UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

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September 20, 2000

INTRODUCTION AND SUMMARY

This merger will eliminate competition between Heinz and Beech-Nut and create a permanent duopoly between Heinz and Gerber. The results will be higher prices, lower quality, less innovation, and a baby food market in which the only two players coexist on the supermarket shelf. The record contains persuasive evidence that:

- Heinz and Beech-Nut bid aggressively for the second spot on the shelf and this competition leads to greater allowances to retailers and ultimately lower prices and other benefits for consumers;
- Heinz and Beech-Nut compete for sales to consumers with couponing and other promotions, and this competition is important since many consumers purchase both brands;
- This merger will lead to a level of concentration that this court considers "overwhelming" both nationwide and in numerous major metropolitan markets where both Heinz and Beech-Nut have substantial market shares; and
- In a market that the Third Circuit[1] has recognized offers the potential for tacit collusion, this merger would greatly enhance the opportunities for coordination, since no environment is as attractive for collusion as a duopoly, and this duopoly is forever.

These facts are consistent with only one outcome – the merger is likely to harm competition.

The Commission's *prima facie* case is undisputed: the defendants concede the relevant product and geographic market and the substantial level of concentration. The burden therefore shifts to the defendants to show that these concentration numbers "give an inaccurate prediction of the proposed acquisition's probable effect on competition" *FTC v. Cardinal Health,* 12 F. Supp. 2d 34, 54 (D.D.C. 1998). This is a daunting task since no court has permitted a merger to duopoly in the presence of high entry barriers or where neither firm was failing. Here both

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[1] *In re Baby Food Antitrust Litigation*, 166 F.3d 112, 138 (3d Cir. 1999).

parties agree that entry barriers are substantial and both Heinz and Beech-Nut are successful, profitable firms.

Seeking to avoid these facts, defendants ask the Court to focus not on anticompetitive effects but on the "health" of the baby food market, and argue that this merger should be approved because: (1) Gerber has a large market share; (2) Heinz and Beech-Nut might be better rivals if they were merged; and (3) under Gerber's alleged dominance the baby food market has "shrunk" and is "boring." But this Court's responsibility under Section 13(b) of the FTC Act is not to administer industrial policy or carry out economic planning; rather it is to determine whether the FTC has raised "serious and substantial" questions going to the merits of this merger under Section 7 of the Clayton Act. We submit that it has. It is then the Commission's role to examine the ultimate merits in its administrative proceeding, *i.e.,* to assess whether the effect of the merger "may be [likely to] substantially lessen competition" in any section of the country or any relevant market. 15 U.S.C. § 18. Gerber is not on trial here. Permitting parties to merge in an attempt to allegedly "improve" the competitive health of a market would be a radical departure from over a century of antitrust law. That is why defendants cannot cite a single case in support of their position that a merger should be permitted as a "structural remedy" to improve a market. DCL 34.[2]

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[2] Numerous courts, including this one, have enjoined mergers to duopoly. *See Cardinal Health,* 12 F. Supp. 2d 34; *FTC v. Staples, Inc.,* 970 F. Supp. 1066 (D.D.C. 1997); *United States v. United Tote, Inc.,* 768 F. Supp. 1064 (D. Del. 1991); *United States v. Ivaco*, 704 F. Supp. 1409 (D. Mich. 1989); *FTC v. Coca-Cola Co.*, 641 F. Supp. 1128 (D.D.C. 1986), *vacated as moot*, 829 F.2d 191 (D.C. Cir. 1987); *FTC v. PPG Indus., Inc.*, 628 F. Supp. 881 (D.D.C.), *aff'd in part*, 798 F.2d 1500 (D.C. Cir. 1986); *see AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568 (7th Cir. 1999).

Defendants ignore *PPG* and *United Tote* in their briefs. They attempt to distinguish

In their Post Trial Brief[3] defendants instead seek refuge in *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), for the proposition that the statistical data presented by the Commission is not conclusive. DCL 5, 17. Of course, the FTC is not relying primarily on statistical data and has provided compelling evidence of how the market operates and the likely anticompetitive effects of the merger. The key instruction of *General Dynamics* is to look at the "structure, history and probable future" of the market. DCL 17. However, each of these factors militates against the merger:

! **Structure:** There have been only three significant baby food firms for at least several decades. Supermarkets want two baby food products on their shelves and Heinz and Beech-Nut compete to be the second baby food.

! **History:** Entry barriers have been substantial and the positions of the firms have been stable for years.

! **Probable future:** An increasing tide of supermarket mergers has increased the geographic scope of Heinz and Beech-Nut which are increasingly invading each others' areas. Absent this merger, Heinz and Beech-Nut will continue to enter each other's

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Staples, *Ivaco*, and *Coca-Cola* based on the fact that the merged firm had a large market share. DCL 31. However, the level of the post-merger market share is not dispositive on the likelihood of either the potential anticompetitive coordinated or unilateral effects in this case. As described *infra,* with Beech-Nut eliminated coordination between Gerber and Heinz will be enhanced, because only 2 firms remain and a duopoly is the easiest environment in which to coordinate. And without Beech-Nut, Heinz no longer has a rival for the second spot on the shelf, making unilateral anticompetitive harm likely. Finally, there are numerous cases finding violations with post-merger market shares smaller than those in this case, including this Court's recent decision in *Cardinal Health*. PCL 56.

[3] 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"; the FTC's Post Trial Memorandum as "FTCPTB"; the FTC's Reply Findings of Fact as "RFF"; the Defendants' Memorandum of Law in Opposition to the Commission's Motion for a Preliminary Injunction as "DB"; the Defendants' Post Trial Brief and Conclusions of Law as "DCL"; and the Defendants' proposed findings of fact as "DFF."

markets, leading to more competition, more choices, and lower prices for consumers. With the merger, significant present and potential competition will be lost.

Similarly, the defendants rely extensively on *United States v. Baker Hughes, Inc.*, 908 F.2d 981 (D.C. Cir. 1990), but a careful analysis of that case provides no solace. DCL 23, 25. The critical factors of that case all support the conclusion that this merger is anticompetitive:

- **Entry barriers:** The primary focus of the opinion was on the standard used in assessing entry barriers: in this case defendants concede substantial entry barriers, since there has been no effective entry for decades.

- **Reliability of market share statistics:** The court rejected the government's reliance on market share because bids were infrequent and large so that market shares were "volatile and shifting." *Id.* at 986. In this case, the market shares have been very stable for decades and there is no suggestion they do not accurately reflect the focus of competition in the market.[4]

- **Ability of buyers to protect themselves:** The *Baker Hughes* court also relied on the sophistication of buyers who were able to "closely examine available options and typically insist on receiving multiple confidential bids for each order." *Id.* at 986. In *Baker Hughes,* post-merger there would have been at least 5 alternative bidders for any individual sale (*see* 731 F. Supp. 3, 9)— in this case post-merger there will be only 2 bidders for two slots and thus there "would be few if any price restraining forces in the market areas where only two competitors exist." *Cardinal,* 12 F. Supp.2d at 67.[5]

The linchpin of the defendants' argument that there will be no anticompetitive effects from this merger is the claim that they don't really compete against each other because they

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[4] Indeed, the defendants' claim that Gerber is a monopolist is almost exclusively based on its market share.

[5] Defendants also note that *Baker Hughes* mentioned several other factors, including "excess capacity," "elasticity of industry demand," "product differentiation," and the "prospect of efficiencies from the merger." *Id.* at 984, 985. Each of these factors support the competitive concerns in this case. This merger will enhance the ability to coordinate by reducing the amount of excess capacity in the market and decreasing product differentiation. PFF 358, 360. Coordination is a greater concern because demand in the market is inelastic. PFF 46, 353. Finally, to the extent that the efficiency claims meet the requirements of the law they are dwarfed by the amount of potential competitive harm. PFF 505 *et seq.*; FTCPTB 35-38.

rarely are on the same supermarket shelves. This is just nonsense. As explained by Judge Posner in *Elders Grain,*

> The argument that ICM and Lincoln are not in the same market because most of their customers are different and because the two firms don't sell the same product mix is based on a misunderstanding of competition. . . . In a normal market, sellers establish relations of mutual trust and advantage with particular customers, and the result is that at a given moment different sellers may have different customers. *That doesn't mean the sellers are not competing. Customers aren't locked into these relationships; they can be lured away by a better offer. The possibility of such offers keeps the existing relationships from becoming exploitive*.

FTC v. Elders Grain, Inc., 868 F.2d 901, 907 (7th Cir. 1989) (italics added).[6] In any case, Heinz and Beech-Nut do compete at both the retail and wholesale levels. RFF I.A., I.B. As Heinz CEO testified: "I agree we fight to get on the shelf with Beech-Nut. We compete." Tr. 487 (Johnson).

Ultimately, the defendants must rely on their promise that if they are permitted to merge, they will choose to lower prices. Such a promise, however, is no substitute for competition. No court has ever permitted the acquisition of market power on that basis. In enacting the antitrust laws, Congress decided to rely on competition, not promises, to protect consumers. In its most recent merger decision, this court rejected the offer of the merging parties to enter an order not to raise prices and pass on 50% of their cost savings. *Cardinal,* 12 F. Supp. 2d at 67. The court observed that "the mere fact that such representations had to be made strongly supports the fears

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[6] Thus, several courts have enjoined mergers in cases where firms bid against one another even if they do not succeed in actually winning the bid. *See PPG Indus.,* 798 F.2d at 1505 (rejecting argument that products were complementary); *United Tote*, 768 F. Supp. at 1071(the fact that United Tote never replaced Autotote "does not necessarily demonstrate a lack of competition between the two suppliers"). As the Supreme Court has stated, "[u]nsuccessful bidders are no less competitors than the successful one." *United States v. El Paso Natural Gas Co.,* 376 U.S. 651 (1964). The defendants have never responded to this clear precedent on the importance of bid competition.

of impermissible monopolization." *Id.* These defendants have promised less, simply going to the retailers, providing them a one-sided presentation, knowing that without their support this deal would be "DOA in Washington." PFF 446. Their apparent promise -- value pricing – is illusory. They simply plan to price below Gerber. And, in any event, even a real promise would be subject to change in corporate policy, and personnel. A company's promise to shareholders to maximize profits always trumps a promise to customers to lower prices.

The defendants' uncharted course must be rejected. It would require this Court to rewrite antitrust law based on a hopeful guess that this merger would shake up the baby food category. Such an approach is inconsistent with the law and sound antitrust policy, which prefers "growth by internal expansion is . . . to growth by acquisition." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 370 (1963). Moreover, to do so this Court must assume that Heinz, when faced with the low-risk prospects of higher profits merely by going along with Gerber's pricing lead, will instead make the decision to compete, with all the risks that would entail. Perhaps the procompetitive course may be taken for some limited time, but in a duopoly protected by concrete entry barriers, the incentive and ability to collude will be ever-present. "The incentive [to collude], of course, is profit maximization." *Ivaco*, 704 F. Supp. at 1428. The parties' own business plans demonstrate that they have tried to accommodate Gerber in the past in order to increase profits, and that post-merger they would have strong incentives, even absent coordination with Gerber, to price at the higher Beech-Nut price. PFF 328-340, 346-352. Approving a merger that poses such a compelling threat of future coordination is inconsistent with the law and antitrust policy.

Defendants' remaining arguments fare no better. Defendants' claims that powerful buyers can protect the market offers little comfort for consumers: a power buyer is a buyer with alternatives, and in this case the buyers will only have two sellers for two positions on the shelf. Moreover, the buyers are not as large or effective at disciplining the market as in those few cases where the defense has been met. Also, since supermarkets are simply the middle person in the distribution chain, their incentive to resist a price increase is much less than the incentive of a final purchaser,[7] and ultimately, they may just pass on price increases to consumers. The defendants' efficiency claims are largely unverified, not cognizable, not merger specific, and cannot overcome the significant risk to competition posed by this merger. Finally, the defendants' equitable claim (raised for the first time in their post-trial brief) that the merger should be permitted because no one else will buy Beech-Nut is not supported by the facts and is not cognizable under the law. A preliminary injunction under Section 13(b) is clearly appropriate because the FTC has raised "questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals." *Cardinal Health,* 12 F. Supp. 2d at 45; *Staples,* 970 F. Supp. at 1071.[8]

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[7] That is especially so when demand is not highly elastic (sensitive to price). That is the case here.

[8] Defendants mischaracterize the appropriate burden for demonstrating the need for a preliminary injunction. They suggest that the "D.C. Circuit" has held that the FTC bears a "heavy" burden in its preliminary injunction motion. DCL 8, *citing FTC v. Occidental Petroleum Corp.*, 1986-1 Trade Cas. (CCH) ¶ 67,071, at 62,516 (D.D.C. 1986). Of course, *Occidental Petroleum* is not a decision of the D.C. Circuit, but rather a vacated decision of the district court which got it wrong --- ultimately the Commission prevailed and secured relief. But in any case, the alleged "heavy burden" standard has not been adopted by this court in any recent decision including *Staples* and *Cardinal*.

ARGUMENT

I. Eliminating an Aggressive Competitor does not Promote Competition

The linchpin to the defendants' argument is that this merger is procompetitive because it enables two "small" companies to better compete against the dominant firm. The defendants' argument is not supported by either the law or the facts in this case.

First, in spite of the *dicta* in *Brown Shoe*, no court has approved a merger simply because it would better enable the combined firm to "enter into more meaningful competition with those [companies which are] dominating the relevant markets." *Brown Shoe Co. v. United States*, 370 U.S. 294, 346 (1962).[9] Of course, this argument was not dispositive in *Brown Shoe* where the merging firms had respective market shares of 4% and 0.5%.[10]

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[9] Although the Supreme Court dictum and the Congressional history of the 1950 Amendments to the Clayton Act may have expressed that the law does not impede the merger of genuinely *small* companies in order to compete against dominant firms, the total lack of cases finding it dispositive is indicative of the high thresholds of the defense. *See* American Bar Association, Mergers and Acquisitions 137 (2000) ("arguments that increased market share will improve competition in the market are . . . rarely successful or publicly endorsed by courts or the enforcement agencies."). Moreover, *Brown Shoe* addresses the need of small firms to merge to compete more effectively "with larger *corporations* dominating the relevant market." 370 U.S. at 319; *Philadelphia Nat'l Bank*, 374 U.S. at 370-71 ("leading *firms*")(emphasis added). The legislative history clearly did not envision a situation where the firms merged to take on a single firm and create a duopoly.

[10] This "defense" was rejected by the Supreme Court in two cases within the next decade. *See United States v. Von's Grocery Co.*, 384 U.S. 270, 277 (1966) (the merger could not "be defended on the ground that one of the companies was about to fail or that the two had to merge to save themselves from destruction by some large and more powerful competitor"); *Ford Motor Co. v. United States*, 405 U.S. 562, 569-70 (1972) (rejecting argument that acquisition would have beneficial effect because it would make third firm in market "a more vigorous and effective competitor against" the top two firms). Lower courts have universally rejected the defense. *See RSR Corp. v. FTC*, 602 F.2d 1317, 1325 (9th Cir. 1979) (declining to approve merger which increased the merged firm's market share from 12% to 19%, because "a merger of

Are Heinz and Beech-Nut small firms? Absolutely not. In the recent Third Circuit decision the court characterized these rivals as two of the "three large and strong competing companies."[11] Post-merger these firms will possess over 34% of the jarred baby food market, a market share higher than in numerous cases where the small company defense was rejected including: *Brown Shoe, supra* (under 5%); *Von's*, *supra* (6%); *RSR*, *supra* (19%); *Lancaster Colony*, *supra* (18%); *Bethlehem Steel*, *supra* (21%). Thus, there is no reason to believe that the merging parties in this case qualify for this "small company" defense, assuming *arguendo* that it even exists.

As a matter of antitrust policy, defendants' position would turn Section 7 on its head, permitting mergers *because* markets *are* concentrated. Where firms competed against more dominant rivals, this argument would permit even more consolidation of power. This is directly contradictory to the Supreme Court's teaching in *General Dynamics Corp.*, where it explained that "if concentration is already great, the importance of preventing even slight increases in concentration is correspondingly great." 415 U.S. at 497 (quoting *United States v. Aluminum Co. of America*, 377 U.S. 271, 279 (1964)). A concentrated market does not become more competitive by permitting significant competitors to consolidate.[12]

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the second and fifth largest firms . . . is not the merger of 'two small firms.'"); *United Tote,* 768 F. Supp. at 1084; *FTC v. Lancaster Colony Corp*., 434 F. Supp. 1088, 1095 (S.D.N.Y. 1977); *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 618 (S.D.N.Y. 1958) (if argument were credited it would lead to an even more highly concentrated industry).

[11] 166 F.3d at 120.

[12] The cases defendants relies upon are clearly distinguishable. In *United States v. M.P.M., Inc.,* 397 F. Supp. 78 (D. Colo. 1975), the court permitted the merger because the acquired firm met the requirements of the failing firm defense: failure was almost certain and there were no alternative purchasers. In *United States v. Country Lake Foods,* 754 F. Supp. 669

In an effort to buttress this argument, the defendants suggest that, because Beech-Nut is languishing and in steady decline, there will be no loss of competition. DCL 119. Defendants, of course, are not making a failing firm defense because they cannot — Beech-Nut is profitable. *See FTC v. Harbour Group Investments, L.P.*, 1990-2 Trade Cas. (CCH) ¶ 69,247 (D.D.C. 1990). Instead, they are making some type of "flailing firm" defense. They do not actually make a legal argument because they know that this "weakened competitor" argument has rarely carried the day, since, as three appellate courts have observed, "[f]inancial weakness, while perhaps relevant in some cases, is probably the weakest ground of all for justifying a merger." *Kaiser Aluminum & Chemical Corp. v. FTC*, 652 F.2d 1324, 1338 (7th Cir. 1981); *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1164 (9th Cir. 1984); *FTC v. University Health, Inc.*, 938 F.2d 1206, 1221 (11th Cir. 1991). Courts have been reluctant to permit acquisitions based simply on predictions of decline, because they, like the report of Mark Twain's death (in 1897), may be greatly exaggerated.[13]

In the most recent case to address this issue, *Ivaco,* 704 F. Supp. at 1425, the district court held that evidence of unprofitability and proof that a shrinking market predestined future

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(D. Minn. 1990), the court permitted the merger of second and third largest milk processors in a Midwest market because: (1) there was an "absence of entry barriers" and brand loyalty was "an insignificant competitive factor," (*Id.* at 673), (2) future price competition was ensured by the power of the milk buyers, the three largest of whom accounted for more than 90% of industry sales; and (3) the size and volume of buyers' purchases, and the demonstrated ability to secure supply outside the geographic market or vertically integrate assured that buyers could prevent any anticompetitive price increases. *Id.* at 674, 676. None of these factors are present in this case. *See Cardinal*, 12 F. Supp. 2d at 59 (distinguishing *Country Lake Foods*);*United Tote*, 768 F. Supp. at 1085 (same).

[13] Cable from London to Associated Press, 1897. (Samuel Clemens ultimately died, to the nation's great loss, in 1910).

exit was "insufficient to demonstrate that the firms' past performance [was] an unreliable indicator of their future ability to compete." In doing so, the court relied on several facts that are present in this case: (1) "both firms, as a whole remain profitable businesses" (*Ivaco*, 704 F. Supp. at 1424; PFF 9, 16, 456); (2) the resources of the parent corporations were substantial (*Ivaco*, *supra*; PFF 456-457); and (3) neither firm had plans of exiting the business (*Ivaco*, *supra*). Thus, the court in *Ivaco* concluded that while the firms were not as profitable "as they would like to be, and while a general decline in the industry may, at some point, cause one firm to exit the market resulting in further concentration, the evidence did not show that exit by either firm was imminent or inevitable." *Ivaco*, 704 F. Supp. at 1424. *See also Warner Communications*, 742 F.2d at 1164-65 ("a company's stated intention to leave the market or its financial weakness does not in itself justify a merger"); *United Tote*, 768 F. Supp. at 1083 & n.17 (rejecting argument that without merger United Tote would be unable to keep up with technological changes in the market).

Moreover, in *Ivaco* the court observed that an environment in which firms compete for survival was procompetitive. In discussing the possibility of future exit, the court noted that:

> firms will continue to compete for a period of time before one firm departs. The customers will, during that period, benefit from competitive pricing. If neither firm decides to exit the market, customers will continue to benefit from competition. If one firm or the other leaves the market, its assets could be sold to a firm in a related industry, and competition would presumably continue.

704 F. Supp. at 1425.

Finally, the facts of this case belie any effort to cloak either Heinz or Beech-Nut as weak competitors. Both firms have substantial financial resources, valuable brands, and strong reputations. Heinz is the largest baby food company in the world and has substantial resources

(of several billion dollars) and diverse product lines. (PFF 3, 4, 7) Beech-Nut is owned by a major private investment firm. Milnot's CEO, Scott Meader, described Beech-Nut as having

PX 131 at 9010. Beech-Nut's alleged bleak future is not supported by the facts. RFF X.

II. The Evidence of Unilateral Anticompetitive Effects is Real and Unrebutted

Defendants' argument on unilateral effects boils down to two simple but erroneous propositions: (1) "this merger falls within the *Merger Guidelines* 'safe harbor' threshold, because the combined national market share is less than 35%." DCL 33; (2) the acquisition will not permit Heinz to exercise market power because competition between Heinz and Beech-Nut does not constrain retail prices.[14] In substantial part, defendants' argument is based on the premise that if their products are not found together on the same supermarket shelves, or if they do not overlap at different retailers in most of the country, they don't really compete. *E.g.,* DCL 39, 40. Defendants are wrong on the facts and the law.

A. Unilateral Effects are Likely in Substantial Markets

! There are numerous metropolitan areas where the merged firm's shares exceed 35 percent and the combined share nationwide is over 34 percent. PFF 80, 81 . There are 10 major metropolitan areas in which both firms have market shares of at least 10 percent and their combined market share is over 40 percent.[15] These 10 metropolitan areas

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[14] Defendants do not address the loss of potential competition, the unilateral reduction of consumer choice of products and quality, innovation, and the elimination of excess capacity and the potential for private label entry. Their silence means they must concede these issues.

[15] Cleveland, OH, Columbus, OH, Cincinnati/Dayton, OH, Roanoke, VA, Raleigh/Greensboro, NC, Charlotte, NC, Atlanta, GA, Jacksonville, FL, Orlando, FL, Tampa/St. Petersburg, FL. PFF 80.

represent baby food sales of approximately $100 million. PFF 82. A likelihood of harm in these metropolitan areas alone is more than sufficient to condemn this merger.[16]

- Defendants persist in arguing there is a "safe harbor" for unilateral effects, when there is none. As noted in the FTCPTB at 20, the Merger Guidelines do not establish a unilateral effects safe harbor for combined shares under 35 percent. Defendants cite no authority to the contrary. As defendants recognize, there is a presumption of unilateral anticompetitive effects if the combined share is above 35 percent. DCL 33 n.9; *Merger Guidelines,* § 2.2.

- Moreover, 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. As a practical matter, unilateral effects are likely in every geographic area, because the merger would eliminate Heinz's only rival for the second slot, leading to significant unilateral anticompetitive effects such as higher prices, both wholesale and retail, reduced consumer choice between differentiated brands, reduced incentives to innovate, and elimination of excess capacity and potential private label entry. PFF 170, 314, 320 et seq.

B. Unilateral Anticompetitive Effects are Likely Even Where There are not Direct Overlaps

- The presence of both firms as potential bidders for a retail account is competitively significant. Even where switching does not occur, the availability of an alternative leads to lower prices. PFF 169-277. *See supra,* n. 6. The elimination of significant bid competition is a basis for a violation of Section 7. *See* FTCPTB at 24 and cases cited therein.

- There is both actual and potential switching between Heinz and Beech-Nut for the second baby food slot on retailers' shelves. PFF 244 *et seq*.; RFF I.B. Indeed, in the recent Third Circuit price fixing litigation, defendants heavily relied on their intense all-or-nothing battle for Winn-Dixie's account as an example of intense competition and argued that it benefitted consumers. PFF 129. That is still the case. Retailers' opportunity for switching will end if this merger takes place. As this Court noted in *Cardinal Health,* because the merger will remove an important alternative supplier from the market, "there would be few if any price restraining forces in the market areas where only two competitors exist." *Cardinal Health,* 12 F. Supp.2d at 67.

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[16] *See Brown Shoe Co.*, 370 U.S. at 337 ("[A]lthough the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area."); *Philadelphia National Bank,* 374 U.S. 321 (four-county Philadelphia area); *Cardinal Health, supra* (anticompetitive effects in the Northwest U.S.); *Staples, supra* (42 metropolitan markets).

! The record shows that competition for retail accounts is intensifying, and, absent the merger, consumers will receive lower prices, more couponing, more choice in three-firm retail markets, more quality, and other non-price benefits. PFF 85-325.

C. Intense Wholesale and Consumer Competition Benefits Consumers

Defendants cannot deny that there is intense price competition between Heinz and Beech-Nut at the wholesale level. What they suggest is that the elimination of wholesale competition between Heinz and Beech-Nut does not matter either legally or factually. DCL 52. That is nonsense.[17]

! The Commission has demonstrated that distribution competition between Heinz and Beech-Nut has beneficial effects on retail prices:

" Defendants compete on discounts and allowances to retailers. PFF 36, 169-326. For example,

PX 342 at 52, 56. When Heinz made a proposal to Winco in Portland, Beech-Nut responded by offering to increase allowances. PFF 262-68. Retailers testified that discounts and allowances get passed on to consumers. PFF 247-251, 258, 267.

" Defendants also compete on up-front payments to retailers. PFF 203, 265. While defendants argue that many of these payments are "fixed," and thus (according to defendants) do not benefit consumers, *see* DCL at ¶ ¶ 53, 55; DFF at ¶ ¶ 243-247,

[17] Defendants cite no legal authority for the proposition that wholesale competition does not matter, because they cannot. For example, if Heinz and Beech-Nut were to fix wholesale prices or otherwise rig their bids, that would be a *per se* and perhaps criminal violation of Section 1 of the Sherman Act. Defendants likewise cite no legal authority for the proposition that the FTC "must" show that the competition between Heinz and Beech-Nut actually lowers retail prices, because they cannot. DCL 52. Numerous mergers at the wholesale level have been enjoined without requiring a showing that retail prices would be affected. *E.g., United States v. Pabst Brewing Co.,* 384 U.S. 546 (1966); *Cardinal Health,*12 F. Supp. 2d 34; *Coca-Cola Co.,* 641 F. Supp. 1128. Finally, in none of the cases involving bid competition such as *United Tote, Coca-Cola,* or *PPG* did the court require a demonstration that the bid competition actually benefitted consumers.

they have provided no evidence that consumers do not benefit.[18] In fact, many of these payments are usually contingent on specified performance requirements. PFF 129, 197, 202. These payments therefore are in the "variable" category, which defendants admit will benefit consumers. PFF 183; DFF 251. Even fixed or non-variable payments can be expected to benefit consumers because they help reduce retailers' costs. PFF 188. It is basic economics that in competitive markets, those savings will be passed on to consumers.

" This competition forces Gerber to respond. For example, Gerber reacts to wholesale competition between Heinz and Beech-Nut by increasing its own marketing and promotion efforts. PFF 237, 238, 241; RFF XI. Where both Heinz and Beech-Nut are in active distribution, Gerber's share position is weaker. PFF 83; PX 780. Loss of a distribution account by Heinz or Beech-Nut also puts competitive pressure on Gerber, because the loser seeks to make up the volume elsewhere. PFF 145, 146, 240.

! The record demonstrates substantial competition between Beech-Nut and Heinz at the retail level:

" The presence of both Heinz and Beech-Nut makes a difference in "split" or three-firm retail markets.

PFF 92.

" Defendants recognize that prices are lower in three-firm markets than in two-firm markets. PFF 92. Beech-Nut prices more aggressively where it faces a greater Heinz presence, such as in the southeast. PFF 71. Heinz attributed the lower Beech-Nut prices in split markets to Beech-Nut "competing with Heinz for the value brand position." PFF 92.

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[18] Defendants attempt to diminish the importance of that competition, by suggesting that most of the payments are fixed and of no consequence to consumers. But they can not rebut the comprehensive evidence that these payments ultimately benefit consumers in lower prices and better services. FTCPTB at 23-26. In order to suggest that these payments are pernicious, the defendants once again attempt to mischaracterize testimony on slotting allowances misrepresenting that the "FTC's official position is that dominant retailers can retain such slotting fees as a bonus rather than passing the money on as a savings to consumers." DCL 55 (citing Willard K. Tom, Deputy Director, FTC Bureau of Competition, "Slotting Allowances and the Antitrust Laws," Hearings before the House Judiciary Committee (Oct. 20, 1999)). Of course, there is nothing in the testimony to suggest that is an official position, rather it simply relates complaints the Commission staff has heard. Our objection on this document was sustained by this Court and the defendants efforts to use it again should be rejected. Tr. 412.

" Heinz and Beech-Nut observe and respond to the other's competitive activity.

" Trade marketing makes a substantial difference in retail pricing.

! The linchpin to defendants' rebuttal of this compelling evidence of competition is Professor Baker's econometric findings. But these are flawed and unreliable for at least three reasons.[19]

" First, the IRI data he used do not accurately measure transaction prices – the prices consumers actually pay. Tr. at 1145-46 (Hilke); PFF 221. Professor Baker's data are based on shelf prices and therefore do not reflect discounts resulting from coupons and loyalty cards. Tr. at 1043 (Baker), at 1145-46 (Hilke); PFF 102, 221.

" Second, Professor Baker used weekly price data, which are likely to provide misleading estimates of price elasticities when consumers stock inventories in response to special promotions. PFF 100-105; RFF 36, 38-39, 44.

" Third, Professor Baker's regressions (DX 617, appendix C) did not account for all the cost factors that could affect the dependent variable of the regressions and this may have skewed the results. RFF 36, 37, 48.

In sum, there is compelling evidence that competition between Heinz and Beech-Nut provides substantial direct benefits to consumers.

III. Post-Merger Coordination is a Likely Result of the Merger

Defendants cannot and do not attempt to distinguish the substantial legal precedent in the case law and commentary that makes it clear that this is the type of case in which post-merger

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[19] Defendants attempt to diminish the weight of Dr. Hilke's testimony by suggesting that he was "perhaps qualified as an economic expert" (DFF 422) and that Hilke "limited his opinion to a naked review of documents selected by complaint counsel" (DPB fn 18). Of course, Dr. Hilke **was** qualified as an expert and the record is unambiguous that he selected his own documents for review. Tr. at 188 (Hilke). Defendants proposed findings contain numerous mistatements and mischaracterizations of Dr. Hilke's testimony.

coordination is a significant threat to competition. PCL 77-92. As the Supreme Court has observed the concern is that by eliminating an important rival it will be easier for Heinz and Gerber to "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 Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993). Because this type of coordination cannot easily be prevented through later antitrust enforcement actions, 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."[20] Because of this threat of coordination, numerous courts have enjoined mergers in which the reduction in the number of competitors was far less than in this case. PCL 80.

This merger significantly increases the threat of coordination for several reasons:[21]

- **The creation of a duopoly:** No environment is as conducive to coordination as a duopoly. *American Hospital Supply Corp. v. Hospital Products Ltd.*, 780 F.2d 589, 602 (7th Cir. 1986) ("it is easier for two firms to collude without being detected than for three to do so."); *Ivaco,* 704 F. Supp. at 1428 & n.18 (collusion likely in a two-firm market where the firms could easily monitor collusion). Courts have found violations with reductions in the number of competitors was far less significant than in this case. PCL 80. Defendants argue that collusion is irrelevant because Heinz and Beech-Nut do not compete face-to-face on supermarket shelves, and so there really are only two firms in the

[20] Areeda, IV Antitrust Law, ¶ 901b2 at 9. *See also Brooke Group*, 509 U.S. at 229-30 ("[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.*, 807 F.2d at 1386.

[21] We will not repeat the discussion of other factors that strongly point to the likelihood of coordination, such as inelastic demand and entry barriers, because it is clear that those factors are present. PFF 377.

market to begin with. That argument is inconsistent with the position they took before the Third Circuit.[22]

! **The elimination of all or nothing competition:** As we have set forth at length in previous memoranda and proposed findings of fact, both Beech-Nut and Heinz have substantial incentives to undercut each other in bid situations to get distribution because winning the bid can provide large distribution gains. See PX 58 and PFF 137-143. This all-or-nothing competition makes it difficult to maintain coordinated pricing not only between Heinz and Beech-Nut but also with Gerber. Currently, Heinz cannot offer any assurance to Gerber that it will not drop prices or increase discounts and allowances to keep Beech-Nut from taking the account. Indeed, the presence of Beech-Nut gives Heinz an excuse to cheat on a coordinated arrangement. The merger would remove Beech-Nut's disruptive influence and make it easier to coordinate with Gerber. Tr. at 197-199, 282-284 (Hilke); PX 782 at ¶ 85 (Hilke Report); PFF 341-344.[23]

! **History of coordination:** Defendants' successful defense against price fixing charges under different market conditions is no guarantee that they would not collude post-merger.[24] Moreover the Third Circuit observed that the three-firm market was an environment that "could facilitate explicit or tacit price-fixing." *In re Baby Food Antitrust Litigation*, 166 F.3d at 138. In particular, this merger eliminates some of the major forces that prevented collusion from occurring.

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[22] Indeed, Heinz's brief to the Third Circuit cited documents referring to "intense competitive activity from Beech-Nut and Gerber." PX 307 at 718. Heinz's brief also noted intensified three-way competition resulting from Beech-Nut's change in position to a premium brand through the introduction of the "Stages" concept, which forced Gerber to "intensify its competitive efforts by spending more money in trade spending, advertising, and new product development." *Id.* at 19.

[23] Indeed, defendants' economic expert in the Third Circuit price fixing litigation argued that the existence of distribution competition between Heinz and Beech-Nut was significant evidence that they were *not* colluding. Phillips Report ¶ 50. The elimination of this head-to-head distribution competition between Heinz and Beech-Nut is a major factor that increases the likelihood of coordination. Tr. at 282 (Hilke); PX 782 at ¶ 84 (Hilke Report); PFF 354-356.

[24] *See Cardinal Health, Inc.,* 12 F. Supp. 2d at 65 (even if not currently an antitrust violation, past efforts at coordination suggest that a merger might increase ability to coordinate). The price fixing charges against the three U.S. manufacturers was not the only time Heinz has been suspected of price fixing, however. Heinz has been charged with price fixing on dry milk in Italy. Tr. at 532-33 (Johnson).

! **Excess Capacity:** The existence of excess capacity can lead to discounting as firms try to increase volume. Several courts have held that excess capacity is an impediment to coordination and elimination of excess capacity can lead to less discounting.[25] This merger will significantly reduce excess capacity in the market,

PFF 320, 360-363, 479.

In addition, the availability of capacity and the desire to increase volume figured prominently in both firms' consideration of private labeling. Currently, coordination between Gerber and Heinz is complicated by Beech-Nut's incentives to develop and market a private label product for sale to grocery retailers in Heinz's core areas and accounts where Beech-Nut's distribution is scant (and vice versa). Tr. at 277 (Hilke); PX 782 at ¶ 89 (Hilke); PFF 319-325. The merger would remove that complication.

! **Product and firm homogeneity:** Defendants argue that product differentiation would impede coordination. On the contrary, the merger would significantly reduce both product and firm differentiation. First, the merged entity's product would be positioned as a premium quality product, close to Gerber's, thus reducing product differentiation. PFF 362-363. Second, the merged entity's costs of production would be about the same as Heinz' present costs, thus lessening differences in the firms' cost structures. Third, the merged entity's market share would be closer to that of Gerber. Fourth, the differences between Heinz and Beech-Nut "core" areas will be eliminated, thus reducing inter-firm geographic differentiation. These were all factors relied upon by defendants to suggest collusion was unlikely in defense of price-fixing in their defense of the price-fixing case. All of these changes lessen potential impediments and thus increase the likelihood of coordination. Tr. at 283 (Hilke); PX 782 at ¶ 88-89 (Hilke); PFF 362-363.[26] And courts have enjoined mergers in far more differentiated markets, such as hospital services. *E.g., Hospital Corp. of Am.*, *supra*.

! **Information:** Defendants contend that information lags and difficulty in deciphering price information would prevent coordination. But significant and timely information about sales not only is available, but also is currently used by the parties. Tr. at 387 (Hilke); PX 782 at ¶ 82 (Hilke Report). Further, even Professor Baker has noted that technology exists to obtain information even more quickly, even day-by-day or hourly

[25] *Cardinal Health*, 12 F. Supp. 2d at 63-64. *See also Elders Grain,* 868 F.2d at 905-06 (excess capacity creates an incentive to cheat on any agreement); *FTC v. Owens-Illinois, Inc.*, 681 F. Supp. 27, 49 (D.D.C.) (considering lack of excess capacity as factor "favor[ing] collusive behavior"), *vacated as moot*, 850 F.2d 694 (D.C.Cir. 1988); *FTC v. Bass Bros. Enters., Inc.,* 1984-1 Trade Cas. (CCH) ¶ 66,041, at 68,614 (N.D. Ohio 1984).

[26] Coordination can be a concern even in highly differentiated product markets. For example, coordination has occurred in differentiated product markets such as breakfast cereals and cigarettes. *See* Note, *Analyzing Differentiated-Product Mergers: The Relevance of Structural Analysis*, 111 Harv. L. Rev. 2420, 2428 (1998).

information. Jonathan Baker, "Contemporary Empirical Merger Analysis," 5 Geo. Mason L. Rev. 347, 348 (1997). And while pricing in the baby food industry may be "multi-dimensional" as defendants' assert, information on sales volume is straightforward. Any unexpected or otherwise unexplained shifts in volume or share would suggest cheating on a coordinated arrangement. And to repeat the obvious, interpreting the information would be much easier because there would only be two firms left in the market.

In sum, the merger would seriously increase the likelihood of collusion.[27] Just as Heinz grew tired of fighting Beech-Nut and now seeks to acquire it, Heinz could soon tire of fighting Gerber. Indeed, Heinz complains of Gerber's vigorous defense of its market share. DB at 11-20. Having doubled its market share through acquisition, Heinz could well decide that cooperation is more lucrative than competition, as Professor Hilke testified. PFF 328; Tr. at 1165-68 (Hilke). Gerber likewise would find it more profitable to collude than to keep market share by cutting price. *See Ivaco,* 704 F. Supp. at 1428 & n.18 (finding that a monopolist had an incentive to collude because a price-cutting strategy would be too costly). A collusive arrangement could be little more than an unspoken truce. Indeed, Gerber already has identified numerous metropolitan areas or regions where both Heinz and Beech-Nut have a sizeable presence, and "where reduced competition will take place if Heinz buys Beech-Nut."[28] PFF 91.

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[27] Defendants suggest that it would be difficult for Heinz and Gerber to reach agreement. DCL 106. But in several articles, Professor Baker explains that even in situations where a firm might be tempted to cheat on a coordinated arrangement if the gains from doing so would be permanent, such cheating is unlikely in a "repeated games" situation in which firms confront each other on a continuing basis. PFF 372 (discussing articles). In the latter situation, retaliation can occur, and so the gains from cheating will be short-lived. The baby food market is that kind of repeated games situation because competitors confront each other at different retailers and different geographic areas all the time.

[28] Columbus, Cleveland, Jacksonville, Cincinnati/Dayton, Orlando, Charlotte, Tampa/St Petersburg, Roanoke, Raleigh/Greensboro, Atlanta, St. Louis, Houston.

Defendants' other defense is that "large, sophisticated buyers' would protect the market from anticompetitive conduct.[29] But as the FTC has already demonstrated the defendants' claims fall short of the so-called power buyer defense. FTCRB at 18. First, a "power" buyer is a buyer with alternatives and in a case where a retailer needs two suppliers for two slots, there are no alternatives. Second, the buyer-side of the market is not particularly concentrated, so that no individual contract is so large that a single-buyer can induce a firm to deviate from a collusive arrangement. *Compare Country Lake Foods*, 754 F. Supp. at 674 (three buyers purchased ninety percent of the fluid milk sales in the relevant market). Third, even if some buyers were powerful they could not necessarily protect less sophisticated or powerful buyers and in this case there are less sophisticated buyers. *See Cardinal Health*, 12 F. Supp. 2d at 60; *United Tote*, 768 F. Supp. at 1085. Finally, these retailers might not necessarily protect the interests of consumers, but might simply pass on any price increase to consumers.[30] Tr. at 1170 (Hilke); PFF 366. *See, e.g., AlliedSignal,* 183 F.3d at 575; *see University Health*, 938 F.2d at 1213 n.13 (discounting ability of insurance companies to prevent anticompetitive price increases since they would "pass these increased costs on to the individual consumers.").

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[29] Defendants continue to argue that customer support should be given strong consideration. Defendants presented numerous affidavits from supermarkets opining that the merger would be procompetitive. Customer predictions, however, must be rejected unless "supported by the evidence." *Ivaco,* 704 F. Supp. at 1428; *see United Tote*, 768 F. Supp. at 1084-85 (enjoining merger despite testimony of "numerous buyers" that the merger would be procompetitive in creating a stronger rival to a dominant firm). Here the weight of the evidence, derived largely from defendants' own ordinary-course-of-business documents, does not support those affidavits. Moreover, this court has enjoined mergers even where the only customer supported the merger. *See FTC v. Imo Indus.*, 1992-2 Trade Cas. (CCH) ¶ 69,943, at 68,559 (D.D.C. 1989).

[30] Retailers would have little incentive to strongly resist price increases if they would bear little of the burden.

IV. Defendants' Efficiency Claims are Seriously Overstated and Cannot Outweigh the Clear Anticompetitive Harm from this Merger

Defendants' last claim is that substantial efficiencies "rebut the FTC's prima facie case."[31] DCL p. 21. Although they refer to FTC reports and speeches in their brief (DCL 68-70), they fail to accurately state the legal standard set forth in the case law and detailed in the FTC briefs. FTCRB at 23; PCL 110. Simply, the law requires that they demonstrate that verified, merger-specific, and cognizable efficiencies will outweigh the anticompetitive effects of the acquisition and result in a more competitive market. *See Cardinal*, 12 F. Supp. 2d at 63-64; *Staples*, 970 F. Supp. at 1089-91; *Ivaco*, 704 F. Supp. at 1427; *United Tote*, 768 F. Supp. at 1085; *see also University Health*, 938 F.2d at 1222-23 ("significant economies and that these economies ultimately would benefit competition, and hence, consumers").[32] Although there may be some cost savings from moving Beech-Nut's production to Heinz, these costs savings are insufficient to reverse the anticompetitive effects of this merger. These efficiency claims fall short because:

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[31] Defendants persist in arguing an efficiencies figure ($11.5 million) that even their own expert refuted. *See* PFF 416; PX 762 at 70 (Painter) ($9.4 million in variable cost savings, $6.6 million in variable production cost savings; *see also*. DX 124; DX 645. Defendants overstate their efficiency claims in several respects. RFF VII.

[32] Defendants' legal support for their efficiency defense (DCL at 24) is clearly distinguishable. In *United States v. Long Island Jewish Medical Center*, 983 F. Supp. 121 (E.D.N.Y. 1997) and *FTC v. Butterworth Health Corp.*, 946 F. Supp.1285 (W.D. Mich. 1996), *aff'd*, 121 F.3d 708 (6th Cir. 1997), the courts relied on the non-profit nature of the merging hospitals and regulatory relief (in *Butterworth*). In *Country Lake Foods*, efficiencies were the least important of several factors, including low entry barriers, a total absence of brand differentiation, and a buying market dominated by 3 firms with numerous alternatives, including vertical integration. None of those factors is present in this case. As a leading treatise has observed "[i]n no case . . . has a court approved an otherwise anticompetitive merger based on proffered efficiencies." American Bar Association, Mergers and Acquisitions 153 (2000).

! **Measurement and verifiability:** The estimates of production efficiencies are riddled with measurement problems and those estimates have increased by over 30% since the merger was proposed. FTCPTB at 37-38. These estimates are also flawed because they assume that the merged firm will keep all of Heinz and Beech-Nut customers, an assumption Heinz employees question. PFF 436.

! **Cognizability:** Efficiency claims are not cognizable if they result from an anticompetitive loss of competition. In this case, for those consumers who prefer Beech-Nut's quality or a recipe that is eliminated this merger will result in a significant reduction in choice. Defendants' sole response is to suggest that there is no limiting principle to this concern (DFF 415), but Dr. Hilke testified that this was a substantial concern where so much consumer choice was being eliminated. Tr. at 1160-61 (Hilke).

! **Merger-specificity:** These claims are not merger specific because there are less anticompetitive means to achieve them. The "new" products can be offered without this merger and production cost savings can be achieved through an acquisition by another party.

! **Ultimate effect on competition and consumers:** Unlike cases such as *Cardinal* and *Staples,* the defendants have failed to provide any evidence (other than Mr. Johnson's promise) and Professor Baker's unsupported opinion (lacking any empirical analysis) (DCL 79) that these cost-savings will be passed on to consumers. And unlike *Butterworth* and *Long Island Jewish* (DCL 77), there is no binding legal commitment that savings will be passed on. Even if these savings were entirely passed on, they are incredibly modest: no more than $ ___ million per year. Such savings would be dwarfed by even a modest price increase (*e.g.*, 2%) in the $600 million prepared baby food market. PFF 505. In a market in which there are regular price increases that Heinz follows, this is a substantial threat. PFF 346-352. Tr. 503-04. (Johnson).

Ultimately, there is no assurance that the efficiencies, whatever they may be, will ever benefit consumers. RFF VIII. As Dr. Hilke demonstrated in PX 809, even if all the efficiencies are achieved, Heinz will find that pricing at the higher Beech-Nut level is more profitable. As this Court has recognized, competition is the force that drives efficiency and that allows consumers to receive the benefits that the market can produce: "[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. After the merger, the competitive constraints imposed by Beech-Nut will disappear. 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 increased prices after the merger maximize profits and shareholder returns. PFF 485.

V. The Compelling Evidence of Competitive Harm Cannot be Reversed by a Handful of Gerber Documents

Defendants rely heavily on a handful of Gerber documents to suggest that Gerber opposes the merger and that opposition suggests that the deal is procompetitive. DCL 92.[33] Of course, Gerber has not opposed the transaction or even complained to the FTC. Rather, it takes no corporate position on the merger, because people within Gerber have expressed differing opinions about how the proposed merger would affect the company. RFF 110. Even if Gerber had taken a formal position opposing the merger, that opposition would not be dispositive. *See Hospital Corp. of Am.,* 807 F.2d at 1391-92 (rejecting argument that because a competitor complaint led to an enforcement action, the merger had to be procompetitive). While some Gerber documents suggest concern over the transaction, other documents suggest that the

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[33] Defendants rely upon several documents that were secured from Gerber in the discovery process. However, defendants called no witness from Gerber to identify the authors or to discuss the context in which (and the purpose for which) the documents were prepared. The documents are hearsay. Moreover, their full meaning is a matter of conjecture and speculation. As the Court observed during defendants' direct examination of Scott Meader, even a Beech-Nut business record may contain objectionable hearsay material. (Tr 884.) Unlike the Heinz and Beech-Nut documents that the Commission relies upon (which constitute admissions and which defendants had ample opportunity in any event to explain), the Gerber documents should be accorded little or no weight.

merger will result in reduced competition. *See*, *e.g.*, PFF 91, 131. Furthermore, the Gerber documents which suggest concern are based on incomplete information about Heinz and Beech-Nut's current plans as well as their post-merger plans.

This is not what Heinz is planning to do post-merger. Rather, Heinz's post-merger plans are to have only one brand, thus eliminating the possibility that Gerber can be attacked on two fronts. PFF 107. In any case, the documents cannot overcome the substantial evidence that the merger poses a serious risk to competition.[34]

VI. The Equities Strongly Favor an Injunction

Defendants assert that a preliminary injunction is "an extraordinary and drastic remedy." (DCL 9.) 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.'" *FTC v. Alliant Techsystems*, 808 F. Supp. 19, 22-23 (D.D.C. 1992) (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.

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[34] Defendants claim Gerber is not constrained by Heinz and Beech-Nut, but the evidence shows the contrary. RFF XI. Moreover, in its decision in the *Baby Food Antitrust Litigation*, the Third Circuit quoted from a 1992 Gerber document that stated "Keep me advised on any price increases by competition! We will be in a world of hurt if Heinz/Beech-Nut does not increase." DX 326. Unlike the testimony from Professor Baker comparing prices increases to the CPI, this document strongly suggests an absence of market power (the ability to raise price) by Gerber, even though it might technically be the price leader.

In their Post-Trial brief defendants attempt to fashion a public equities argument claiming that Beech-Nut is an "orphan brand" with no one else to give it a home. DCL 117, 121. Although they do not claim Beech-Nut will exit (because they can't), instead they claim it will languish and there is no one else interested in buying it.[35] This claim is inconsistent with the law and the facts:

- The law does not countenance withholding an injunction because a firm is languishing. In *PPG,* the D.C. Circuit reversed a lower court decision that failed to grant an injunction because the future of the firm was "conjectural" (628 F. Supp. at 886) and "there was no assurance" that another firm would make an offer for the acquired firm. 798 F.2d at 1507. In *PPG*, the status of the acquired firm was tenuous because its founder and entrepreneurial owner was in ill-health. The district court decision was reversed because the company was not in financial trouble and there were alternative means for it to secure financing. Beech-Nut is certainly in a stronger competitive position than the acquired firm in that case.[36] RFF X.

- Beech-Nut is a strong and viable firm, with an excellent record of quality and a strong reputation. PFF 16, 28.

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[35] Merging parties often claim that they face a bleak future if their merger is not approved, but the reality is that they typically find other means to succeed and prosper, primarily through internal growth or acquisition by a party that does not raise competitive concerns. For example, after the Coke-Dr Pepper merger was enjoined, Dr Pepper was acquired by Cadbury and its market share is now 7.1%, over 50% higher than at the time of the proposed merger. DX 616 at 34. After the Staples–Office Depot merger was enjoined, both firms continued to prosper and grow and both have surpassed the size that the merged firm would have achieved. *See* Richard G. Parker & David A. Balto, "The Evolving Approach to Merger Remedies," Antitrust Report 2, 23 (May 2000), available at <www.FTC.gov/speeches/other/remedies.htm>, visited Sept. 19, 2000. In almost all of the recent FTC merger challenges, the potential acquired firm continued to compete after the acquisition was dropped. *Id.* at 24.

[36] Another argument rejected by the D.C. Circuit was that a hold separate order was appropriate because of the possibility that the merger would result in technological efficiencies. Rather the court held that "even assuming that advances could be made, the danger of harm to competition outweighs any technological benefit." 798 F.2d at 1508.

! In the event that a buyer is "needed" -- which has not been demonstrated –

Finally, defendants may suggest that an preliminary injunction is inappropriate because it will kill this transaction. Defendants cannot argue that this *preliminary injunction* proceeding should be held to a higher standard because, if the injunction is granted, defendants will abandon the transaction. DCL 9. This claim has been rejected by this court on several occasions. *Staples*, 970 F. Supp. at 1091-92. Moreover, defendants entered into this transaction advised by counsel and fully aware of the statutory scheme and the clear law that once the Commission "raise[s] questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination." that a preliminary injunction is in order. *Cardinal Health*, 12 F. Supp. 2d at 45. Moreover, should the Court enter an injunction, the Commission will offer defendants its "fast-track" procedure, leading to a Commission decision within 13 months (unless defendants seek a stay pending appeal from the injunction). 16 C.F.R. § 3.11A.

CONCLUSION

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

Respectfully submitted,

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September 20, 2000

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