. 1165 (Hilke). The threat to competition in this case

is tangible. As the Supreme Court has recognized : "firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions." *Brooke Group*, 509 U.S. at 227.

In sum, the FTC has presented compelling evidence that this acquisition poses a significant competitive threat to competition. Injunctive relief is necessary to preserve the status quo pending a full trial on the merits in an administrative proceeding. Preliminary relief is justified both to prevent the serious harm to consumers that the transaction is likely to produce in the interim, and to avoid the difficulty of obtaining adequate relief in the future if the merger were allowed to take place.

ARGUMENT

I. SECTION 7 OF THE CLAYTON ACT PROHIBITS MERGERS THAT MAY SUBSTANTIALLY LESSEN COMPETITION

The Supreme Court has instructed that Section 7 of the Clayton Act "creates a relatively expansive definition of antitrust liability," by requiring a showing that the merger's effect "*may be* substantially to lessen competition." *California v. American Stores Co.*, 495 U.S. 271, 284 (1990) (emphasis in original). Section 7 does not require a certainty, or even a high probability, that a merger will substantially lessen competition. *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 906 (7th Cir. 1989). All that is required is a reasonable probability, and all "doubts are to be resolved against the transaction." *Id.* Accordingly, to establish a violation, the FTC need show only a reasonable probability, not a certainty, that the proscribed anticompetitive activity may occur. As Judge Posner has explained, "[a]ll that is necessary is that the merger create an

appreciable danger of [anticompetitive] consequences in the future." *Hospital Corp. of Am.*, 807 F.2d at 1389. Hence, the ultimate question in any Section 7 case is whether the transaction creates an "appreciable danger" of anticompetitive effects. *Id.* at 1386. The answer to this question depends upon (1) the "line of commerce," or product market, affected by the transaction; (2) the "section of the country," or geographic market, in which the transaction will have an effect, and (3) the transaction's probable effect on competition in the relevant market.

II. JARRED BABY FOOD IS A RELEVANT PRODUCT MARKET

The pivotal question in defining a relevant product market is whether an increase in price for one group of products – here, prepared baby foods – would cause a sufficient number of buyers to turn to other products so as to make the price increase unprofitable. *See, e.g., Rothery Storage & Van Co. v. Atlas Van Lines,* 792 F.2d 210, 218 (D.C. Cir. 1986); *Cardinal Health,* 12 F. Supp.2d at 46; *Merger Guidelines.* § 1. Because the ability of customers to turn to other suppliers restrains a firm from raising prices above the competitive level, the definition of the "relevant market" rests on a determination of reasonable substitutes. *See United States v. E.I. du Pont de Nemours & Co*., 351 U.S. 377, 395 (1956); *Cardinal Health,* 12 F. Supp.2d at 46. Here, the Court's task in finding a relevant market is simplified by defendants' agreement that jarred baby food is a relevant product market.[16] Tr. at 216-18. There is also ample evidentiary support for such a market. *See* PFF 52 *et seq*.

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[16] While the Commission believes that another relevant product market is the broader prepared baby food market, which includes infant cereals, bottled juices, and water, the Court may treat jarred baby food as the relevant product market for purposes of this preliminary proceeding.

III. THE UNITED STATES AND METROPOLITAN AREAS WITHIN THE UNITED STATES ARE RELEVANT GEOGRAPHIC MARKETS

The focus in defining a relevant geographic market is to determine which areas of the country would be affected adversely by an acquisition. *Philadelphia Nat'l Bank*, 374 U.S. at 357. The relevant geographic market is the area of effective competition to which a purchaser "'can practicably turn for supplies.'" *Id.* at 359 (*quoting Tampa Elec. Co. v. Nashville Coal Co.,* 365 U.S. 320, 327 (1961)).[17] Although many retailers operate on a local or regional basis, there nonetheless can be a national geographic market for goods they purchase. *See United States v. Grinnell Corp.*, 384 U.S. 563, 575 (1966) (geographic market for central station fire alarm services is national, even though service is provided locally); *Coca-Cola-Co.,* 641 F. Supp. at 1140 (national and 7-state regional markets, with particular focus on 32 metropolitan areas).

A. <u>The United States Is A Relevant Geographic Market</u>

The evidence clearly shows that the United States as a whole constitutes a relevant geographic market within the meaning of the antitrust laws and a "section of the country" within the meaning of Section 7 of the Clayton Act. All three major manufacturers of jarred baby food – Gerber, Heinz, and Beech-Nut – offer their products for sale nationally. None of the traditional sources of restrictions on geographic markets apply here (*i.e.,* high transportation costs; product spoilage; legal restrictions). PFF 54. Gerber is sold in virtually every part of the country. Both Heinz and Beech-Nut ship to most areas of the country and have areas of substantial sales in almost all sections of the country. PFF 54. Thus, any of the three major

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[17] The *Merger Guidelines* ask this question in terms of where a customer could turn for supplies in the event of a small (*e.g.,* five percent) but significant and nontransitory increase in price. § 1.21.

manufacturers is a realistic alternative for U.S. retailers, wherever located, in response to a price increase by the other firms.[18] *See FTC v. Illinois Cereal Mills, Inc.,* 691 F. Supp. 1131, 1142 (N.D. Ill. 1988) (national geographic market where all producers "ship their products nationally, customers look to each of them for supplies and producers consider each other to be competitors"), *aff'd sub nom. FTC v. Elders Grain,* 868 F.2d 901 (7th Cir. 1989).

Heinz and Beech-Nut compete nationally even if they do not have retail accounts in each and every locality. *See Illinois Cereal Mills,* 691 F. Supp. at 1142 ("The inquiry . . . does not focus on where the parties do business or where they presently compete, but rather it focuses on where, within the area of competitive overlap, the effect of the merger or acquisition on competition will be direct and immediate.") In *Illinois Cereal Mills*, the defendants contended that mills located on opposite sides of the Mississippi River did not compete against each other because of special transportation costs incurred in crossing the river. Nonetheless, the evidence showed that firms did ship across the river, and the court found a national market. *Id.* Likewise, both Heinz and Beech-Nut have sought to expand their sales beyond their "core areas" and in fact ship across the country. PFF 60. Unlike *Illinois Cereal Mills,* however, the "core" distribution areas for Beech-Nut and Heinz are not dictated by transportation costs (or, for that matter, regulatory barriers or freshness concerns.) PFF 54; PX 782 at ¶ 18 (Hilke Report). Moreover, their core areas are expanding as a result of retailer consolidations and national or broader regional contracting for single-source supplies for the second baby food slot. PFF 60.

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[18] PFF 58. Defendants concede that competition between baby food manufacturers for the business of retailers (*i.e.*, competition at the wholesale level) is not confined to local areas. DB 41 n. 20; DX 617 at ¶ 20 (Baker Report). Defendants' economic expert, Professor Baker, testified that wholesale competition for shelf space is regional or national. Tr. at 970 (Baker).

In addition, wholesale competition within a local or regional area is affected by the threat of expansion by Heinz or Beech-Nut from another geographic area. PFF 58. Both firms know that if they do not remain competitive, retailers can turn to the other supplier.

Competition between the firms also takes place on a national basis along numerous non-price dimensions, including product innovation, product formulations, packaging and labeling, and establishing brand recognition and reputation for quality. PFF 278-303; *see* PX 343 at 78

In each of these respects, both firms seek to further their positions as national players.[19]

In addition, theses firms will have to compete on a broader geographic scale as a result of the changing dynamics of the industry. To the extent Heinz or Beech-Nut do not already sell in certain areas of the country, geographic expansion will come about as retailers merge and consolidate across regions into chains of greater national scope and select one company for their

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[19] The geographic market is no larger than the United States because there are no competitively significant imports of baby foods into the United States. PFF 63.

second baby food line chain-wide.[20] Heinz and Beech-Nut inevitably will have a geographical reach at least as broad as those chains. Both companies have recognized this changing dynamic.

B. Metropolitan Areas Within The United States Also Constitute Relevant Geographic Markets

Competition can have both national and regional or local dimensions. *E.g., United States v. Pabst Brewing Co.,* 384 U.S. 546, 551-52 (1966) (entire nation, three state area, one state); *Coca-Cola-Co.,* 641 F. Supp. at 1140 (national and 7-state regional markets, with particular focus on 32 metropolitan areas); *see Brown Shoe,* 370 U.S. at 337 (evaluating shoe merger's effect on national scale and on local retail scale). The baby food industry likewise has both national and localized competition. For example, baby food manufacturers locally target

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[20] Even if competition currently were localized, Heinz and Beech-Nut are potential competitors for each others' "core markets." This merger will eliminate that potential competition. The elimination of a potential competitor in a market such as this – high concentration, high entry barriers, and no other potential entrants – is illegal under Section 7. *E.g., Yamaha Motor Co. v. FTC,* 657 F.2d 971, 977-980 (8th Cir. 1981) (affirming Commission decision that acquisition of a potential entrant violated Section 7 under the actual potential competition theory); *United States v. Philips Petroleum Co.,* 367 F. Supp. 1226, 1232-34 (C.D. Cal. 1973), *aff'd mem.,* 418 U.S. 906 (1974). *See also Staples,* 970 F. Supp. at 1082 (granting preliminary injunction against horizontal merger but also stating: "In addition, allowing the defendants to merge would eliminate significant future competition. Absent the merger, the firms are likely, and in fact have planned, to enter more of each other's markets, leading to a deconcentration of the market and, therefore, increased competition between the superstores.") The competition arising from geographic expansion that Judge Hogan found likely in *Staples* is precisely what is occurring in the baby food market. Geographic expansion for both companies is highly likely as regional supermarkets consolidate and select a single chain-wide source for their second baby food slot, thereby easing Heinz and Beech-Nut expansion into areas they may not currently serve.

advertising, merchandising payments, consumer couponing, and new product introductions to meet or intensify local competition without affecting demand and supply elsewhere. PFF 69. Such local targeting of discounts and allowances can create localized differences in prices that cannot be readily arbitraged. PFF 67. Thus, wholesale and retail prices for baby food often differ by geographic region. PFF 70. The ability to maintain such localized price differences, and thus discriminate among retailers located in different metropolitan areas, is evidence of localized geographic markets. PX 782 at ¶ 20 (Hilke); *Merger Guidelines* § 1.22; *see also Eastman Kodak Co. v. Image Technical Servs., Inc.,* 504 U.S. 451, 475-77 (1992) (price discrimination in sales of parts to different classes of customers supports separate market for sales to customers facing discrimination). In addition, Heinz and Beech-Nut closely track each other's sales and promotional activities in local areas, thus indicating their recognition of localized competition. PFF 73. In sum, the evidence demonstrates that metropolitan areas constitute relevant geographic markets.

IV. THIS MERGER WILL SIGNIFICANTLY REDUCE COMPETITION IN THE MARKET FOR JARRED BABY FOOD IN THE UNITED STATES AND NUMEROUS METROPOLITAN MARKETS THEREIN

The proposed creation of a duopoly clearly falls within the Supreme Court's pronouncement that where a merger results in a significant increase in concentration and produces a firm that controls an undue percentage of the market, the combination is so inherently likely to lessen competition substantially that it "must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." *Philadelphia Nat'l Bank*, 374 U.S. at 363. As stated by this Court, "[b]y showing that the proposed transaction . . . will lead to undue concentration" in the relevant market, "the

Commission establishes a presumption that the transaction will substantially lessen competition," and thus establishes its *prima facie* right to injunctive relief. *Staples,* 970 F. Supp. at 1083. The evidence in this case clearly warrants that presumption.

A. The Merger Would Increase Market Concentration to Extraordinary Levels

This merger will increase market concentration to extraordinarily high levels by any measure. Two firms will control over 98 percent of the market. Post-merger, Heinz will have a nationwide market share of over 34 percent of jarred baby food sales. PFF 79-81. Under the Merger Guidelines, a market is considered highly concentrated when the HHI, or Herfindahl-Hirschman Index, exceeds 1800, and in such cases, unless entry is easy, "it will be presumed" that a merger that increases the HHI by over 100 points "is likely to create or enhance market power or facilitate its exercise."[21] Here, the merger would increase the HHI by almost 600 points to over 5400 in the national jarred baby food market (PFF 79),[22] far exceeding the thresholds at which courts have enjoined mergers in highly concentrated markets.[23] This concentration level

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[21] *Merger Guidelines,* § 1.51; *see Philadelphia Nat'l Bank*, 374 U.S. at 364; *PPG Indus.,* 798 F.2d at 1502-03.

[22] See PX 781 (Hilke Exhibit); see also DX 617 at Appendix B (Baker Report).

[23] Courts have barred mergers resulting in substantially lower concentration levels. *Elders Grain*, 868 F.2d at 902 (acquisition increased market shares of largest firm from 23% to 32%); *Hospital Corp. of Am.*, 807 F.2d at 1384 (acquisition increased market share of second largest firm from 14% to 26%); *Warner Communications*, 742 F.2d at 1163 (acquisition increased market share of second largest firm from 19% to 26%; four-firm concentration ratio of 75%); *Cardinal Health*, 12 F. Supp. 2d at 52 (mergers increasing HHIs from 1648 to 2450 and 1648 to 2277); *United Tote,* 768 F. Supp. at 1069-70 (merger between two firms with 13 and 27% of sales, increasing the HHI from 3940 to 4640, presumptively unlawful); *FTC v. Bass Bros. Enters. Inc.*, 1984-1 Trade Cas. ¶ 66,041, at 68,609-10 (N.D. Ohio 1984) (acquisition increased market share of second largest firm from 20.9% to 28.5%, increasing HHI from 1802 to 2320). Other cases with finding violations with market shares below 30% are at PCL ¶ 55-56.

exceeds the range that the Court of Appeals for this Circuit has found to be "overwhelming." *PPG Indus.*, 798 F.2d at 1505-06 (post-merger HHIs estimated from 3184 to 5213). Courts have consistently concluded that within highly concentrated markets any further industry consolidation would facilitate collusion.[24]

In addition, among the major metropolitan areas in which both firms have market shares of at least 10 percent, their combined market share exceeds 40 percent in 10 of those markets,[25] including three metropolitan areas where their combined share exceeds 50 percent. PFF 81. (Expert Exhibit 1B). These 10 metropolitan areas represent baby food sales of approximately $100 million. Tr. at 1129 (Hilke). The HHI would increase by more than 700 points in each of these 10 metropolitan areas, and all post-merger HHIs would be over 5000. Among the metropolitan areas in which both firms have at least a 5 percent share, there are 19 areas in which their combined share exceeds 35 percent, and 5 metropolitan areas in which their combined share exceeds 50 percent. The post-merger HHI in each of these metropolitan areas also exceeds 5000. PFF 340. (Expert Exhibit 1A). Even Gerber recognizes the potential loss of competition in these markets. PX 719. The increase in concentration in each of these markets establishes a presumption that the merger will result in unilateral anticompetitive effects. *See Staples*, 970 F. Supp. at 1081 (increases in concentration in metropolitan markets); *Merger Guidelines* § 2.2.[26]

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[24] *See, e.g.*, *Elders Grain,* 868 F.2d at 905; *PPG. Indus.,* 628 F. Supp. at 885; *Bass Bros.*, 1984-1 Trade Cas. (CCH) ¶ 66,041, at 68,620.

[25] Cleveland, OH, Columbus, OH, Cincinnati/Dayton, OH, Roanoke, VA, Raleigh/Greensboro, NC, Charlotte, NC, Atlanta, GA, Jacksonville, FL, Orlando, FL, Tampa/St. Petersburg, FL. PX 781 (Hilke Exhibit); see also DX 617 at Appendix B (Baker Report).

[26] Defendants argue that the unilateral effects analysis of the Merger Guidelines is inapplicable if the merging firms have a combined market share of less than 35 percent.

This level of "overwhelming" concentration establishes a presumption of unlawfulness and makes out the government's *prima facie* case. *Philadelphia Nat'l Bank*, 374 U.S. at 363; *Baker Hughes,* 908 F.2d at 982-83; *Cardinal*, 12 F. Supp. 2d at 52. "Once such a presumption has been established, the burden of producing evidence to rebut the presumption then shifts to the defendants." *Staples*, 970 F. Supp. at 1083; *Cardinal Health,* 12 F. Supp. 2d at 54 ("Although the ultimate burden of persuasion always rests with the FTC, once a presumption has been established that the proposed transaction will substantially affect competition, the burden of production shifts to the defendants to rebut the presumption"). "To meet their burden, the defendants must show that the market-share statistics . . . 'give an inaccurate prediction of the proposed acquisition's probable effect on competition.'" *Cardinal Health,* 12 F. Supp. 2d at 54 (quoting *Staples*, 970 F. Supp. at 1083). Defendants' burden is a heavy one in this case. As the leading antitrust treatise explains:

> Mergers in [the highly concentrated range] should carry a strong presumption of illegality that can be defeated only by a showing of extraordinarily easy entry or truly extraordinary efficiencies; all other evidence relating to product differentiation, nature of transactions or of buyers should ordinarily be ignored unless the defendant can establish by clear and convincing evidence that such a characteristic makes both collusion and noncooperative oligopoly virtually impossible.

Areeda, IV Antitrust Law ¶ 932, at 160.

Defendants' suggestion that the Guidelines' 35 percent threshold creates a "safe harbor" for market shares below that level is a figment of their imagination. The Guidelines simply state that market shares above 35 percent may be entitled to presumption of likely unilateral effects. *Merger Guidelines* § 2.2. Whether Heinz ends up with a market share slightly below or above 35 percent is not the decisive factor, because it is clear that retailers will be left with *no* choice for the second baby food slot; they will have to carry Heinz if they want to carry two brands of baby foods. Thus, as a practical matter, unilateral effects are likely in every market where Heinz and Beech-Nut compete, because the merger would eliminate Heinz's only rival for the second slot.

One of the usual ways of trying to rebut the presumption is by showing ease of entry into the market. *See Baker Hughes,* 908 F.2d 981. But defendants essentially concede that no entry into the U.S. jarred baby food market is likely for the foreseeable future. It would take many years and the expenditure of high non-recoverable costs to establish brand awareness and consumer acceptance. PFF 378, 381. Even then, gaining distribution would be problematic because the entrant would have to displace one of the two established incumbents to gain the second spot on retail shelves. PFF 384. There has been no entry into the U.S. market for decades, except for small niche players. PFF 379. Defendants cannot meet the standard of "timely, likely, and sufficient" entry.[27]

Even assuming *arguendo* that defendants could produce evidence to rebut the presumption that their proposed merger would substantially lessen competition, the Commission has presented additional evidence that easily satisfies its "ultimate burden of persuasion" that the proposed merger will in fact substantially reduce competition in the jarred baby food market in two ways. First, the proposed merger would eliminate substantial head-to-head competition between Beech-Nut and Heinz for the second baby food slot on grocers' shelves, thus enabling the merged firm to increase its prices unilaterally. Second, by reducing the number of competitors in the jarred baby food market from three to two, the proposed merger would significantly increase the likelihood that the merged firm and Gerber would engage in coordinated behavior.[28]

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[27] *See* FTCB at 37-39 and authorities cited therein; *Merger Guidelines,* § 3.0.

[28] Numerous cases have involved competition at the wholesale level, with similar implications for harm to consumers. *E.g., Pabst*; *Cardinal Health*; *Coca-Cola.*

B. **The Merger Will Result in a Substantial Likelihood of Unilateral Anticompetitive Effects**

A merger of Heinz and Beech-Nut is likely to result in unilateral anticompetitive effects by eliminating retailers' ability to choose between two close substitutes for the second baby food slot on their shelves. *See Merger Guidelines* § 2.2. Heinz and Beech-Nut not only are close substitutes, they are the *only* brands that can serve retailers' needs for the second baby food slot. PFF 158. Substitution occurs at both the retailer level and at the consumer level, despite (and perhaps because of) the brand differentiation that each firm tries to achieve. Both firms actively bid against each other to gain or retain the second slot. PFF 109. This competition continues on an ongoing basis as retailers seek better deals, as Heinz and Beech-Nut try to displace the other from existing accounts, and as retailers merge. PFF 173. The presence of both firms in the market has numerous competitive benefits, including lower prices, increased innovation, and consumer choice, which will be lost as a result of the merger.

1. **Elimination of Significant Price Competition Between Heinz and Beech-Nut**

Heinz and Beech-Nut are engaged in direct and increasing competition to be the second baby food line on retail shelves, and for ultimate sales to consumers. PFF 108-111. Competition involves price terms, incentive payments to retailers, discounts and allowances, coupons for consumers, and other marketing techniques. PFF 167. Competition takes place both in areas where the two brands are widely distributed as well as in areas where one firm is trying to gain distribution and the other is trying to retain its place on retail shelves,[29] and it is

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[29] Even if Heinz and Beech-Nut were correctly viewed as not competing in certain areas, they are potential competitors for each others' "core markets." This merger will eliminate that potential competition. *See* PCL ¶ 93 *et seq.*

clear that retail pricing is affected by competition at the wholesale level. Many retailers attest that the benefits of wholesale competition in price terms, incentive payments to retailers, discounts, and allowances are passed on to consumers in the form of lower prices and other consumer benefits. PFF 248. They also attest that the retail pricing of Heinz and Beech-Nut at competing stores affects their own pricing. PFF 96. Defendants' own documents show that Beech-Nut prices are lower in mixed markets in which Heinz is also competing than in Beech-Nut core markets in which Heinz has little or no presence. PFF 92. In addition, Dr. Hilke, the Commission's economic expert, found that Gerber's market share tends to be significantly lower in mixed markets than in which it faces substantial competition from only one other firm. PFF 112. Thus, three-firm markets are more competitive than two-firm markets, as one would expect. This means that, with Beech-Nut out of the way, Heinz will have greater ability to increase prices.

Competition for shelf space is important even when a firm fails to win a bid, because the discounts and allowances that it offers may force the other firm to raise its discounts and allowances in order to win the bid. PFF 147. The loss of an account also will prompt the losing firm to compete harder at other accounts to make up the volume. PFF 160-61. The loss of this bidding competition is a significant concern. *See PPG Indus.,* 798 F.2d at 1505 (enjoining merger of firms engaged in bid competition for aircraft transparencies); *FTC v. Alliant Techsystems Inc.,* 808 F. Supp. 9 (D.D.C. 1992) (enjoining merger of the only two competitors in bidding for sole-source contract for Department of Defense munitions); *FTC v. Imo Indus.,* 1992-2 Trade Cas. (CCH) ¶ 69,943 (D.D.C. 1992) (enjoining merger of competitors in Department of Defense bid market for night vision devices); *United Tote,* 768 F. Supp. at 1071

(unsuccessful bids led to lower prices). As the Supreme Court has stated, "[u]nsuccessful bidders are no less competitors than the successful one." *El Paso Natural Gas,* 376 U.S. 651; *see also Grumman Corp. v. LTV Corp.,* 665 F.2d 10, 12 (2d Cir. 1981); *Seeburg Corp. v. FTC,* 425 F.2d 124, 128 (6th Cir. 1970).[30]

Heinz and Beech-Nut also aggressively promote their products *prior* to bidding on accounts because they must demonstrate a track record of good market performance in order to be considered for a bid. Retailers choose the second brand based not only on price, but also on how well Beech-Nut and Heinz have performed in the past. PFF 144. Heinz and Beech-Nut also compete in areas where they are not actively bidding against the other for distribution. Each firm uses various customer inducements in an effort to grow sales in its traditional distribution ("core") areas in order to make themselves look good to prospective purchasers in other areas. PFF 146. In so doing, they are also competing with Gerber. PFF 146. The discounts, coupons, and other promotions involved in this competition clearly benefit consumers. PFF 175-78.

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[30] This case is similar to the competitive situation in the abandoned Coca-Cola/Dr Pepper merger. *Coca-Cola,* 641 F. Supp. 1128. There the two companies were in a heated battle to gain or retain placement as the "pepper" drink in fountain accounts. Coca-Cola Company had developed its own "pepper" drink and had targeted all convenience store fountain sales in an attempt to dislodge Dr Pepper, including offering $320,000 for Circle K's termination of Dr Pepper, and Dr Pepper responded with additional marketing and advertising dollars. *Id.* at 1139 n.23. A Dr Pepper executive declared: "[w]e must reach some arrangement with Coca-Cola that neither one of us continue to throw money away attempting to preclude one or the other from the business or spend excessive money to maintain our position in the business. This is only a waste of both of our resources." *Id.* at 1139 n.24. Defendants here are saying the same thing as the Dr Pepper executive: Let's stop this wasteful competition. In *Coca-Cola*, the court rejected the argument and enjoined the merger. Even though Dr Pepper had only a 4.6% market share, the merger was prohibited because "if the proposed acquisition is consummated there will be one less independent factor in the market to challenge the dominance of Coca-Cola Company." 641 F. Supp. at 1138.

The presence of an alternative for the second slot also constrains Heinz and Beech-Nut from raising prices to existing accounts. *E.g.,* PFF 234; PX 42 at 905

; PX 36 at 783

. Competition between and from Heinz and Beech-Nut also forces Gerber to respond with price competition and promotions for consumer sales. PFF 242.

As a result of this merger, Heinz will be able unilaterally to reduce competition at the wholesale level because it will have eliminated its only competitor for the second baby food slot on retailers' shelves. The likely – indeed, high likely – effect will be a reduction in trade payments, allowances, discounts, and consumer promotions, and thus higher prices and lower consumer benefits of other types. PFF 230.

The elimination of an aggressive competitor in a highly concentrated market significantly increases the risk that prices will rise after the merger. *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1345 (4th Cir. 1976) (enjoining merger when merging firms have been "aggressive competitors in the past"); *United States v. Ivaco*, 704 F. Supp. 1409, 1419-20 (D. Mich. 1989) (parties to joint venture were "especially" vigorous price competitors, viewing "each other as their primary competitor" in the relevant market). Without the competitive restraint posed by Beech-Nut, Heinz may well choose to price the remaining consolidated product line closer to Beech-Nut's current "premium" pricing point than to Heinz's pre-merger value pricing point. Indeed, Dr. Hilke found that defendants' business plan, DX 1, indicates that Heinz could earn higher profits by increasing prices to the Beech-Nut level post merger. PX 809; PFF 89, 328. That would be another unilateral price increase made possible by the merger, and nothing in the

post-merger market could restrain Heinz from imposing the price increase. In fact, it likely would be welcomed by Gerber.

2. Elimination of Consumer Choice Between Heinz and Beech-Nut Brands and Quality

Product quality is a major dimension of competition between Heinz and Beech-Nut. While Heinz has focused on its "value" positioning, Beech-Nut differentiated its product on the basis of quality. PFF 310. In addition to quality ingredients, quality control and safety are important aspects of that differentiation. Beech-Nut has a reputation for high quality, while Heinz has had repeated problems with maintaining quality production. This merger has the potential to reduce product quality, because only Heinz's production facility will be operated after the merger. PFF 315. Section 7 prohibits anticompetitive reductions in quality because it equivalent to an increase in price – consumers pay the same (or greater) price for less. *Community Publishers, Inc. v. Donrey Corp.,* 892 F. Supp. 1146, 1153 n.8 (W.D. Ark. 1995), *aff'd sub nom. Community Publishers, Inc. v. DR Partners.* 139 F.3d 1180 (8th Cir. 1998); *Merger Guidelines,* § 0.1 ("Sellers with market power also may lessen competition on dimensions other than price, such as product quality, service, or innovation."); *id.* §1.11; *see also Nat'l Soc'y of Prof. Eng'rs v. United States,* 435 U.S. 679, 695 (1978) (competition protects "all elements of a bargain – quality, service, safety, and durability – and not just the immediate cost"); *FTC v. Alliant Techsystems Inc.,* 808 F. Supp. 9, 23 n.5 (D.D.C. 1992).

The merger also will eliminate retailer and consumer choice between the Heinz and Beech-Nut brands because Heinz intends to produce only one brand after the merger. Defendants plan to discard 60 percent of Heinz's recipes and 40 percent of Beech-Nut's recipes

and produce a single "rationalized" product line. PFF 475. This is a major change in a differentiated product market. PFF 476-478, 480. Consumers value choice and a large percentage of baby food consumers purchase both Heinz and Beech-Nut even though they may prefer one brand over another. These consumers value variety and to the extent they lose their preferred brand, recipe, quality, or price "there will be substantial consumer disappointment." Tr. 1160 (Hilke).

Moreover, absent the merger, more and more consumers are likely to gain access to all three brands as Heinz and Beech-Nut continue to gain retail accounts in the other's traditional distribution area.

3. Elimination of Significant Non-Price Competition Between Heinz and Beech-Nut

Innovation competition in matters such as new products, development of new packaging, product quality, product safety, and services to retailers is a major selling point in the competition to be the second brand on the shelf. PFF 278. Both firms believed that it was necessary to innovate in order to maintain or gain an edge in the competition for the second spot on the shelf. PFF 279, 292. Defendants' claim that they are too small to innovate is belied by their history of successful innovations. Both firms have successful track records in innovation. Innovation has played an important competitive role in this market, and Beech-Nut and Heinz have competed aggressively in new product development and product differentiation. For example, Beech-Nut was the first firm to put baby food in glass jars when others used lead-soldered metal cans, the first to use stages based on age levels, the first to remove salt from all

baby foods, and the first to eliminate unnecessary starches and sugars. PFF 288. Beech-Nut has important patents on additives that improve the nutritional value of the baby food. PFF 289-291 Heinz also has numerous important innovations. Tr. 1154-56 (Hilke). Heinz has a global baby food program in which it has been developing aseptic products, and it recently launched its new Nature's Harvest product line. As a general matter size does not necessarily hinder innovation. As Professor Baker has observed, smaller firms often play a critical role in bringing innovation to the market. For example, Royal-Crown Cola, not Coke or Pepsi, produced the first diet cola, the first caffeine-free soft drinks, and the first soft drinks in cans.[49]

This merger will eliminate that stimulus to innovate. A lessening of innovation is an anticompetitive effect, just as an increase in price is an anticompetitive effect. *See PPG Indus.,* 798 F.2d 1500 (merger of firms engaged in design competition for aircraft transparencies); *Merger Guidelines,* § 0.1 ("Sellers with market power also may lessen competition on dimensions other than price, such as product quality, service, or innovation."); *id.* §1.11.

4. <u>Elimination of the Threat of Private Label Entry</u>

The elimination of excess capacity through this merger threatens to lessen competition because excess capacity can spur firms to compete more aggressively to increase sales. *See Cardinal Health,* 12 F. Supp.2d at 63-64.

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[49] *See* Jonathan B. Baker, "Fringe Firms and Incentives to Innovate" 63 Antitrust L.J. 621 (1995) (*citing* "The Innovative Royal Crown," N.Y. Times (Jan. 14, 1984) at 27).

Post-merger

incentives for Heinz to introduce private label baby food (and the threat of such action by Beech-Nut) would diminish with the acquisition for several reasons. First, there would no longer be any areas where Heinz could introduce private label baby food without immediate concern about extensive cannibalization of its existing sales. Second, current incentives for geographic extensions are at least partly due to extensive excess capacity. PFF 320.

Third, Heinz

was spurred by concern that Beech-Nut might move into supplying private label baby foods. PFF 320. Beech-Nut will no longer exist as an independent entity threatening Heinz with introduction of private label baby foods in Heinz accounts.

C. <u>The Merger Would Substantially Increase the Likelihood of Coordinated Interaction</u>

By creating a duopoly, the proposed merger would substantially ease the ability of the Gerber and Heinz to coordinate their behavior. The ability of firms to pull their competitive punches, with the expectation that their competitors would do the same, is one of the central concerns of the antitrust laws, as discussed above. Courts recognize that "significant market concentration makes it 'easier for firms in the market to collude, expressly or tacitly, and thereby force price above or farther above the competitive level.'" *University Health*, 938 F.2d at 1218 n.24. "Where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels." *PPG*, 798 F.2d at 1503. As the Supreme Court has observed, as concentration increases "greater is the likelihood that parallel policies of mutual advantage not

competition will emerge." *United States v. Aluminum Co. of America*, 377 U.S. 271, 280 (1964). Tacit collusion is more likely where firms have a better opportunity to monitor their competition and enforce cooperative pricing strategies. No environment could be more conducive to coordinated interaction than a duopoly. *See American Hospital Supply Corp. v. Hospital Products Limited*, 708 F.2d 589, 602 (7th Cir. 1986). As this Court has observed, "The relative lack of competitors eases coordination of actions, explicitly or implicitly, among the remaining few to approximate the performance of a monopolist." *PPG Indus.*, 628 F. Supp. at 885 n.9; *see Ivaco*, 704 F. Supp. at 1428 n.18 ("with only two firms in the market, the firms would be able to police cheating, or non-collusive pricing by their competitor."). Because of the increased likelihood of anticompetitive behavior, no court has permitted a merger-to-duopoly absent clear evidence that new entry into the market was likely.[50]

Tacit collusion is particularly a concern where entry barriers are significant, as in this case. Where entry into a market is slow, "colluding sellers need not fear that any attempt to restrict output in order to drive up price will be promptly nullified by new production." *Elders Grain*, 868 F.2d at 905; *Warner Communications*, 742 F.2d at 1162-63; *United States Steel Corp. v. FTC*, 426 F.2d 592, 604 (6th Cir. 1970). High entry barriers protect "the market power of existing firms and intensif[y] their ability to wield oligopolistic and anticompetitive practices with relative impunity." *Id.*; *see also Fruehauf Corp. v. FTC*, 603 F.2d 345, 357 (2d Cir. 1979) (high entry barriers may be a signal that a particular merger carries a potential for impairing competition). When entry is difficult, firms can increase price or engage in other

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[50] *See, e.g., PPG Indus.,* 798 F.2d 1500; *Staples*, 970 F. Supp. 1066; *United Tote,* 768 F. Supp. 1064; *Ivaco*, 704 F. Supp. 1409.

anticompetitive conduct without fear that new entrants will be attracted by the lure of supracompetitive profits.

A number of other post-merger conditions render this market "conducive to reaching terms of coordination, detecting deviations from those terms, and punishing such deviations." *Merger Guidelines,* § 2.1. *See* Memorandum in Support of Plaintiff's Motion for Preliminary Injunction at 33-37; PX 782 at ¶¶ 80 (Hilke Report). Defendants either concede or do not dispute most of those conditions. They concede the existence of high entry barriers. They have not disputed the proposition that competition between Heinz and Beech-Nut for shelf space is an impediment to coordination that would be removed by this merger. *See Id.* at ¶ 79; Tr. at 282-83 (Hilke). Defendants' expert could only suggest that it would be difficult to monitor an agreement without current sales information. Tr. at 1011-12 (Baker). But significant and timely information about sales not only is available, but also is currently used by the parties.[51] Tr. at 287 (Hilke).

Defendants also contend that retailers could preclude coordination by pitting Gerber against Heinz. . But their expert admits that very few retailers are willing to carry only a single brand of baby food.

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[51] Professor Baker has written that technology exists to obtain up-to-the-minute information: "Today we are increasingly able to observe prices and quantities sold on a weekly, daily, hourly, and even transaction-by-transaction basis." Jonathan Baker, "Contemporary Empirical Merger Analysis, 5:3 Geo. Mason L. Rev. 347,348 (1997).

[52] Two-brand retailers will have no choice but to carry both Heinz and Gerber, so they lack leverage. Moreover, defendants' power buyer defense does not apply in a case such as this, where there are scores of supermarket purchasers. *See* Reply Memorandum in Support of Plaintiff's Motion for Preliminary Injunction at 18-19.

Defendants also incorrectly assume that post-merger collusion is unlikely because Heinz will have an incentive to act as a maverick as a result of cost savings generated by the merger. Tr. at 997-98 (Baker); The shakiness of that assumption was demonstrated by the analysis of the Commission's economic expert. *See* PX 809. Tr. 1166-69. Heinz will not have an incentive to act as a maverick. Rather, its profit maximizing strategy very likely would be to raise price even if all the cost savings are realized. *Id.* Those incentives are magnified by investor pressures to increase profits and stock prices. While those pressures exist in any industry, Gerber and Beech-Nut will find it much easier to increase prices and profits without the three-way competition that currently exists.

Heinz has already indicated its desire for a less competitive market:

Beech-Nut also signaled its desire for a less competitive environment. Its integration/turnaround plan after its acquisition by Milnot stated that it should become "a quick follower to Gerber on pricing . . . ." PX 532 at 380. Heinz similarly has noted that it is

[52] Switching to a one-brand strategy because of the non-competitive situation created by this merger would, in itself, restrict consumer choice and would be an anticompetitive effect of this transaction.

Before the Heinz-Beech-Nut merger announcement, distribution competition between the two firms prevented them from fully acting on their desire to be passive followers. Post-merger, there would only be two brands of baby food available. Since retailers almost uniformly carry two brands of baby foods on their shelves, there would be significantly less incentive for the merged entity and Gerber to engage in head-to-head competition to displace each other–there would be space on the shelves for both firms' products. [53] In addition, by acquiring the brand that, by reputation, can price just behind Gerber, and does, Heinz will have positioned itself to move its new product line into Beech-Nut's pricing point. There would be a significantly reduced incentive for either of the two remaining firms to compete aggressively against one another or cheat on any tacit understanding they may reach.[54] PFF 364 at 100.

V. DEFENDANTS' ALLEGED EFFICIENCIES DO NOT REVERSE THE LIKELIHOOD OF ANTICOMPETITIVE EFFECTS

As a leading treatise has observed "[i]n no case . . . has a court approved an otherwise anticompetitive merger based on proffered efficiencies."[55] In *Staples* and in *Cardinal Health*, this Court evaluated efficiencies far more substantial than those suggested by these defendants

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[53] Retailers are reluctant to carry only a single brand of baby food, for fear of not providing their customers a choice. PX 95 at 620

[54] PFF 364 . While defendants contend that coordination would be difficult, Professor Baker has written that firms could establish "focal points," such as a market share agreement, would be a way to coordinate even in complex markets. *See* Jonathan B. Baker, "Predatory Pricing After Brooke Group: An Economic Perspective," 61 Antitrust L.J. 585, 600 n.74 (1994). Heinz and Gerber could establish similar focal points here. PFF 372. Professor Baker stated in the same article that "coordination may be harmful even if it is imperfect and incomplete." *Id.* at 602. *See* PFF 372.

[55] American Bar Association, Mergers and Acquisitions 153 (2000).

and found them insufficient to reverse the anticompetitive effects of the mergers. Those decisions confirm the instruction of the Merger Guidelines that "[e]fficiencies almost never justify a merger to monopoly or near-monopoly." *Merger Guidelines,* § 4.0.

Efficiency claims must be assessed within the competitive context of the transaction because competition is the force that drives efficiency[56] and it is the force that allows consumers to receive the benefits that the market can produce. In addition, efficiency claims are easier to assert than to achieve,[57] which is why the courts impose a "very rigorous" evidentiary burden on efficiency claims. *United States v. Rockford Mem. Corp.*, 717 F. Supp. 1251, 1289 (N.D. Ill. 1989), *aff'd*, 898 F.2d 1278 (7th Cir.), *cert. denied*, 498 U.S. 920 (1990); *see FTC v. University Health*, 938 F.2d 1206, 1222-23 (11th Cir. 1991). Specifically, defendants must demonstrate that claimed efficiencies:

(1) are identified with precision, are not based on "speculation," can be verified and actually will be achieved, *Staples*; *see University Health*, 938 F.2d at 1223; *United States v. Mercy Health Services*, 902 F. Supp. 968, 987-88 (N.D. Iowa 1995);

[56] Indeed, as recognized by this Court, "[E]xperience teaches that without worthy rivals ready to exploit lapses in competitive intensity, incentives to develop better products, to keep prices at a minimum, and to provide efficient service over the long term are all diminished to the detriment of consumers." *PPG Indus.*, 628 F. Supp. at 885; *see also United States v. Western Elec. Co.*, 592 F. Supp. 846, 874 (D.D.C. 1984), *appeal dismissed*, 777 F.2d 23 (D.C. Cir. 1985) (competition results in "lower prices, highest quality, and the greatest material progress").

[57] Some studies show that firms often fail to accomplish the projected cost savings from a merger. *See generally*, Craig W. Conrath and Nicholas A. Widnell, "Efficiency Claims in Merger Analysis: Hostility or Humility?" 7 George Mason L. Rev. 685 (1999)(describing cases where efficiency claims failed to be achieved); Joseph Brodley, "Proof of Efficiencies in Mergers and Joint Ventures," 64 Antitrust L.J. 576 (1996); KPMG, "Mergers and Acquisitions: Global Research Report (1999) (83% of mergers failed to add to shareholder value).

(2) are "cognizable," *i.e.*, they do not result from an anticompetitive reduction in output or quality; *Cardinal Health*, 12 F. Supp.2d at 62-62; *NCAA v. Law*, 134 F.3d 1010, 1022 (10th Cir. 1998);[58]

(3) are "merger-specific," *i.e.*, they cannot be achieved by other means less restrictive of competition, *Cardinal Health*, 12 F. Supp.2d at 62-63; *Mercy Health*, 902 F. Supp. at 987, n.4; *United States v. Ivaco*, 704 F. Supp. at 1425; *Rockford*, *supra*;

(4) will be passed on, and produce a significant economic benefit to consumers, *Cardinal Health*, 12 F. Supp.2d at 62; *Staples*, 970 F. Supp. at 1089-91; *United Tote*, 768 F. Supp. at 1084-85 (efficiencies rejected because "there are no guarantees that these savings will be passed on to the consuming public"); *California v. American Stores*, 697 F. Supp. 1131, 1133 (C.D. Cal. 1988) (rejecting claim of over $50 million in efficiencies since savings will not "invariably" be passed on to consumers); and

(5) will outweigh the anticompetitive effects of the acquisition and result in a more competitive market. *Cardinal Health*, 12 F. Supp.2d at 64; *Staples*, 970 F. Supp. at 1089-91; *University Health*, 938 F.2d at 1222-23 ("significant economies and that these economies ultimately would benefit competition, and hence, consumers"); *Ivaco*, 704 F. Supp. at 1427; *United Tote*, 768 F. Supp. at 1085.

Tested against this framework and the law, defendants' efficiency claims fall far short of justifying an anticompetitive merger.

A. <u>Defendants' Production Efficiency Claims Suffer From Numerous Defects</u>

Defendants' production efficiency claims relate to the transfer of Beech-Nut's production volume to Heinz's facility. The claims are beset with deficiencies, but even ignoring the measurement problems, the lack of merger specificity, the lack of cognizability, and assuming Heinz actually does pass them on to consumers (contrary to the tremendous power it will share with Gerber), the alleged efficiencies are quite modest. Variable cost efficiencies, which they admit are the only relevant efficiencies, are estimated by defendants at only $ million after

[58] *See also* Robert Pitofsky, "Efficiencies in Defense of Mergers," 7 Geo. Mason L. Rev. 485, 486-87 (1999) ("efficiencies must not arise from anticompetitive reductions in output, service, or other competitively significant categories such as innovation.").

correcting for a known error. Variable production cost efficiencies, which defendants' expert agrees are the most important, are estimated at $ million after correcting for a known error. Only the portions properly allocated to the jarred baby food market are relevant. Defendants did not make that allocation, but conservatively assuming it is 90 percent, and the efficiencies are passed through 100 percent, the $ million in production efficiencies amount to less than one percent of this $600 million market.

1. The Production Efficiency Claims are Infected with Measurement Problems

Defendants' production efficiency claims relate to the transfer of Beech-Nut's production volume to Heinz's facility. The efficiency claims suffer from a number of measurement problems:

! First, it is difficult to pin down precisely what defendants are claiming, because it keeps changing – their efficiency estimates have steadily increased since the merger came under scrutiny by the Commission, and now are much higher than those presented to senior Heinz management. PFF 411-15.

! Second, while defendants concede that only variable cost savings are relevant to the analysis of the competitive effects of the merger (*see* DB at 25-26; DX 629 at ¶¶ 14-16 (Painter Report)), defendants' prehearing memorandum asserts an efficiencies estimate ($ million) that is considerably higher than the variable cost savings estimate of Ken Campbell, defendants' fact witness ($ million). *Compare* DB at 25 with DX 205. And, although Mr. Campbell increased his estimate of total cost savings up to $ million just before trial, defendants' efficiency expert opined that only $ million represent variable cost. PFF 416; DX 124; PX 762 at 70 (Painter).

! Third, while defendants apparently agree that production variable cost savings are the most relevant (*see* DB at 26, quoting *Merger Guidelines* § 4), their prehearing memorandum neglected to mention that Messrs. Campbell and Painter estimated production variable cost savings to be only $ million. DX 124; DX 645; PX 762 at 72 (Painter).

! Fourth, defendants' estimates are based on outdated information. PFF 422-25. For example, more recent cost information from Beech-Nut shows that actual variable

conversion cost for the Canajoharie plant in fiscal year 2000 was __ cents per case less than as assumed by defendants' efficiency witnesses. PFF 424. This reduces the variable cost savings estimate by $ million dollars. PFF 424. Defendants also relied upon outdated cost information for the Heinz plants. PFF 425.

! Fifth, defendants relied on unverified assumptions. For example, just prior to providing efficiency estimates to Commission investigators on March 31, 2000, Heinz's Mr. Campbell increased his estimate of variable production cost savings by $ million from $ to $ million by eliminating, for still-unexplained reasons, a utility cost "plug." PFF 411; Tr. at 712-13 (Campbell).

Mr. Campbell also increased his estimate of purchase cost savings from $ million to $ million during the course of litigation based on his interpretation of four non-specific letters solicited from suppliers. PFF 415. Defendants' efficiency expert (to his credit) testified that only $ million in purchase cost savings were cognizable. PFF 419.

Defendants also relied on estimates prepared by a consulting firm, Booz Allen, and admitted that they lacked the necessary mathematical or statistical expertise to evaluate the results. PFF 426-27. Defendants' efficiency expert likewise did not undertake an independent review of those results. PFF 428. To the extent they tried to replicate the Booz Allen results, their estimates were lower than the amounts presented by Mr. Campbell. PFF 429.

! Sixth, defendants' efficiencies assume that volume will stay constant – they do not account for a likely decrease in volume as some consumers, dissatisfied with the loss of choice between Heinz and Beech-Nut, defect to Gerber, or as some consumers switch to Heinz's touted aseptic packaging, if and when that product is introduced. PFF 436, 438-39. Defendants also assumed, without analysis, that variable unit production costs would remain constant regardless of volume. PFF 437. Defendants also made several methodological errors. *See* PFF 430-33. For example, there are deficiencies in their estimates of depreciation and other expenses (PFF 430-32), and they did not take into account the increased costs associated with aseptic production, when that occurs. PFF 433.

2. Defendants' Production Efficiency Claims Are Not Cognizable Because They Result From an Anticompetitive Reduction in Consumer Choice

The centerpiece of the defendants' efficiency claims is their plan to reduce consumer choice. Defendants plan to eliminate both the Heinz brand and the Beech-Nut brand as they exist today.

For those consumers who prefer the recipe that is not selected or prefer Beech-Nut's assurance of product quality and safety (Heinz has a greater rate of product recalls), the merger will result in a significant reduction in choice, particularly since these products are differentiated and there are only three brands to begin with. PFF 479, 480-84. PX 782 at ¶¶ 99-102 (Hilke Report).

In addition, while defendants' efficiency claims assume no change in quality – in contrast to their argument that baby foods are heterogeneous products, with Beech-Nut having superior quality – the efficiencies in reality may be based on an apples-to-oranges comparison. To the extent Heinz is unable to duplicate Beech-Nut's quality – a serious question considering Heinz's track record – the merger will result in a degradation of quality. That too would make the efficiencies non-cognizable. In sum, while moving production from Beech-Nut's plant to Heinz may lower some production costs, consumers who prefer the products that are discontinued or who prefer Beech-Nut's quality may be worse off. PFF 479. Efficiencies resulting from significant loss of consumer choice or of product quality are not cognizable. This merger is unlike *Staples* (office supply superstores) and *Cardinal Health* (drug wholesaling services), where customers were not threatened with a significant loss of choice among non-price attributes; the services involved in those cases were essentially homogeneous. That is not the case here.

3. <u>Defendants' Production Efficiency Claims Lack Merger Specificity</u>

! First, defendants' efficiency claims do not take into account the extent to which production efficiencies would be improved if Heinz had continued with its plans to

continue to expand its baby food business through internal growth rather than acquire Beech-Nut. *See* PFF 470.

- Second, defendants' efficiency claims do not consider whether Beech-Nut's variable production costs could be decreased by modernization of certain equipment such as that installed by Heinz. PFF 470.

- Third, defendants have not demonstrated that a merger with Heinz is the only feasible ownership change that would enable Beech-Nut to achieve greater production efficiencies. As Dr. Hilke stated in his supplemental written testimony, defendants' evidence on this point is weak. PX 821 at 1 (Hilke).

Thus, it is highly questionable whether defendants' efficiency estimates are merger-specific.

4. The Claimed Production Cost Efficiencies are Small

Even if projected efficiencies were passed on, they are unlikely to reverse the potential competitive harm from the merger. The potential cost savings are certainly less than defendants' variable cost savings estimate of $ million. At a minimum, the estimate must be pared down to $ million a year to take into account updated conversion cost data for Beech-Nut's plant.[59] *See* PFF 497. The adjusted variable production cost efficiency would be even smaller, $ million. Further, only a part of those efficiencies are attributable to the relevant market being considered in this action, jarred baby food, because both the Heinz plant and Beech-Nut's plant produce cereals and juices. PFF 498. Jarred baby food accounts for about 65 percent of all prepared

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[59] Other errors in defendants' estimates are unquantifiable at this time. *See* discussion *supra*.

baby food sales. PFF 499. Even applying a conservative estimate that 90 percent of the cost savings are attributable to jarred food, the outer limit for variable cost efficiencies is $ million, and the outer limit for variable production cost efficiencies is $ million. That sum, even assuming a 100 percent pass-through, is smaller than the competitive harm from a minimal price increase of 2 percent in the $600 million jarred baby food market. PFF 505. *Cf. Rockford*, 717 F. Supp. at 1291. Furthermore, the realization of efficiencies could take up to 18 months or more, PFF 504, whereas the loss of competition will be instantaneous.

5. There Is No Guarantee That Heinz Will Keep Its Prices at Current Levels (Much Less Pass On the Alleged Savings) if the Merger is Consummated

Defendants have indicated that Heinz intends to consolidate all its baby food production under a single brand – "Beech-Nut Nature's Goodness" – because

Within the current market structure, Heinz baby food is sold at wholesale prices __% to __% lower than the prices for Gerber baby food, and __% to __% lower than the prices for Beech-Nut baby food (DB at 28), and is perceived to be of somewhat lower quality than Gerber and Beech-Nut baby food. By contrast, Beech-Nut baby food is sold at approximately the same prices as Gerber baby food (and less if Heinz is competing in the same area), and is perceived to be of approximately the same or higher quality. Heinz represents that after the merger, it will "offer [] a higher quality product at value pricing." *Id*. at 28. But it is uncertain what that "value" pricing will be.

After the merger, the competitive constraints imposed by Beech-Nut as an independent firm will no longer exist. As a result, the prices at which Heinz will be able to maximize profits may in fact be considerably higher than its current prices, and its volume levels may be

correspondingly lower. Thus, for example, Heinz may find – its current intentions notwithstanding – that it must increase prices after the merger in order to maximize profits and shareholder returns. Indeed, alternative profitability scenarios based on defendants' business plan, DX 1, indicate that Heinz's profits would be greater by pricing its new baby food product line at or close to Beech-Nut's current prices. *See* PX 809; PFF 485; Tr. 1166-69 (Hilke).

Ultimately, the basis for claimed consumer benefits is defendants' confidence that they can achieve the substantial efficiencies and "promise" they will pass on those savings. But "trust me" is not the standard of proof adopted by the courts. *See University Health*, 938 F.2d at 1223 ("defendant [cannot] overcome a presumption of illegality based solely on speculative, self-serving assertions"); *see Ivaco*, 704 F. Supp. at 1428 (rejecting claims because defendants not obligated to produce new product). Defendants' business plan in fact implies that they will not pass on any of the alleged efficiencies. *See* DX 1; PX 809, PFF 328.

B. <u>Promises of Beneficial New Competition Are Not Merger-Specific</u>

Defendants claim that they will be able to offer innovative new products and achieve national distribution, and thus will be better able to compete with Gerber. Defendants' promises are not cognizable because they could be achieved by less anticompetitive means. First, as discussed above, after Heinz came in with a large offer, Beech-Nut's owners did not seriously consider alternatives to a merger with Heinz.

Second, both firms are successful and profitable and have been able to innovate on their own. Some of the "new" products defendants are promising already are available, and others would be available without the merger. For example:

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Thus, the promised new competition is not merger specific.

! Heinz promises high quality recipes at value prices after the merger. (DB at 49)

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However, Heinz's "plans" for the U.S. may be more fiction than fact – they were developed for government review. Defendants realized they need to create a "tangible growth plan" to obtain "trade buy in" or the deal would be "DOA in Washington." [PFF 446 [PX 440]

Further, assuming aseptic is a viable product, Heinz may be able to enter into a co-packing arrangement with another company, just as it co-packs baby cereal with Beech-Nut. PX 821 at 1-3 (Hilke).

! Heinz's promise of "revolutionary quality control" (DB at 49) adds nothing to the market. Beech-Nut already has unsurpassed quality control.

! "National distribution" in itself is not an efficiency, but even if it were, defendants do not need this merger to achieve "national" distribution. The defendants already sell on a broad geographic basis, and their geographic reach is expanding, partly as a result of supermarket consolidations. PFF 408; PX 299 at III-1 (supermarket mergers are "breaking down regional markets"); PX 764 at 03 ("customer consolidation is decreasing margins and moving business from regional to national players'). That expansion will continue absent this merger. Tr. 1138-39.

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In sum, defendants' efficiency claims cannot trump the anticompetitive effects of this merger.

VI. NOTHING LESS THAN A FULL-STOP INJUNCTION WILL PROTECT COMPETITION HERE

Defendants assert that a preliminary injunction is "an extraordinary and drastic remedy." (DB at 19.) To the contrary, it is Congress's designated remedy to preserve the status quo pending plenary FTC investigation and deliberation. This Circuit has "consistently held" that where the Commission has raised serious and substantial questions about the legality of a proposed merger, "there is a 'presumption in favor of a preliminary injunction.'" *Alliant Techsystems*, 808 F. Supp. at 22-23 (quoting *PPG Indus.*, 798 F.2d at 1507); *Cardinal Health*, 12 F. Supp. 2d at 66. "The statute itself indicates that likelihood of success on the merits weighs heavily in favor of an injunction." *PPG Indus.*, 798 F.2d at 1508; *Staples*, 970 F. Supp. at 1091. An injunction is especially important in this case because

An effective post-merger remedy after an administrative trial is likely to be futile. That is precisely the situation Section 13(b) was intended to prevent.

Defendants are strangely silent on the question of public equities, suggesting only that absent the merger "who will compete with Gerber?" (DB at 56.) As is eminently clear, this argument is wrong on both the law and the facts. The law does not countenance the acquisition of market power in order to "counteract" market power. Defendants' argument is wrong on the facts, because Heinz and Beech-Nut do offer significant competition in the market which benefits consumers. Both Heinz and Beech-Nut are profitable and robust and will continue to offer significant competition absent this merger.

CONCLUSION

For the foregoing reasons, the Court should grant the Commission's motion for a preliminary injunction against the proposed acquisition.

Respectfully submitted,

DEBRA A. VALENTINE
General Counsel

RICHARD G. PARKER
Director
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

RICHARD DAGEN
DAVID SHONKA
DAVID BALTO

Attorneys
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

By:

RICHARD DAGEN
DC Bar No. 388115
DAVID SHONKA
DC Bar No. 224576
DAVID BALTO
Attorneys for Plaintiff
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

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(202) 326-2628