IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, Plaintiff, v. H.J. HEINZ COMPANY and MILNOT HOLDING CORPORATION, Defendants.	Case No. 1:00CV01688 (JR)

DEFENDANTS' POST TRIAL BRIEF AND CONCLUSIONS OF LAW

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I. INTRODUCTION

1. The trial confirmed defendants' promise to this Court at the outset that the Heinz/Beech-Nut transaction would be shown by concrete evidence substantially to ***increase*** competition. After an assessment of all the facts — including the internal documents of Heinz, Beech-Nut ***and*** Gerber — it is indisputable that the Heinz/Beech-Nut transaction is decidedly procompetitive, directly and signficantly benefitting grocery store chains and their baby food customers with lower prices, better quality, and increased innovation, immediately and for the foreseeable future.

2. What is most remarkable are the crucial market realities that the FTC has ***not*** and ***cannot*** dispute. Together, these key facts compel dismisal of the FTC's case. The FTC's three witnesses and document cites essentially sidestep and certainly fail to refute the baby food market realities established by the defendants' evidence, including the following dispositive facts:

- ***Gerber Has Dominated the Baby Food Category for Decades.*** While Dr. Hilke may try, the FTC cannot deny that Gerber dominates the baby food category. The reality is, as Gerber says, "***[i]t's hardly a three horse race when we have 70% of the market.***" DX 710. Gerber has controlled the market for four decades, has steadily increased prices more than the rate of inflation for food prices; Gerber's conduct has caused a significant decline in the category while its own revenues and profits increased. This is exactly what dominant firms do.[1]

- ***Heinz and Beech-Nut Have For Decades Been Unable to Threaten Gerber's Dominance.*** Gerber describes Beech-Nut and Heinz as

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  Years of renewed effort to grow share have failed, as their initiatives have been punished or preempted by Gerber's retaliatory tactics. Beech-Nut has had several major food company owners, all of whom have failed to grow the company, including the world's largest infant feeding company.

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1 *See, e.g., United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000), *petition for cert. filed*, 69 U.S.L.W. 3111 (U.S. July 26, 2000) (No. 00-139); *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945); *Minnesota Mining & Mfg. Co. v. Appleton Papers, Inc.*, 35 F. Supp. 2d 1138 (D. Minn. 1999); *In re: McCormick & Co.*, No. C-3939 (F.T.C. Apr. 27, 2000) (DX 475).

2 *Aluminum Co. of Am.*, 148 F.2d at 427 (noting the anticompetitive effects monopolists have on a market).

- ***There Is No Loss of Any Constraint on Consumer Prices Because Heinz and Beech-Nut Do Not Compete at the Retail Level.*** Beech-Nut and Heinz are offered on the same shelf at only roughly 200 of 25,000 grocery stores nationwide. The FTC has offered ***no evidence*** that demonstrates there is any meaningful consumer substitution at the retail level between Heinz and Beech-Nut or to rebut the statistical evidence demonstrating that prices in "mixed" markets, *i.e.*, where both Heinz and Beech-Nut have at least a 10% market share, are ***not*** lower than in "core" markets for each brand.

- ***Heinz and Beech-Nut Competition To Be the Number Two Brand on the Shelf Rarely, if Ever, Results in Lower Prices for Baby Food.*** To the extent accounts play Beech-Nut off Heinz in competition to get on the shelf, this generally results in higher "fixed trade" spending than would have otherwise been offered. The FTC has not offered anything to overcome the statistical evidence produced by defendants that this fixed trade spending does ***not*** result in lower prices for baby food consumers.

- ***Heinz Will Lower Prices Post Closing.*** Heinz has submitted concrete evidence of the extraordinary, merger-specific efficiencies it will realize, and has shown that it has real-world plans for lowering prices, increasing quality, and introducing innovative products (*e.g.* REDACTED) and marketing concepts (*e.g.*, REDACTED stemming from its incentive to maximize profit through a value pricing strategy that is designed to promote topline growth and displace Gerber as the share leader.

- ***Gerber's Reaction Underscores the Real Competitive "Threat" Posed by This Merger.*** Gerber will be forced to lower prices and innovate. Gerber's own documents reflect its senior management's belief that the merger will force Gerber to REDACTED The FTC has offered ***no*** evidence — no witness, no documents — that in any credible way undercuts these facts.

- ***The Net Competitive Effects Weigh Heavily In Favor of the Merger.*** Probably the most significant and undisputed fact is that there are two brands on virtually every shelf today and there will be two brands post merger. The FTC has failed to proffer evidence of any meaningful constraint on consumer prices that will be lost; to the contrary, the evidence is unrefuted that real competition will be enhanced.

3. At its core, this acquisition is about — in Gerber's' words — creating a

REDACTED [3] The FTC simply has no response to the ***immediate***, pro-competitive

[3] Notably, Dr. Hilke's "final answer" was his admission that "a duopoly is a more pro-competitive market [structure] than a monopoly." Hilke Tr. at 1185.

effects that will result from the acquisition other than to argue that all of these facts are irrelevant, because it has established a "prima facie" numbers case.[4] Implicitly, the FTC is arguing that even if the procompetitive effects of the acquisition outweigh the anticompetitive effects, even if efficiencies are enormous, even if consumers would benefit from lower prices and higher quality, even if the acquisition offers the first challenge to a monopolist in forty years, there is no legal authority for clearing such a proconsumer/procompetitive transaction. That is simply wrong.

4. As the Supreme Court explained, the Clayton Act was not designed to "impede ... a merger between two small companies to enable the[m] ***to compete more effectively*** with larger corporations ***dominating*** the relevant market." *Brown Shoe Co. v. United States*, 370 U.S. 294, 319 (1962) (emphasis added); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 370-71 (1963) (the Clayton Act was designed to allow "two small firms" to merge "to compete more successfully with the leading firms in that market.").

5. The core question, therefore, is whether the ***entire baby food market*** will be more, or less, competitive after the merger, ***not*** whether unproductive skirmishes between Beech-Nut and Heinz at the wholesale level will be eliminated. As this Court has noted, "the burden of proof on this case is on the FTC, not on Heinz and Beech-Nut." Court Tr. at 28. Because the FTC comes to a full stop after offering a prima facie case, it fails to meet its required burden of proof and its case must fail as a matter of law. In *United States v. General Dynamics*, the Supreme Court rejected the FTC's primary argument here that "statistical data" is a "conclusive indicator of anticompetitive effects." 415 U.S. 486, 498 (1974). This is because as made clear by the D.C. Circuit in *United States v. Baker Hughes Inc.*, mere market share analysis can be "misleading" and can "obscure, rather than illuminate the core inquiry, which is what will be the

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[4] Indeed, Dr. Hilke ultimately disagreed with the FTC, admitting that he "certainly wouldn't want to discard" Gerber's views. Hilke Tr. 334.

transaction's probable effect on future competition." 908 F.2d at 986, 991 (D.C. Cir. 1990). It is ***that*** inquiry which the FTC has failed to address with facts, rather than speculation.

6. In the final analysis, competition will be lessened only if the merger is ***not*** allowed to proceed. The facts, the law and the equities compel denial of the FTC's motion to enjoin this merger.

II. THE FTC BEARS THE "ULTIMATE BURDEN OF PERSUASION"

7. Plaintiff, the Federal Trade Commission ("FTC" or "Commission"), seeks a preliminary injunction pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b) to enjoin the proposed merger of defendants H.J. Heinz Company ("Heinz") and Milnot Holding Corporation, the parent company of Beech-Nut Nutrition Corp. ("Beech-Nut"), on grounds the merger may substantially lessen competition in violation of Sections 7 and 11 of the Clayton Act, 15 U.S.C. §§ 18 and 21, and Section 5 of the FTC Act, 15 U.S.C. § 45. [5]

A. The FTC Has a "Heavy" Burden

8. In the D.C. Circuit, "[t]he Commission's burden on a preliminary injunction motion is properly a ***heavy one*** ..." *FTC v. Occidental Petroleum Corp.*, 1986-1 Trade Cas. (CCH) ¶ 67,071, at 62,516 (D.D.C. 1986) (emphasis added).[6]

9. "[I]t is well recognized that the issuance of a preliminary injunction prior to a full trial on the merits is an extraordinary and drastic remedy. This is particularly true in the

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[5] Notably, the FTC's staff lawyers and economists recommended that the merger be allowed to proceed, but in a 3-2 vote, the Commission departed from the staff's analysis. *See Commissioners Override Staff, Vote to Block Beech-Nut Sale*, FTC: Watch (July 10, 2000) (Commission overrode "recommendations of its staff economists and antitrust lawyers" who thought "this deal should be looked at [not] as diminishing the number of competitors to only two" but "as producing a stronger competitor for Gerber").

[6] The FTC asserts that *Occidental Petroleum Corp.* is no longer good law, pointing to an unpublished and unreported per curium order by the D.C. Circuit vacating the case. But the case was vacated as moot only pursuant to a consent settlement of subsequent litigation. The case is good law in this District, as recognized by recent cases citing and expressly following the opinion. *See, e.g., FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1071 (D.D.C. 1997) (following *Occidental* for its express rejection of the "fair and tenable chance of ultimate success on the merits" standard).

acquisition and merger context, because, as a result of the short life-span of most tender offers, the issuance of a preliminary injunction blocking an acquisition or merger [will in all likelihood] prevent the transaction from ever being consummated." *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C. Cir. 1980) (citations omitted); *see FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1087 (D.C. Cir. 1981) ("[a] preliminary injunction may kill, rather than suspend, a proposed transaction"); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1093 (D.D.C. 1997) (preliminary injunction "will most likely kill the merger").[7]

10. "The FTC has the burden of proof in presenting [a] motion for a preliminary injunction to show a likelihood of success on the merits on two issues: whether the effect of the merger may be substantially to lessen competition and whether the issuance of an injunction would be in the public interest." *FTC v. Owens-Illinois, Inc.*, 681 F. Supp. 27, 33-34 (D.D.C.) (citations omitted), *vacated as moot*, 850 F.2d 694 (D.C. Cir. 1988); *see Staples, Inc.*, 970 F. Supp. at 1071.

11. Notably, "[t]he government must prove not that the merger in question may possibly have an anticompetitive effect, but rather that it will ***probably*** have such an effect." *Id.* quoting *FTC v. Great Lakes Chem. Corp.*, 528 F. Supp. 84, 86 (N.D. Ill. 1981) (emphasis added). "Section 7 involves probabilities, not certainties or possibilities." *Baker Hughes Inc.*, 908 F.2d at 984.

B. The Ultimate Burden of Persuasion Remains with the FTC at All Times

12. The D.C. Circuit has set forth the analytical process for judicial review of a merger:

> The basic outline of a section 7 case is familiar. By showing that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area, the government establishes a presumption that the

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[7] "The reason a grant of a preliminary injunction will spell the doom of an acquisition is apparent. No substantial business transaction could ever survive the glacial pace of an FTC administrative proceeding." *Occidental Petroleum Corp.*, 1986-1 Trade Cas. at 62,516.

> transaction will substantially lessen competition. The burden of producing evidence to rebut this presumption then shifts to the defendant. If the defendant successfully rebuts the presumption, ***the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times.***

Baker Hughes Inc., 908 F.2d at 982 (emphasis added) (citations omitted).

13. As this Court appropriately summarized during the hearing, the FTC's case consists of "evidence of a concentrated industry [and] evidence of an increased market share after [the] acquisition." Tr. at 1013:14-16. Based on this showing, the Court raised a question whether this evidence "boxed in" the case under a theory that this evidence "adds up … as a matter of law to an inherent likelihood of success [or] an inherent likelihood of less … competition, unless the evidence clearly shows that the merger is not likely to have such anticompetitive effects." Tr. at 1013:16-20.

14. The answer is ***no***. The "clear showing" standard, in particular, has been expressly rejected in this Circuit. As the Court of Appeals unequivocally stated in *United States v. Baker Hughes Inc.*, ***"[w]e conclude that a "clear" showing is unnecessary***." 908 F.2d at 989 (emphasis added).

15. More specifically, the FTC's "clear showing" argument in this case — concentration statistics plus high barriers to entry — is precisely the same as the one that now-Supreme Court Justices Ginsburg and Thomas expressly rejected in *Baker Hughes Inc.*:

> The government argues that, as a matter of law, section 7 defendants can rebut a prima facie case only by a clear showing that entry into the market by competitors would be quick and effective. . . . ***We find no merit in the legal standard propounded by the government.*** It is devoid of support in the statute, in the case law and in the [agency's] own Merger Guidelines.

Id. at 983 (emphasis added). Such an argument, in the D.C. Circuit's view, is fundamentally "flawed" because it impermissibly "shifts the government's ultimate burden of persuasion to the defendant." *Id.*

16. Rather, as the D.C. Circuit in *Baker Hughes Inc.* held, "[t]he Supreme Court has adopted a totality-of-the-circumstances approach to the statute, weighing a variety of factors to

determine the effects of particular transactions on competition." *Id.* at 984. "That the government can establish a prima facie case through evidence on only one factor, market concentration, does not negate the breadth of this analysis. Evidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness." *Id.* (emphasis added).

17. In the watershed decision *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), the Supreme Court "cautioned" lower courts and government antitrust agencies that statistical data are "not conclusive indicators of anticompetitive effects," and that "only a further examination of the particular market — its structure, history, and probable future — can provide the appropriate setting for judging the probable anticompetitive effect of the merger." 415 U.S. at 498 (citation omitted).

18. "Since the Supreme Court's 1974 decision in *General Dynamics*, it has been clear that to overcome the government's statistical proof, the defendant need only introduce evidence sufficient to show 'that the prima facie case inaccurately predicts the relevant transaction's effect on future competition." *United States v. Archer-Daniels-Midland Co.*, 781 F. Supp. 1400, 1421 (S.D. Iowa 1991) (quoting *Baker Hughes Inc.*, 908 F.2d at 991). The FTC's citation to *Philadelphia National Bank* and *Proctor & Gamble Co.* for a contrary proposition is not well founded. The D.C. Circuit explained how *General Dynamics* affects these cases: "[a]lthough the Supreme Court has not overruled these section 7 precedents, it has cut them back sharply." *Baker-Hughes Inc.*, 908 F.2d at 990.[8]

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[8] *See* Baker Tr. 1015 (When *Philadelphia National Bank* was handed down in 1964, "economists generally had the view that if there were only a handful of firms, they'd find a way to coordinate, that coordination was nearly inevitable when the number of firms reached a small number. But economists understand this problem of coordination differently now than they did then...."); *United States v. Rockford Mem'l Corp.*, 898 F.2d 1278, 1282 (7th Cir.) ("In recent years, however, a more moderate interpretation of section 7 has prevailed.... [T]he current understanding of section 7 is that it forbids mergers that are likely to 'hurt consumers, as by making it easier for [them] to collude, expressly or tacitly, and thereby force price above or farther above the competitive level.'") *cert. denied*, 498 U.S. 920 (1990) (citation omitted); Joe Simms & Deborah P. Herman, *Twenty Years of Hart-Scott-Rodino Merger Enforcement*, 65 Antitrust L. J. 865 (Spring 1997) ("Today, we look back on this period of 'the more the merrier' merger enforcement with wonder: how did the government ever get away with that? Even today's aggressive merger enforcers want no part of defending early merger cases or the 1968 Merger Guidelines. But at the time that was mainstream antitrust.").

19. ***"The Herfindahl-Hirschman Index cannot guarantee litigation victories."*** *Id.* at 992 (emphasis added). "To allow the government virtually to rest its case at that point, leaving the defendant to prove the core of the dispute, would grossly inflate the role of statistics in actions brought under section 7." *Id.; see Occidental Petroleum Corp.*, 1986-1 Trade Cas. at 62,513 ("it cannot be concluded from market statistics alone that an acquisition will lessen competition"); *see Great Lakes Chem. Corp.*, 528 F. Supp. at 90 ("the focus of a proceeding such as this should not be on numbers, but rather on commercial realities").

20. Instead, the proper measure under Clayton Act Section 7 is the extent to which the merger could lessen competition in the ***industry***, rather than the extent to which the merger is reasonably probable to reduce competition ***between*** two particular companies. *Citizens Publ'g Co. v. United States*, 394 U.S. 131, 137 n.3 (1969). Indeed, the Clayton Act was expressly designed to allow "two small firms" to merge "to be able to compete more successfully with the leading firms in that market." *Philadelphia Nat'l Bank*, 374 U.S. at 370-71. The Clayton Act was simply not designed to "impede ... a merger between two small companies to enable the[m] to compete more effectively with larger corporations dominating the relevant market." *Brown Shoe Co.*, 370 U.S. at 319; *Philadelphia Nat'l Bank*, 374 U.S. at 370-71; *see also United States v. M.P.M., Inc.*, 397 F. Supp. 78, 93 (D. Colo. 1975) (merger of two of the four largest competitors with combined market share over 30% "motivated by a desire to improve the companies' competitive position" and resulting in a "combination [to offer service that] was superior to that offered by either of the previously independent companies alone."); *United States v. Country Lake Foods, Inc.*, 754 F. Supp. 669 (D. Minn. 1990) (finding that evidence that merger would allow the acquiring firm "to compete directly with the market leader "relevant" as further evidence that the proposed acquisition will enhance competition.")

21. This law is buttressed by the legislative history of the 1950 amendments to the Clayton Act. The House sponsor of the 1950 amendments, Congressman Celler, addressed this very question. When asked whether the merger of two smaller competitors would violate the Clayton Act, Congressman Celler replied: "there is nothing whatsoever that will prevent those

corporations — you call them small corporations — from merging. . . . In the case you have indicated there would be an increase of competition — not a suppression of competition." 95 Cong. Rec. 11488 (1949) (Statement of Rep. Celler); *see generally*, Timothy J. Muris, *The Efficiency Defense Under Section 7 of the Clayton Act*, 30 Case W. Res. L. Rev. 381, 399 (1980).

22. Yet the FTC has done nothing more in this lawsuit than count the number of competitors in the industry and rest its case on concentration statistics. While this calculation may raise a ***rebuttable*** "presumption that the transaction will substantially lessen competition," defendants have presented substantial evidence to "show that the market-share statistics give an ***inaccurate*** prediction of the proposed acquisition's probable effect on competition." *Staples, Inc.*, 970 F. Supp. at 1083.

23. More specifically, as emphasized by the D.C. Circuit, "[i]n the wake of *General Dynamics*, the Supreme Court and lower courts have found section 7 defendants to have successfully rebutted the government's prima facie case by presenting evidence on a variety of factors other than ease of entry." *Baker Hughes Inc.*, 908 F.2d at 985. "These factors include, but are not limited to, ... the misleading nature of the statistics underlying the government's prima facie case," the "industry structure," "excess capacity," "elasticity of industry demand," "product differentiation," and the "prospect of efficiencies from the merger." *Id.* at 984 and 985.

24. Not surprisingly, the agency itself parallels this same approach in its *Horizontal Merger Guidelines*:

> market share and concentration data provide only the ***starting point*** for analyzing the competitive impact of a merger. Before determining whether to challenge a merger, the Agency also will assess the other market factors that pertain to competitive effects, as well as entry, efficiencies and failure.

United States Dep't of Justice & Federal Trade Comm'n, *Horizontal Merger Guidelines* § 2.0 (1997) (emphasis added).

25. The FTC's heightened and exclusive reliance on entry barriers as a dispositive factor in its request for a preliminary injunction is therefore seriously misplaced. Again, *Baker Hughes* addressed the very same contention in 1990, and forcefully rejected this notion:

> The government inexplicably imbues the entry factor with talismanic significance. If, to successfully rebut a prima facie case, a defendant must show that entry by competitors will be quick and effective, then other factors bearing on future competitiveness are all but irrelevant.

Baker Hughes Inc., 908 F.2d at 984. Holding "the government's fixation on entry is misplaced," the D.C. Circuit affirmed the district court's order denying a request for preliminary injunction based on two specific "non-entry factors" — "the misleading nature of the statistics underlying the government's prima facie case and the sophistication of [buyers]" — which the D.C. Circuit concluded "provide[d] compelling support" for the district court ruling. *Id.* Notably, these same two "non-entry" factors are present here.

26. As in *Baker Hughes Inc.*, defendants have "ma[de] the required showing [to rebut the FTC's prima facie case] by affirmatively showing why [this] transaction is unlikely to substantially lessen competition ...." *Id.* at 991.

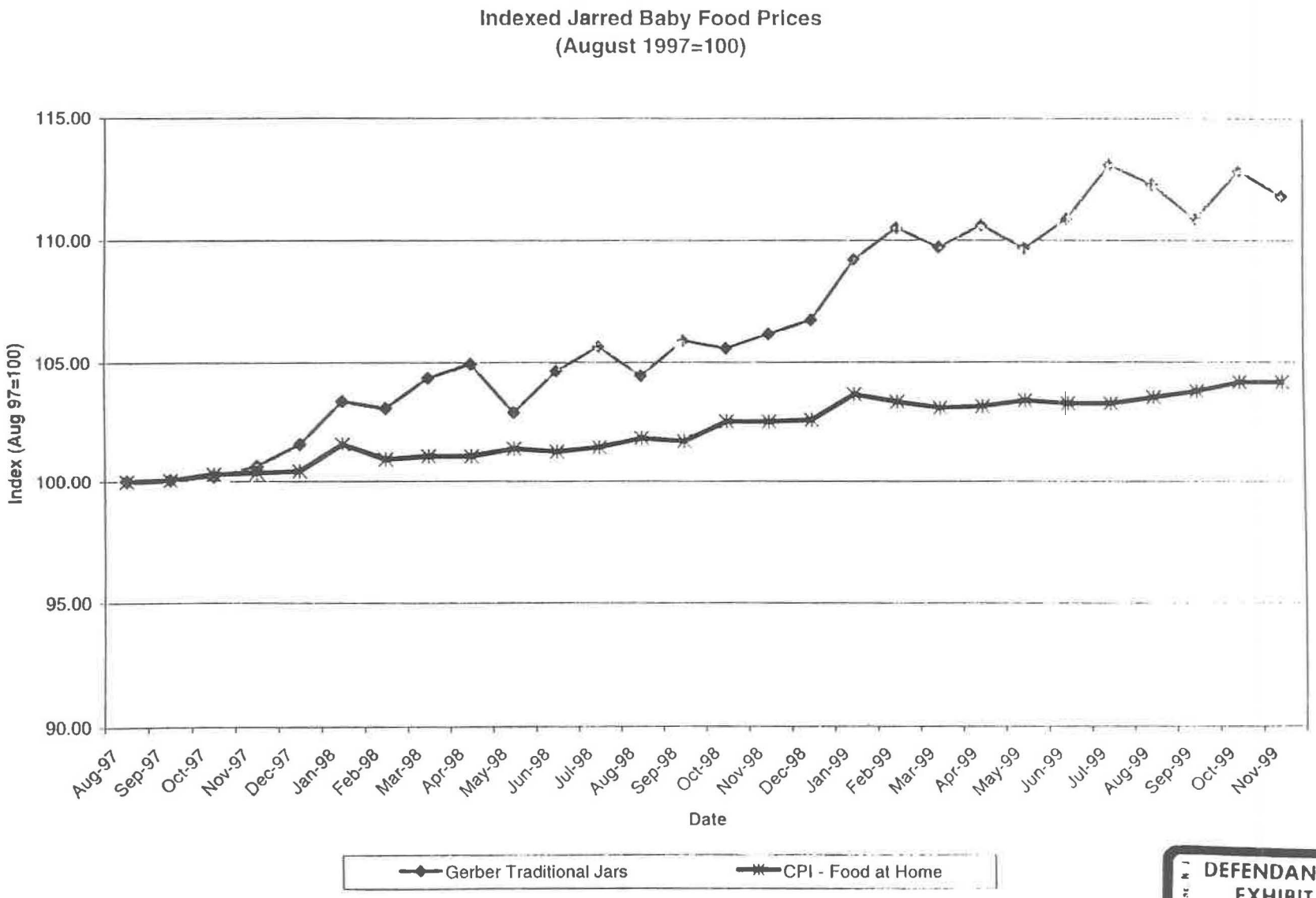
III. THE FTC CANNOT REST ITS CASE ON HHI STATISTICS

The FTC's case — concentration — is not enough. The prima facie presumptions the agency rests on are overwhelmingly rebutted by the "non-entry" factors considered in *Baker Hughes* and cases since.

A. Market Share Statistics Do Not Accurately Reflect the Competitive Structure of the Baby Food Industry

27. As the Seventh Circuit has explained, "market concentration statistics ... must be relevant to the focus of competition." *Kaiser Aluminum & Chem. Corp. v. FTC*, 652 F.2d 1324, 1341 (7th Cir. 1981). The HHI market concentration statistics in this case are ***not*** relevant to the focus of competition in the jarred baby food market, and more to the point, fail to show the requisite connection between increased concentration and any anticompetitive effects.

28. The HHI statistics are skewed by the fact that the baby food market is dominated by a single firm — Gerber — which is not a party to this case. Gerber, in its own words, "dominates the $1 billion baby food market, with approximately a 70% share." DX 727. Its dominance has endured for over 40 years, during which no company has effectively increased



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share or distribution versus Gerber. *See also In re Baby Food Antitrust Litigation*, 166 F.3d 112 (3d Cir. 1999).

29. More importantly, as a result of its dominance, Gerber is the acknowledged price leader, and has raised prices annually to ***supra***-competitive levels. *See* DX 128 on Facing Page; Defendants' Joint Findings of Fact [hereinafter cited as "FF"] ¶ 18. At the same time, Gerber has failed to bring meaningful innovation to the category. In the last five years alone, baby food grocery sales have declined ***more than 15%***, while the birth rate has remained flat. DX 2 at 15-16; FF ¶ 85.

30. By contrast, neither Beech-Nut nor Heinz is a national brand. While Gerber's distribution across United States grocery stores reaches nearly 100%, Heinz baby food is represented in stores that account for only 40% of all grocery sales in the United States, and Beech-Nut is represented in stores that account for only 45% of all U.S. grocery sales. DX 1 at 69 (Heinz); DX 444 at 3924 (Beech-Nut); FF ¶¶ 51, 74-75. Further reflective of its dominance is Gerber's share of advertising — well over 90% — far in excess of its market share. DX 1060; FF ¶¶ 21, 22.

31. The fact that Heinz and Beech-Nut are the two "also-ran" firms in a declining market, combining to compete against the unquestioned dominant firm in the industry is the critical fact that sharply distinguishes this case from the decisions in *Staples, Inc.*, *Coca-Cola Co.* and *Ivaco*, principally relied on by the FTC; FF ¶¶ 7-16, 12-47, 62-70, 83-85. In *Staples*, the proposed merger would combine the two ***leading*** firms in the industry. The merged firms in *Staples* would have had a dominant share in 42 geographic markets, including a 100% share in fifteen markets. *Staples, Inc.*, 970 F. Supp. at 1081. In *FTC v. Coca-Cola Co.*, the combined firm would have had "a market share in excess of 50% in 32 significant population areas." 641 F. Supp. 1128, 1140 (D.D.C. 1986), *vacated as moot*, 829 F.2d 191 (D.C. Cir. 1987); *see United States v. Ivaco, Inc.*, 704 F. Supp. 1409, 1413 (W.D. Mich. 1989) ("the joint venture would create a firm controlling 70% of the … market").

32. In contrast, a combined Heinz and Beech-Nut will ***not*** have a dominant share. The merged firm would still lag far behind Gerber, whose share would remain more than ***double*** the combined share of Heinz and Beech-Nut. The proposed merger combines the two trailing firms in the industry, and presents precisely the scenario the district court felt compelled to distinguish in the *Coca-Cola* case. *See Coca-Cola Co.*, 641 F. Supp. at 1139 (granting an injunction because, unlike here, the court noted it was ***not*** dealing with "a situation where a small company is acquiring another small company to enhance its competitive power").

33. In fact, within the regional to national geographic market for wholesale competition, this merger falls within the *Merger Guidelines* unilateral effects "safe harbor" threshold, because the combined national market share is less than 35%. *See* DX 617 at Appendix B.[9]

34. This distinction is critical — rather than presenting the same anticompetitive concerns addressed in *Staples* and the other cases the FTC cites, this acquisition provides a structural remedy to the market power *Staples* and these other cases sought to avoid. Put another way, the FTC in this case is seeking to ***protect*** the very anticompetitive effects the *Staples, Coca-Cola* and *Ivaco* courts enjoined.

35. Unlike *Staples, Coca-Cola or Ivaco*, the combined share of the merging firms in this case is at or below the combined shares in several mergers courts have ***recently*** allowed. *See, e.g., FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285, 1294 (W.D. Mich. 1996) (combined share of merged firms ranged from 47-65%), *aff'd*, 121 F.3d 708 (6th Cir. 1997);

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9 Under the *Merger Guidelines*, there is presumption of a unilateral exercise of market power ***only*** if the combined firm has ***more than a 35%*** market share. *Horizontal Merger Guidelines* § 2.211; PX 782 at 21 n. 15 n.15; Hilke Tr. 390; FF ¶ 393. As the Assistant Attorney General in charge of the development of the *Merger Guidelines* made plain: "The size of the merging firm also is important, hence the requirement that the combined market share of the merging firm exceed 35 percent." *60 Minutes with the Honorable James F. Rill, Assistant Attorney General, Antitrust Division, U.S. Department of Justice*, 61 Antitrust L.J. 229 (Summer 1992). Of course, because wholesale competition occurs on a chain-by-chain basis, and chains extend across multiple cities, either covering broad regions or the nation as a whole, the geographic market measurement is regional to national. Baker Tr. at 969-70.

Archer-Daniels-Midland Co., 781 F. Supp. at 1416 (combined share of 28.9%); *Country Lake Foods, Inc.*, 754 F. Supp. at 673 (combined share of 36%); *Owens-Illinois, Inc.*, 681 F. Supp. at 32 (combined share of 37%); FF ¶ 393.

B. Concentration Statistics Are Not Correlated with Increased Baby Food Prices

36. The FTC has ***no*** case unless competition between Heinz and Beech-Nut is now constraining consumer prices either directly or indirectly. If the competition between Heinz and Beech-Nut does not constrain consumer prices, the elimination of that competition will ***not*** eliminate a constraint on consumer prices. If the acquisition will not eliminate a constraint on consumer prices, the acquisition will ***not*** permit Heinz to exercise market power either unilaterally or collusively with Gerber. Baker Tr. 1015-18; FF 175-76..

37. As set out below, any loss of competition between Heinz and Beech-Nut would not remove any constraints on consumer prices either directly (at retail) or indirectly (wholesale prices affecting retail prices). "HHIs" in this case do not and cannot measure ***how*** this merger is likely to effect price competition, because the concentration statistics do not capture how and at what levels the parties compete. *See, e.g. Butterworth Health Corp.*, 946 F. Supp. at 1295 (concluding that, where defendants show that "high market concentration . . . does not correlate positively with higher prices," they have "demonstrated good reason to question the applicability of the traditional presumption that a significant increase in market concentration will lead to higher prices in connection with the merger . . . .")

1. No Impact on Consumer Retail Price

38. The proposed acquisition could ***not*** adversely affect consumer prices directly, because Heinz and Beech-Nut do ***not*** constrain each other's retail or consumer prices. Hence, unlike *Staples*, this acquisition could have ***no*** direct effect on retail prices. At trial, defendants proffered six types of evidence that show definitively that competition between Heinz and Beech-Nut does ***not*** directly constrain each other's retail prices.

Beech-Nut & Heinz are REGIONAL Players
1999

Note: Based on 10% filter.
Source: IRI Data.

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39. ***First***, in most sections of the country a consumer has a choice of either Heinz or Beech-Nut but not both.[10] In fact, in 75% of the country, essentially only one of the two brands is present to any meaningful degree, rendering it virtually impossible to switch. Heinz and Beech-Nut both have a significant presence in relatively few cities. In only 20% of the country do both Heinz and Beech-Nut have a 10% market share. In a majority of cities in the country, either Heinz or Beech-Nut does not have a 4% market share. Baker Tr. 950-51; FF ¶ 118. Obviously, in most of the country consumers do ***not*** have the sort of choice between Beech-Nut and Heinz that would constrain prices. *See* DX 129 on Facing Page.[11]

40. ***Second***, even when Heinz and Beech-Nut are found in the same city, they are virtually never found on the same store shelf. Heinz and Beech-Nut are found together in only three of one hundred seventy divisions of the top twenty United States retailers. DX 1; FF ¶ 112. Indeed, there is no evidence in the record that any appreciable number of shoppers switch stores based on relative price changes between Beech-Nut and Heinz. Baker Tr. 951; FF ¶¶ 167-76. Even Gerber's consumer research confirms that shoppers do not cross stores for Heinz or Beech-Nut baby food. *See* DX 724 at 144-45; FF ¶ 155. Retailers recognize that any such cross shopping is trivial and, therefore, do ***not*** usually even price check Heinz against Beech-Nut or vice versa. *See* FF ¶¶ 126-29.

41. ***Third***, Heinz and Beech-Nut occupy entirely different market positions, in large part reflecting the significant differences in their respective manufacturing costs. "Heinz is the value brand, consistently adopting strategies to maintain a significant price spread between itself and ***Gerber***." *In re Baby Food Antitrust Litig.*, 166 F.3d at 116 (emphasis added). *See also* Johnson Tr. 444-445; 463-464; FF ¶¶ 48-50, 130-34. Beech-Nut, on the other hand, has

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[10] The appropriate geographic market for retail analysis is local, *i.e.*, cities — consumers are unlikely to travel out of their local areas to purchase baby food. Hilke Tr. at 219:4-11; DX 617 ¶ 17; FF ¶¶ 155-56.

[11] Stated another way, while both Heinz and Beech-Nut have some presence in most regions, the FTC did not address the magnitude of this presence: in 85% of the regions where Beech-Nut baby food is sold, sales of Heinz amount to a negligible 5%; and in regions that make up 73% of Heinz sales, Beech-Nut sales amount to 4%. *See* PX 310 at 22 (Beech-Nut top 15 markets); PX 97-0841 (Heinz sales in Beech-Nut top 15 markets); DX 276; FF ¶ 96.

"elevate[d] its price structure to be competitive with Gerber's." 166 F.3d at 117; *see also* Meader Tr. 863:7-12; FF ¶¶ 135-41. This makes it less likely that consumers would respond to a higher Beech-Nut price by shifting to Heinz and vice versa. Baker Tr. 951-52; FF ¶¶ 173-76.

42. ***Fourth***, there is a dearth of any record evidence that Heinz and Beech-Nut monitor each other's price or they change their retail price based on the other's retail price. Even Dr. Hilke concedes that both companies focus almost entirely on the ***Gerber*** price. Hilke Tr. 398-99. *See, e.g.*, Hilke Tr. 226; DX 14 at 19; FF ¶¶ 124-46 ("***Gerber*** now utilizes deals to offset our retail price advantage to gain share at our expense"); DX 13 at 14 ("Heinz lost significant share to ***Gerber*** . . . when we lost our price differential, demonstrating the Brand's vulnerability").

43. Ms. Quinn, Heinz's managing director of infant feeding, explained how Heinz monitors its infant feeding business. She testified that monthly reports are generated that show whether or not Heinz is achieving the desired price gap between its retail shelf price and Gerber's. These reports do not target Beech-Nut's shelf pricing. Further, she has ***never*** received a proposal from her sales managers to change her retail pricing to match or compete against a Beech-Nut retail shelf price. Quinn Tr. 578-579.

44. Heinz, in its FY 2000 "Big 6" objectives, has two price points: "[a]chieve minimum price differentials ***versus Gerber***" and "increase % of Heinz ACV with minimum price differentials ***versus Gerber*** from 74% to 85%." *See* DX 5; FF ¶ 130. Again, there is ***no*** reference to Beech-Nut. In fact, in the ***hundreds upon hundreds*** of documents produced in this case discussing pricing practices, virtually ***none*** suggest that the Beech-Nut retail price is relevant to Heinz or vice versa. *See* DX 48-52.

45. Mr. Meader, Beech-Nut's CEO, similarly testified without challenge that Beech-Nut focuses entirely on Gerber in its marketing and pricing, and is indifferent to Heinz's pricing philosophy. FF ¶¶ 137-39, 143.

46. In Beech-Nut's FY01 business plan, for example, in its top 15 markets, Beech-Nut discusses

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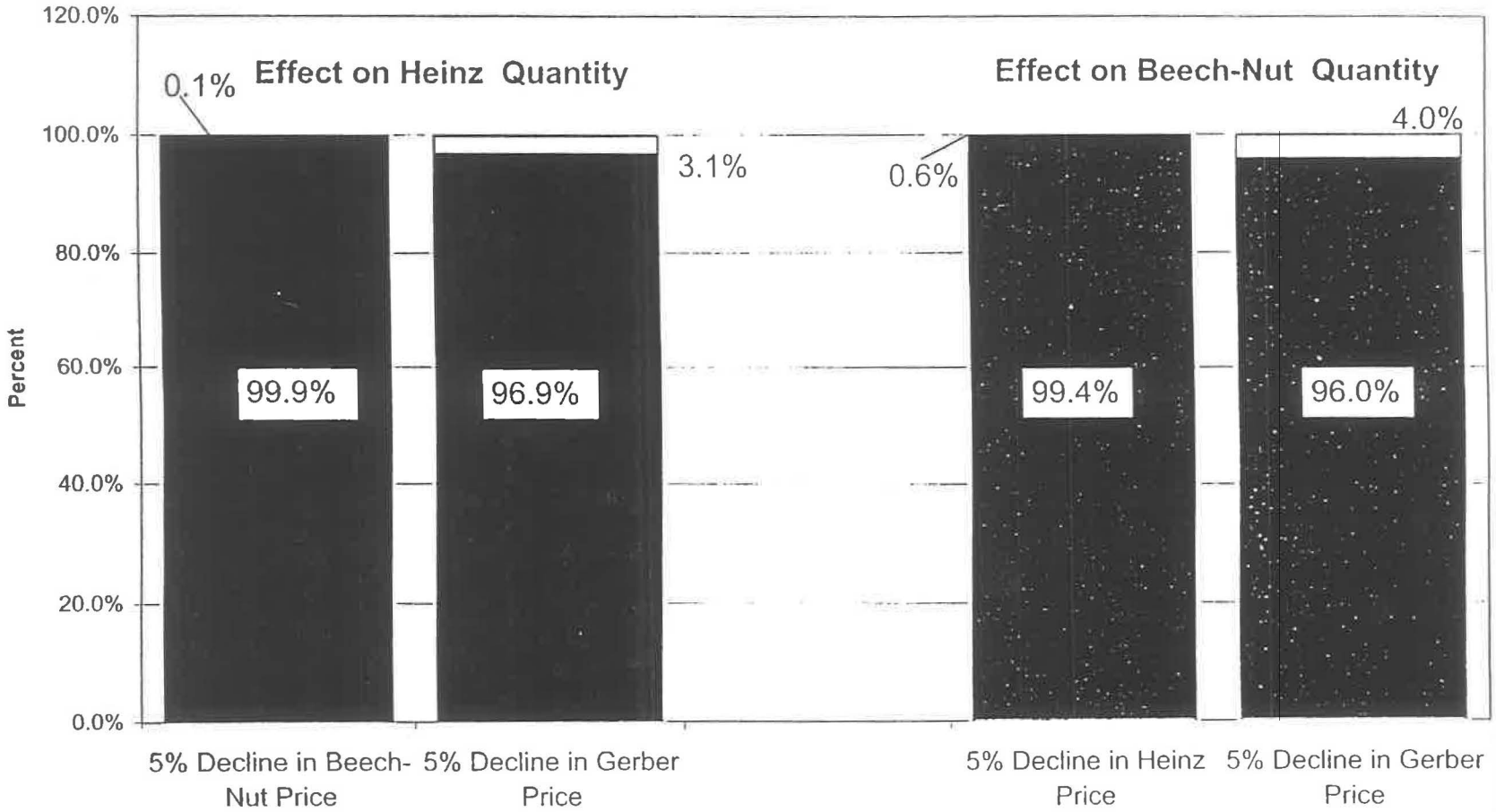
Consumer Substitution Between Heinz and Beech-Nut is Limited
Heinz and Beech-Nut Cross Elasticities
Jars in Mixed Markets



Source: Structural demand estimation, Appendix C, Professor Baker's Expert Report; Data from 12 IRI markets.

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Id. at 4546 and 4562; *see also* PX97 at 861-62

These business plans make ***no*** reference to pricing against Heinz.

47. If Heinz and Beech-Nut were constraining each other's retail price there would certainly be a paper trail of monitoring and price moves versus each other. Compare the record here with *Staples*. There, one of the significant findings by the district court was that documents from each company were replete with references to —and focus upon — each other's pricing. 970 F. Supp. at 1076 ("the evidence showed that Office Depot's prices are significantly higher . . . in Depot only markets than they are in three firm markets"). There is no such trail here.

48. ***Fifth***, Professor Baker's cross elasticity analysis, DX 130, demonstrates that consumers do not respond to a price increase of Heinz or Beech-Nut by buying the other brand, *i.e.*, the cross elasticity between the brands is extremely low, and indeed, not even statistically significant. *See* DX 130 on Facing Page; DX 617 at Appendix C; Baker Tr. 952-955. Notably, however, when Gerber's price decreases, Heinz and Beech-Nut consumers will switch to Gerber. Baker Tr. at 952. This evidence underscores the lack of on-shelf competition, and, accordingly why the loss of competition between them would not have any significant direct retail effect. FF ¶ 187.

49. ***Sixth***, if Heinz and Beech-Nut were actually constraining each other's retail prices, under the FTC's theory, consumer prices should be ***lower*** in "mixed markets" where both Heinz and Beech-Nut have some substantial presence, and ***higher*** in core markets where there is much less competition between them. *See, e.g., Staples, Inc.*, 970 F. Supp. at 1076 (prices lower in markets where merging firms competed). Here, however, as reflected in DX 612, there is no significant difference between prices in "mixed markets" and core markets. *See* DX 612

attached as Exhibit A; Baker Tr. 958-963; DX 617 at Appendix D; *see also* DX 1 at IV-5F; Baker Tr. 962-64; FF ¶ 178.

50. Because consumers do not switch between Heinz and Beech-Nut, the two brands do not constrain each other's retail prices. Because the merger does not eliminate a price constraint, there is simply no risk, post-merger that Heinz would be able to exercise market power unilaterally or to engage in any tacit coordination with Gerber.

2. Distribution Competition Between Heinz and Beech-Nut Similarly Does Not Constrain Gerber

51. The FTC's case focuses on competition between Heinz and Beech-Nut to gain access to the shelf in some selected accounts. It theorizes that Heinz-Beech-Nut wholesale competition constrains Heinz's unilateral ability to raise retail prices and its ability to collude with Gerber to raise retail prices even more. Hilke Tr. 1131-33.

52. Critically, to prove its case of anticompetitive effects, the FTC ***must*** show that the competition between Heinz and Beech-Nut to get on the shelf actually lowers retail prices. That is, the FTC must show that supermarkets pass along to the baby food consumer the increased moneys they obtain as a direct result of the competition to get on the shelf. The FTC has offered no credible evidence to support this theory.

53. Simply showing that Heinz and Beech-Nut offer trade spending money as part of the wholesale competition proves nothing, the reality is that both offer trade spending to compete with ***Gerber*** regardless of whether they are competing with each other for shelf space. *E.g.*, Quinn Tr. 573; FF ¶¶ 209-14. Moreover, trade spending has "fixed" and "variable" components. "Fixed" trade spending is a lump sum payment, which does not change with the volume the grocery chain sells. In contrast, "variable" trade spending will increase the more jars of baby food a supermarket sells. Baker Tr. 970-71. As Professor Baker explained, if variable trade spending increased as a result of wholesale competition, some consumers might benefit because supermarkets are likely to pass some of that incremental variable spending along to the

consumer. If only the fixed component of trade spending increases, however, baby food consumers would not benefit. Baker Tr. 973-74.

54. Heinz and Beech-Nut offer variable trade spending whether or not they are competing with each other for shelf space, because in both cases, these programs are directed at taking sales from Gerber, not each other. *E.g.*, Quinn Tr. 590, 591; Meader Tr. 863, 865, 867; FF ¶¶ 209-14.

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55. Notably, Heinz considers fixed trade spending a write-off because it is not reflected in shelf price. Quinn Tr. 594; Meader Tr. 864-65 ("We have never seen any evidence that fixed trade spending trickles down to the consumer"); FF ¶ 224. Indeed, the FTC's official position is that dominant retailers can retain such fixed fees as a bonus for themselves rather than passing the money on as a savings to consumers. Willard K. Tom, Deputy Director, FTC Bureau of Competition, *Slotting Allowances and the Antitrust Laws*, Hearings Before the Committee on Judiciary, United States House of Representatives (Oct. 20, 1999).

56. Bidding to get on the shelf has resulted in higher fixed, ***not*** variable trade spending. Baker Tr. 971-72. *See* PX 76-0204 ("Albertson's was from the beginning focused on up-front dollars to be used to ***pay down their acquisition debt***"); PX 56-3327 ("It is clear at this point that cash is going to be determining factor as well as how much can be paid up front"); PX 199-1675 (REDACTED is up-front payments) FF ¶¶ 229-35.

57. Indeed, the recent consolidation of supermarket chains has resulted in a short-term increase in wholesale competition and this in turn has resulted in more "nonworking trade dollars." PX 58 at 78; FF ¶¶ 229-34. Thus, Heinz trade spending payments are trending toward fixed and away from variable. DX 20-0012; Quinn Tr. 591, 592; DX 17-0015

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("[t]he up-front spending that results from pitting Heinz against Beech-Nut for distribution tends to eliminate any brand development funds") FF ¶¶ 229-34. This depletes funds each company has available for "variable spending," and may even lead to higher consumer prices, if manufacturers raise price to compensate for shelf space fees. *See* PX 56-3327; PX 367-0001

FF ¶ 234.

58. REDACTED

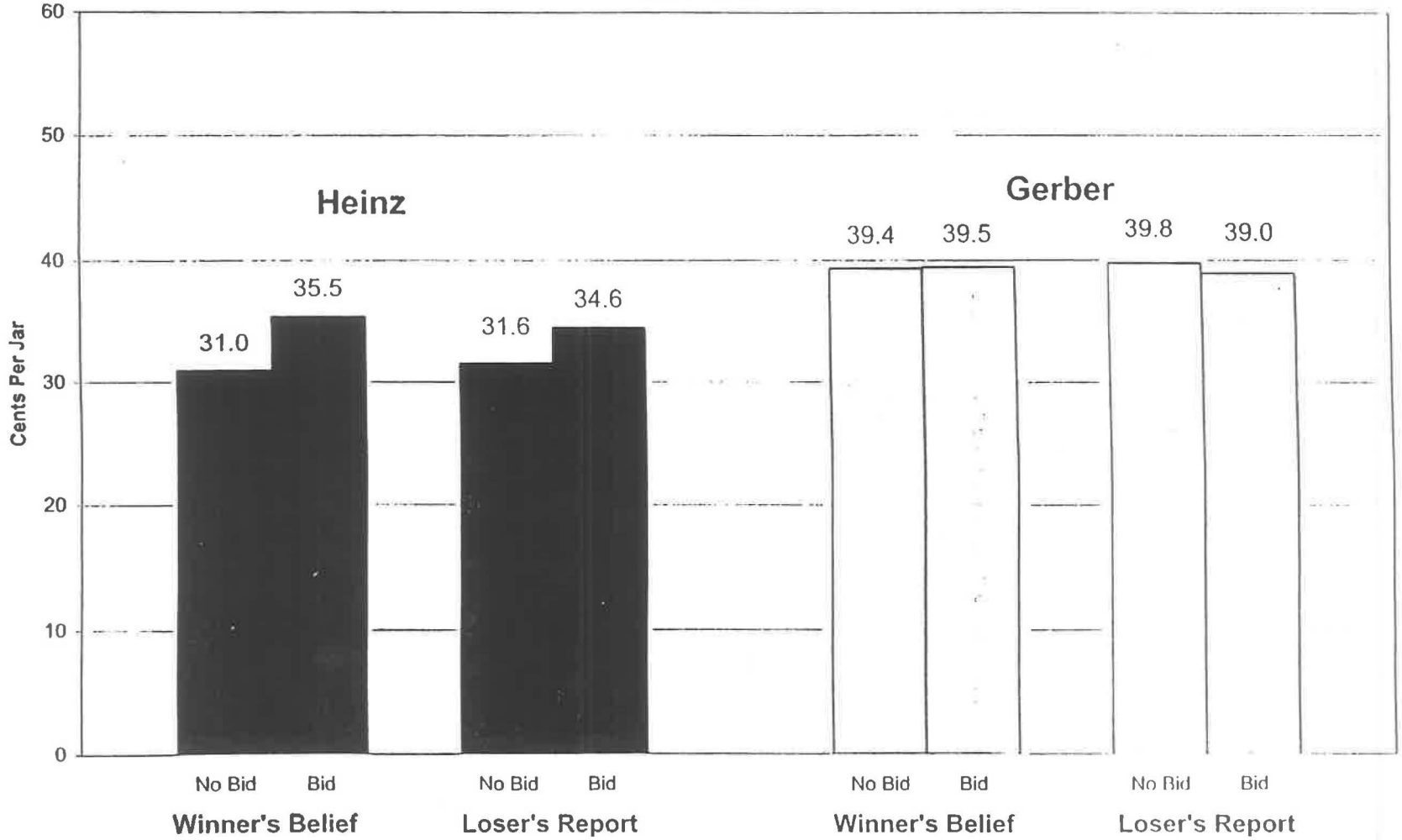
Findings of Fact ¶ 236

59. The Food Lion episode presents the case in point. Food Lion was principally a Beech-Nut/Gerber account (with a few divisions carrying Heinz as the second brand). Food Lion invited Heinz to "bid" on replacing Beech-Nut, which successfully defended its incumbent second-position to stay on the shelf next to Gerber. But the bid process significantly altered the structure of Beech-Nut's competitive spending at the account. Prior to the bid, Beech-Nut's promotional monies were weighted toward variable "performance" or consumer spending, which reduced retail baby food prices. After the bid process, Beech-Nut's variable consumer spending dropped, to balance the significant increase in its "fixed" spending — the lump sum payments made directly to Food Lion. Meader Tr. 816-23; FF ¶ 235.

60. The Food Lion episode is not unique. The record is replete with examples of accounts that have demanded increased fixed payments at the expense of variable spending; *e.g.*, WinCo's CEO, Mr. Long, testified to the effect WinCo used its fixed payments to build a new warehouse (Long Tr. 160-62); Albertson's used "bid" money to pay debt (PX 76); Farmer Jack's acknowledged that the "Heinz/Beech-Nut competition resulted in a *zero* reduction in retail prices" (Jezowski Dep. at 49); and Pathmark similarly testified that it did not "use any of the extra money to lower prices on baby food" or "to offer additional coupons or promotions." Whitney Tr. 539; FF ¶¶ 232-42, 248.

61. Moreover, this competition is limited either to grocery chain consolidation or episodic opportunities. The "incumbent" advantage operates to limit any realistic opportunity

Impact of Heinz/Beech-Nut Bid Competition On Average Retail Price 1998/1999



Note: Prices adjusted for differences in cost of retail groceries.
Source: Appendix E, Professor Baker's Affidavit; IRI data and ACCRA.

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for one brand to replace the other. This bidding competition could not have a large impact on retail prices if it had an impact at all. *See* FF ¶¶ 193, 196, 243-47.

62. To determine whether there was any merit to the claim that this bidding competition had an impact on consumer prices, Professor Baker tested whether bidding for shelf space between Heinz and Beech-Nut resulted in lower retail prices. (The FTC's expert, Dr. Hilke, did not attempt any similar analysis). Professor Baker found that the bidding had, in fact, ***no*** statistically significant impact on retail prices. *See* DX 132 on Facing Page; *see also* DX 617 ¶ 74 and Appendix E. Baker Tr. 977-981; FF ¶¶ 254-55. That is, the bidding competition was not constraining retail prices, or to put it another way, it was not constraining the ability of Heinz or Beech-Nut to raise retail prices unilaterally or in concert with Gerber.

63. Again, this conclusion is confirmed by Professor Baker's separate study of prices in core versus mixed cities. *See* Exhibit A, DX 612; FF ¶ 178, 256. As he testified, one would expect that bidding competition for shelf space would be more intense in mixed than in core cities. So if bidding competition had any impact on prices, it should be lowering prices in mixed cities relative to core cities. But, as DX 612 shows this is not the case. Baker Tr. 982-83. And the FTC has ***not*** come forth — as is its burden — with any evidence to the contrary.

64. The final defect in the FTC's "elimination of trade spending" thesis is that it does not take into account that — in fact — trade spending competition will actually ***increase*** post-merger. Already, Heinz has had to fend off proposals by Gerber for exclusive distribution at several accounts such as Farmer Jack's and Kroger-Louisville. Quinn Tr. at 588, 594-95; FF ¶¶ 33, 104, 239. As a result, the financial model used to provide the Heinz Board with a valuation for this acquisition actually allocated an additional reserve fund of at least

. **post**-merger, to defend against Gerber. REDACTED

65. At present, retailers do not require shelf space fees from Gerber at all. But post-merger, ***Gerber itself*** confirms it will have to

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66. Combining two weak competitors to attack a strong one is common place and occurs frequently with pro-consumer results. The record evidence is that — for grocery stores and their customers — two player competition can be intensely competitive and clearly sufficient to deter any efforts at collusion. Thus, as Roger Davidson from Ahold testified, the merger between American Greetings and Gibson's created a stronger competitor to Hallmark. Where "one was dominant before [and] wasn't doing much bidding, now . . . [y]ou have two strong players bidding," which has "drive[n]" "consumer prices" "down." Davidson Tr. 852.

67. Accordingly, the competition between Heinz and Beech-Nut does not constrain an exercise of market power against consumers either directly or indirectly. The merger would have no impact on the ability of Heinz to raise price unilaterally and no impact on the ability of Heinz or Gerber to raise price collusively. ***The most important feature of jarred baby food competition is that there are two manufacturers on the grocery store shelf before the acquisition and there will be two after the acquisition.*** That is what drives competition and that will not change post acquisition, except for the better, as Heinz gains efficiencies to challenge Gerber's market dominance and Gerber responds to that challenge.

C. Substantial, Merger-Specific Efficiencies Resulting from this Merger Focus the Competitive Effects Analysis and Rebut the FTC's Prima Facie Case

68. As explained in the *Horizontal Merger Guidelines* § 4 ("[e]fficiencies generated through merger can enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products"); *see also* Debra A. Valentine, General Counsel, FTC, *Health Care Mergers: Will We Get Efficiencies Claims Right?*, Prepared Remarks, Nov. 14, 1997 ("[c]entral to the revisions [to the Guidelines] is a recognition that cost savings and other efficiencies from a merger can enhance the merged firm's ability and incentive to compete").

69. In 1997, the FTC amended its *Merger Guidelines* concluding "that efficiencies are properly considered in merger analysis." FTC Staff Report, *Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace*, Ch. 2 at 1 (May 1996). More specifically, the FTC explained:

> Section 7 asks whether a transaction's effect may be substantially to lessen competition. Credible efficiencies likely to be achieved through a transaction may contribute to the overall competitive effect of the merger. For this reason the merging parties should be able to put forward likely procompetitive efficiencies at the agency review stage, in administrative litigation, and in court. ***Because both courts and agencies have jurisdiction over mergers, there is little basis for suggesting that a court ignore what an agency may consider.*** Moreover, the introduction of competitively relevant efficiency evidence in court better aligns merger policy with other areas of competition law.

Id. at 24 (emphasis added).

70. The FTC therefore allows "merging parties the opportunity to show why merger-created, credible efficiencies may deter any increased likelihood of the exercise of market power or even improve a market's competitive dynamics post-merger." *Id.* at 27. According to the FTC, this approach is "consistent with not only the Supreme Court's approach to analyzing efficiencies in the non-merger context, but also the general approach of some lower courts that have begun to consider efficiencies claims in mergers." *Id.*[12]

71. The D.C. Circuit's *Baker Hughes* decision expressly held that the "prospect of efficiencies from the merger" is a factor that rebuts the FTC's prima facie case. *Baker Hughes*, 908 F.2d at 985. Similarly, in *Cardinal Health*, the district court, following *Baker Hughes*, held "a defendant may rebut the government's prima facie case with evidence showing that the merger would create significant efficiencies in the relevant market." 12 F. Supp. 2d at 61

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[12] *See, e.g.*, *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1053 (8th Cir. 1999); *Allied Signal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568, 574 n.3 (7th Cir. 1999); *United States v. Englehard Corp.*, 126 F.3d 1302, 1304 (11th Cir. 1997); *California v. Sutter Health Sys.*, 84 F. Supp. 2d 1057, 1068-69, 1082-83 (N.D. Cal.), *aff'd sub nom. California ex rel. Lockyer v. Sutter Health*, 2000-1 Trade Cas. (CCH) ¶ 72,896 (9th Cir. 2000); *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 61-62 (D.D.C. 1998); *Staples, Inc.*, 970 F. Supp. at 1082, 1088-89; *United States v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121, 137 (E.D.N.Y. 1997); *Advocacy Org. For Patients & Providers v. Mercy Health Servs.*, 987 F. Supp. 967, 973-74 (E.D. Mich. 1997); *Butterworth Health Corp.*, 946 F. Supp. at 1294.

(citation omitted). And *Staples* likewise held "whether an acquisition would yield significant efficiencies in the relevant market is an important consideration in predicting whether the acquisition would substantially lessen competition." 970 F. Supp. at 1088.

72. In this case, the merger will give Heinz the national platform and cost savings it needs finally to compete with Gerber on equal footing, as a strong brand. The merger will add Beech-Nut's ACV to Heinz's ACV, giving the new brand presence in all stores that carry two brands of baby food across the country. (Over 10% of the United States will still be exclusively Gerber). The engine behind this national platform and cost savings is the ***extraordinary*** manufacturing synergies that result from this merger. The savings realized by combining the operations of the two companies provide immediate and direct benefits by lowering Beech-Nut's production costs, consequently allowing Heinz to lower Beech-Nut prices.

73. The variable manufacturing cost savings alone are estimated to be

REDACTED for all of Beech-Nut's production. As established by Professor Baker and Mr. Painter, these savings are extraordinarily large, merger specific and cognizable under the FTC's *Horizontal Merger Guidelines*. According to Mr. Painter, who was at the FTC thirty years, the savings are among the highest ever to come before the agency. DX 629 at ¶ 82; Painter Tr. 750; FF ¶ 381.

74. These savings are precisely the type of efficiencies the agencies hold out in the *Merger Guidelines* as enhancing competition:

> mergers have the potential to generate significant efficiencies by permitting a better utilization of existing assets, enabling the combined firm to achieve lower costs in producing a given quantity and quality than either firm could have achieved without the proposed transaction.
>
> * * *
>
> efficiencies resulting from shifting production among facilities formerly owned separately, which enable the merging firms to reduce the marginal cost of production, are more likely to be susceptible to verification, merger-specific, and substantial, and are less likely to result from anticompetitive reductions in output.

Horizontal Merger Guidelines § 4.

75. Courts have credited cost-savings like those here in denying motions seeking to enjoin mergers. *See, e.g., Long Island Jewish Med. Ctr.*, 983 F. Supp. at 149 ("the 'efficiencies' gained in this merger will ultimately result in benefits to the consumers"); *Butterworth Health Corp.*, 946 F. Supp. at 1300-01 (savings of $99.2 million of capital expenditures and operating efficiencies of $68.5 million in the first five years); *Country Lake Foods, Inc.*, 754 F. Supp. at 674, 680 (efficiencies from acquisition of second and third players with combined share of 36% allowed purchaser to increase capacity resulting in lower plant and transportation costs enabling it to compete with top selling firm in market).

76. Similarly here, together with the national distribution Heinz achieves from its merger with Beech-Nut, these manufacturing savings will allow Heinz to distribute Beech-Nut's high quality products at the current low Heinz value prices. And like the district courts in *Butterworth Health Corp.* and *Long Island Jewish Medical Center*, this Court may take cognizance of Heinz' post-merger motives and incentives to pass-on its cost savings.

77. In *FTC v. Butterworth Health Corp.*, for example, the Western District of Michigan held proffered efficiencies from a hospital merger successfully rebutted the FTC's prima facie "concentration" case. 946 F.Supp. at 1300. Specifically, the court held that the proffered operating savings would be invariably passed on to consumers, in view of defendant's incentives from its nonprofit status and its "community commitment," a series of formal assurances to the community to freeze certain prices and hospital governance. *Id.* at 1301. Collectively, this evidence distills to motive and incentive to pass along cost savings. *See also Long Island Jewish Med. Ctr.*, 983 F. Supp. at 149 (incentive to pass along savings and agreement with New York Attorney General to pass on savings equal to $100 million to community over five-year period).

78. The motive and incentive for Heinz to pass along cost savings to its customers is driven and compelled by the company's necessary competitive posture and desire to take share from Gerber. Johnson Tr. 452-53; FF ¶ 264. First, Professor Baker explains, as the cost of production decreases, the profitability of selling each unit increases. To maximize profitability,

Heinz has every economic incentive to increase output. The means to increased output is increased volume sales, which are only achievable through aggressive, low prices. Baker Tr. 999; FF ¶¶ 409-11.

79. As Professor Baker further testified, when price falls, demand grows more "elastic" *i.e.*, consumers become even more price sensitive. As elasticity increases, a firm is able to grow its output as prices fall, again giving Heinz every incentive to pass along its cost savings through lower prices. Based on these two irrefutable economic principles, Professor Baker modeled pre- and post-merger acquisition competition and concluded that Heinz will pass through at least fifty percent and maybe all its cost savings. Baker Tr. 998-99; FF ¶ 412.

80. Notably, the efficiencies generated by the acquisition for Heinz make it a disruptive or "maverick" firm, unlikely to collude. Baker Tr. 942, 1012-13. The reduction in Heinz costs, the increase in Heinz quality, the new products and safety standards that Heinz will introduce, the expanded geographic scope of Heinz's operation, its broader shelf presence, all make collusion unattractive to Heinz. Heinz will ***not*** want to settle for just the combined market share of the pre-acquisition Heinz and Beech-Nut. It will be driven to expand that share at Gerber's expense. Baker Tr. 1012-13; FF ¶¶ 291, 408-10.

81. The "duopoly" prognosticated by the FTC and Dr. Hilke would lock Heinz into a twelve point share gain from the acquisition. Mr. Johnson testified that this gain does ***not*** justify $185 Million and would not satisfy his Board of Directors, shareholders or Wall Street analysts. Johnson Tr. 452-53; FF ¶¶ 264, 291. As the Supreme Court has made clear: "Coordination will not be possible when any significant firm chooses, for any reason, to go it alone," and one reason to go it alone is an "objective to capture a significant amount of volume in order to [improve] sales position." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 239-40 (1993).

82. In fact, Heinz has an extensive corporate history of passing efficiency savings to consumers. Heinz CEO William Johnson, for example, discussed how Heinz succeeded in growing its Nine Lives pet food brand through low cost production, lowering price and

increasing volume. FF ¶ 293. In short, low costs, low prices and increased share is the Heinz business culture. Its self-interest in creating shareholder value through growth similarly drives it to compete for share against Gerber. *See* Mehring Dep. at 30 ("Investors today, I believe, are looking for . . . volume growth . . . that would be the primary thing that investors are searching for today in food stocks"). FF ¶ 309. The Project N growth study corroborates that a value price growth strategy is the most profitable course for Heinz to follow post-merger, given its manufacturing cost savings and national distribution.

83. The merger will also give Heinz the national distribution necessary to innovate, where previously it has been unsuccessful. For example,

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Johnson Tr. 456-57, 470-71; FF ¶¶ 297-306.

84. Finally, Heinz has made express commitments to its customers and to its board of directors to pass through cost savings in the form of lower consumer prices, which given the economic incentives, makes the best business sense. Because Heinz must work with its supermarket customers on cooperative marketing efforts for not only baby food, but scores of other grocery products as well, it cannot breach its commitments to these customers. Baker Tr. 1003.

85. For these and other reasons, retail grocery stores have overwhelmingly expressed support for this merger.[13]

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[13] With due respect to the Court's prior ruling, these customer views should be given strong consideration in a merger case. *See United States v. Syufy Enters., Inc.*, 903 F.2d 659, 669 (9th Cir. 1990) ("[p]erhaps the most telling evidence of Syufy's inability to set prices came from movie distributors, Syufy's supposed victims"); *see also Butterworth Health Corp.*, 946 F. Supp. at 1299 ("the FTC has turned up remarkably little … opposition"), *Great Lakes Chem. Corp.*, 528 F. Supp. at 95 ("buyers see only procompetitive benefits from the proposed acquisition and urge that it be permitted") (citation omitted). In *Great Lakes Chemical Corp.*, the Northern District of Illinois held "[a] key factor to consider in analyzing whether the proposed acquisition will violate Section 7 is the impact of the transaction on … customers." 528 F. Supp. at 94.

D. Concentration Statistics Cannot Account for Gerber's Pro-Consumer Response

86. The force and competitive potential of the efficiencies from this merger is perhaps nowhere better illustrated by the reaction of Gerber's senior management to this acquisition.[14] Gerber views the merger as

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87. After the merger was announced,

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DX 731. Dr. Hilke begrudgingly conceded that this "could be consistent" with the view that there would be "new — meaning increased — competition as opposed to lessened competition." Hilke Tr. 351. He further conceded that it "could be" that "some retailers will *welcome* the acquisition on the basis that they believe there will be *more* competition." *Id.* at 353. Dr. Hilke also conceded that REDACTED could mean keeping "Gerber's prices low." *Id.* at 354; *see also* FF ¶¶ 445-60.

88.

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[14] Despite the FTC's theory of the case, *i.e.*, that the competition between Heinz and Beech-Nut to gain access to the shelf acts as a constraint on the other, Dr. Hilke admits that in reaching his opinions, he did not pay that much attention to the Gerber documents. Hilke Tr. 321. Nor did the FTC act to bring Gerber testimony to court.

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See DX 747; FF ¶ 451.

89.

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. *See id.*; FF ¶¶ 450-53.

90.

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DX 703 at 183; FF ¶ 451. Dr. Hilke acknowledged Gerber perceived this increased innovation as a "risk." Hilke Tr. 373.

91.

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Id.

92. It is therefore not surprising that Gerber opposed this deal from the outset, and would consider it '

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' DX 703; DX 715.[16]

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[15] Gerber concluded
See DX 717.

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[16] Competitor opposition to a merger is especially suspect and often proves the merger will benefit consumers through lower prices. *See* then-FTC attorney Lawrence R. Fullerton, *How Can I Stop That Merger? The Role of Third Parties in Agency Merger Reviews*, 9 Antitrust 37, 38 (Spring 1995) ("If a merger is anticompetitive and may be expected to increase prices, why should a competitor complain? Competing players in the market would generally benefit from increased prices. If a competitor is complaining about a merger, its *real concern* may be that the transaction may be expected to increase competition and ***lower*** prices, suggesting that the merger should be

93. Finally, Gerber recognizes that as the result of the merger, retailers will have the ability to REDACTED

See DX 703 at 183; FF ¶ 455. Based on this type of evidence, Dr. Hilke concedes that "Gerber might have to be brought into that game and replace the elimination of [the Beech-Nut competition that formed the basis of Dr. Hilke's opinions] with competition, this time with Gerber." Hilke Tr. 491; FF ¶ 455.[17]

IV. THE FTC HAS FAILED TO SUSTAIN ITS "ULTIMATE BURDEN OF PERSUASION" UNDER *BAKER-HUGHES*

94. The evidence produced by defendants regarding industry structure, competitive market dynamics and efficiencies is sufficient to show that the merger between the two small competitors in this declining industry is unlikely to substantially lessen competition. *See Baker Hughes*, 908 F.2d at 991. "[T]he burden of producing additional evidence of anticompetitive effects" therefore "shifts to the [FTC], and merges with the ultimate burden of persuasion, which remains with the [FTC] at all times." *Id.* at 983. The FTC has not sustained its burden.

A. The FTC Has Offered No Evidence That Consumer Prices Will Rise

95. "[T]he ultimate issue under Section 7 is whether the challenged acquisition likely will enable the merging firm, acting unilaterally or collectively with other firms, ***to increase prices above competitive levels.***" *In re R.R. Donnelley & Sons Co.*, 120 F.T.C. 36, 151 (1995) (emphasis added). That is the central issue the Court must address and it is precisely what the FTC has failed to show in this case, as is its burden. The agency has completely ignored how competition really operates in the baby food market, particularly given the dominant role of

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approved"); Brief for the United States *and the FTC* as Amici Curiae Supporting Petitioners at 10, *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986) (No. 85-473) ("[C]ompetitors have a substantial incentive to challenge acquisitions that will make their rivals more efficient, make their industry more competitive, and reduce the prices they can charge their customers").

[17] Even the FTC's own customer witness testified that the merger could cause Gerber to respond in procompetitive fashion. Tr. at 152, 165.

Gerber. In doing so, it has ignored the D.C. Circuit's *Baker-Hughes* test, which requires consideration of the "totality-of-the-circumstances" weighing all "factors to determine the effects of [this] particular transaction[] on competition." 908 F.2d at 984; *see Staples, Inc.*, 970 F. Supp. at 1072 ("Court must consider the likely competitive effects of the merger").

96. Instead, through a single expert witness, the FTC has simply put on a case of high concentration, based on a merger from three firms to two firms, with the afterthought that the merger of the two smaller firms in the industry will eliminate some limited competition for ***distribution***. The FTC's argument widely misses the point of Section 7 merger analysis:

> [Section 7] was amended to make the measure of anticompetitive acquisitions the extent to which they lessened competition 'in any line of commerce,' ***rather than the extent to which they lessened competition 'between' the two companies.***

Citizens Publ'g Co., 394 U.S. at 137 n.3 (emphasis added). The core question therefore is whether the FTC has shown a probability that baby food market prices will be increased post-merger, ***not*** whether the merger will eliminate some competition between the merging parties. Significantly, the evidence is to the contrary. *See supra* ¶¶ 13-67.

97. Its position at trial in this regard is telling. The FTC put on no witnesses at trial beyond Dr. Hilke, one discount grocer (WinCo), and one other small grocery store (Weis) who admittedly had no personal knowledge.[18] The FTC put forth no market studies, and no substantive econometric work to support the views of its expert. Indeed, the FTC argued that econometrics are not important, and that knowledge of the trade or industry is not important. The FTC could have called Gerber to testify about the constraints it contends Heinz and Beech-

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[18] The agency then expressly urged this Court to ignore testimony of grocery customers. Dr. Hilke essentially limited his opinion to a naked review of documents selected by complaint counsel. He did not interview any customers or other industry participants or conduct any other independent investigation into the market. "When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when the indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a ... verdict." *Brooke Group Ltd.*, 509 U.S. at 242. For these very reasons, the FTC itself has rejected expert testimony, including from Dr. Hilke himself, when not supported by "convincing record evidence." *See, e.g.*, DX 1310 at 0013-14; DX 1311 at 0023; DX 1312 at 0030; DX 1313 at 0025-26.

Nut exert in the marketplace, but did not, and instead urged the Court to ignore Gerber's documents predicting the competitive effects of this merger as "irrelevant."

98. Nor did the FTC present any evidence of the nature relied on by the court in *Staples* or *Cardinal Health*. Here, unlike those cases, the FTC presented ***no*** retail pricing analysis or price comparison evidence. It presented ***no*** contemporaneous evidence of price changes by Heinz or Beech-Nut in reaction to each other. The FTC has presented ***no*** evidence that Heinz could raise price above competitive levels post merger. It has presented ***no*** evidence to suggest the parties have the ability to engage in collusion even without the merger, as in *Cardinal Health*. The FTC has presented ***no*** evidence that Heinz and Beech-Nut have caused "irrational pricing," also as in *Cardinal Health*. Nor, tellingly, has the FTC even shown how competition with Gerber will benefit consumers without this merger.[19]

99. When all is said and done, the FTC's position is quite simple: if it did not have the evidence, it is not important. But in the end, this position amounts to no evidence. What the FTC is left with is its fall-back contention that it is entitled to an ***unrebuttable*** presumption that all three-to-two mergers are anti-competitive. Once again, beyond Dr. Hilke's expert conjecture, the FTC offers ***no*** evidence to support this conclusion.

B. No Evidence of a Likelihood of Post Merger Collusion

100. The FTC's fear of post-merger collusion "sometime in the future" is pure speculation, premised on simple market participant counting, and ***not*** on any analysis or evidence. No effort was made to explain when or how Heinz and Gerber can overcome what the FTC's own *Merger Guidelines* concede are serious impediments to reaching a collusive

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[19] The FTC's sole rebuttal to the overwhelming competitive effects of this merger was a single exhibit regarding theoretical elasticity, which failed to account for corresponding cost changes that come with the changed elasticity. FF ¶ 397. Had the analysis been performed correctly, profits would be higher, increasing incentives to grow sales and output. *See* Baker Tr. 1019-21 ("So if there are five scenarios on the right, there should be five scenarios on the left. . . I believe if that analysis were done correctly, it would show what the Booz-Allen study found, which is that the merged firm has an incentive to lower the price of the Beech-Nut brand after this merger to the Heinz value pricing level").

arrangement, monitoring any such arrangement, and punishing deviations. *See Horizontal Merger Guidelines* § 2.11.

101. ***First***, the FTC has failed to show why there would be any increased likelihood to collude post-merger, when there is no likelihood of collusion today. The two-brand dynamic of the marketplace is simply no different post-merger. Just as now, only one other brand will be on the shelf next to Gerber. And there is no evidence that collusion occurs in two-brand markets, but not three brand markets. FF ¶¶ 424-43. The merger, therefore, does not make the prospect of collusion any more likely.

102. On this score, the United States Court of Appeals for the Third Circuit's exhaustive opinion, addressing allegations of collusion in the same "two brand" baby food competitive landscape just last year, refutes any notion of post merger collusion. *In re Baby Food Antitrust Litig.*, 166 F.3d 112. After a comprehensive review of scores of deposition testimony and thousands of documents, the Third Circuit, affirming the district court's summary judgment order, found that "market realities" and business records belied any notion of collusion in this industry:

> These memoranda reveal that the defendants engaged in independent pricing determined by market conditions at the time, profit margins, and the effect of price increases or decreases on sales volume and distribution. They provide a striking insight into the defendants' marketing strategy which negates the plaintiffs' inference of conscious parallelism.

Id. at 132.[20]

103. Professor Baker explained why the two shelf mates have not been able to collude and it had nothing to do with the fact that there was a third firm out there on some other shelf in some other region. FF ¶¶ 433. Rather, it had to do with the fact that lags in information made it impossible to detect whether a firm was cheating on a collusive arrangement (assuming that such collusion could be agreed upon in the first instance) and made it impossible for the cheater to

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[20] The Third Circuit held "[a]s a court, . . . we have the duty to examine the record carefully and decide the case fairly on the law and not on mere conjecture, ambiguous circumstantial evidence, and suspicion." 166 F.3d at 138.

twelve point gain Mr. Johnson testified does not justify $185 Million and would not satisfy his Board of Directors, shareholders or Wall Street analysts. Johnson Tr. at 452-53. All theory aside, it simply makes no sense for Heinz to reach any tacit agreement with Gerber that reduces the value of Heinz in the eyes of its Board and its investors. Rather, as discussed earlier, Heinz incentives deriving from its efficiencies create a new "maverick" under the Guidelines. *See Horizontal Merger Guidelines* at §§ 2.12 and 4; FF ¶¶ 325-85.

108. ***Third***, the presence of large, sophisticated retail chains in the market, moreover, counters any likelihood of collusion. FF ¶¶ 424-32. As this Circuit has held, "[w]ell-established precedent and the United States Department of Justice Merger Guidelines recognize that the sophistication and bargaining power of buyers play a significant role in assessing the effects of a proposed transaction." *FTC v. R.R. Donnelley & Sons Co.*, 1990-2 Trade Cas. (CCH) ¶ 69,239, at 64,855 (D.D.C. 1990).

109. More to the point, large, sophisticated buyers "make any anticompetitive consequences very unlikely." *Id.* at 64,855; *see Baker Hughes*, 908 F.2d at 986 (buyers who "closely examine available options and typically insist on receiving multiple, confidential bids" show a "sophistication ... likely to promote competition even in a highly concentrated market"); *Archer-Daniels-Midland Co.*, 781 F. Supp. at 1416 ("[t]he existence of large, powerful buyers of a product mitigates against the ability of sellers to raise prices"); *Horizontal Merger Guidelines* § 2.12 ("[w]here large buyers likely would engage in long-term contracting, so that the sales covered by such contracts can be large relative to the total output of a firm in the market, firms may have the incentive to deviate," and therefore collusion is unlikely); Mary Lou Steptoe, *The Power-Buyer Defense in Merger Cases*, 61 Antitrust L. J. 493, 493 (Winter 1993) ("a merger should not raise competitive concerns when the purchasers of the relevant product are themselves large and sophisticated firms").

110. Here, most industry volume is driven through the large, national retail grocery, mass merchandiser and club store accounts. Heinz, for example, sells

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See DX 20; FF ¶ 425.

111. These customers maintain confidentiality of their prices, and swing volume to leverage price. And their "buyer power" grows as the trend toward grocery consolidation continues. *See, e.g.*, DX 1 at BAH 000024-25.[21] It is not credible to suggest that these buyers will likely tolerate collusion between Gerber and Heinz impacting baby food prices, particularly after the commitment to value pricing made by Heinz.

112. ***Finally***, Heinz and Gerber products will be differentiated, and "reaching terms of coordination may be limited or impeded by product heterogeneity ...." *Horizontal Merger Guidelines* § 2.11; *see* FF ¶ 457. Dr. Phillips, relied on by the FTC, is instructive: "Gerber's market performance shows that it has succeeded in creating a significant degree of brand loyalty to its products. That is, on a national basis, Gerber has been able to increase its market share despite the fact that, for the most part, Heinz products are available to consumers at lower prices." *See* PX 304 ¶ 26. This product differentiation, under the FTC's own Horizontal Merger Guidelines, strongly weighs against any possibility of post-merger collusion.

113. Similarly, "[t]here are also differences in the package sizes and product categories among Gerber, Beech-Nut and Heinz." *Id.* ¶ 36. "Each of the manufacturers has different categories and varieties of baby food products," including more than 130 SKUs per company. *Id.* ¶ 37. And "significant differences in costs and product mix among firms ... makes coordination among those in an industry more difficult." *Archer-Daniels-Midland*, 781 F. Supp. at 1420. Indeed, as the *Archer-Daniels-Midland* court succinctly held, "significant differences in production costs and product mix among firms in the industry ... would make agreement on a single collusive price difficult to achieve." *Id.* at 1423.

114. Baby food is therefore far different from the homogenous products at issue in "collusion" cases cited by the FTC. *See FTC v. Elders Grain*, 868 F.2d 901 (7th Cir. 1989) ("industrial dry corn" used as raw material); *FTC v. Bass Bros. Enterprises, Inc.*, 1984-1 Trade

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[21] The top ten chain supermarkets currently account for nearly 50% of all grocery sales. *See* DX 272 (Trade Dimensions Report: Top 50 Owner Chain Supermarkets).

Cas. (CCH) ¶ 66,041 (N.D. Ohio 1984) ("carbon black" raw material used for rubber manufacturing).

V. THE EQUITIES STRONGLY FAVOR PERMITTING THIS TRANSACTION TO PROCEED.

115. "Once the Court has found that the FTC does not have a likelihood of success in showing anticompetitive effects, ... the presumption in favor of issuing injunctive relief is no longer operative. Equities ***alone*** would not justify the issuance of a preliminary injunction." *Owens-Illinois*, 681 F. Supp. at 52 (citation omitted). Because the FTC has failed to meet the burden of persuasion on its likelihood of success in showing that competition will be substantially lessened in this industry, this Court need go no further in the public or private equities analysis, and should deny the motion for preliminary injunctive relief.

116. However, if the FTC had — arguably — shown some likelihood of success, the Court must balance that argument against the public and private equities of the situation.[22] As the D.C. Circuit explained, "[i]t is permissible for the court to weigh among the equities the potential benefits, public and private, that may be lost by merger blocking injunction, whether or not those benefits could be asserted defensively in a proceeding for permanent relief." *Weyerhauser Co.*, 665 F.2d at 1084; *see also Great Lakes Chem. Corp.*, 528 F. Supp. at 186 (the FTC is not entitled to a preliminary injunction unless it can "prove that the harm to the parties and to the public that would flow from a preliminary injunction is outweighed by the harm to competition, if any, that would occur in the period between denial of a preliminary injunction and the final adjudication of the merits of the Section 7 claim"). It is well recognized that "[a] merger that achieves important real economies" is in the public interest, particularly where, as

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[22] Section 13(b) of the FTC Act states that "[w]henever the Commission has reason to believe — (1) that any person ... is violating ... any provision of law enforced by the Federal Trade Commission, and (2) that the enjoining thereof pending [completion of administrative proceedings] — the Commission ... may bring suit in ... district court. Upon a proper showing that, ***weighing the equities*** and considering the Commission's ***likelihood of ultimate success***, such action would be in the public interest, ... a preliminary injunction may be granted." 15 U.S.C. § 53(b).

here, "the competitive threat is merely a low magnitude 'textbook proposition.'" Phillip Areeda, *Comments on Merger Rules and Guidelines*, 36 Antitrust L.J. 45, 46 (1967).

A. There *Will* Be A Lessening Of Competition If Beech-Nut Cannot be Sold to Heinz

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See DX 402; ¶¶ 463-65.

118. Beech-Nut has made numerous unsuccessful attempts to flourish over the past 110 years, as Beech-Nut brand baby food has been passed around among 8 different companies. DX 1088. Beech-Nut is as an "orphan brand" — a brand "hav[ing] a strong brand equity or identity, but. . . hav[ing] underperformed in the companies that have owned." Meader Tr. 858. Its previous owners have included some of the best known consumer products companies in America. It has been owned by Mead-Johnson/Squibb and Nestle/Carnation — leaders in the sale of infant formula and infant feeding. FF ¶¶ 63-65. These various previous owners had the know-how, the experience in the U.S. grocery retail market, and the experience in infant nutrition. Yet Beech-Nut still failed to thrive.[23] Meader Tr. 859. Indeed, Beech-Nut's performance has suffered because it "has never been able to sustain greater than a 15 percent market share of the category. . . for the last 13 years." Meader Tr. 859. FF ¶¶ 65.[24]

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[23] The Third Circuit noted that, except for a pre-tax profit of $7,000 in the year it acquired Beech-Nut, "Nestle made no profit on its baby food business in any of the ten years during which it owed Beech-Nut." 166 F.3d 137.

[24] Beech-Nut is owned today by Milnot Holdings Corporation which purchased it from RalCorp Holdings two years ago, in August 1998. (DX 435 (Chase Offering Memorandum) at 0009, 0022.) FF ¶ 59. Milnot is a small, privately-held St. Louis company that in addition to Beech-Nut baby food makes and sells only two other regional product lines: (1) branded and private label canned milk (the Milnot brand) and (2) branded and private label chili (Chilli Man brand). *Id.*; FF ¶ 60.

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Meader Tr. 823 ("We are not part of a $10 billion organization like Heinz or Novartis, and ***we have to manage our cash flow very carefully***."); DX 446

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119. Given its numerous owners, the presence of Gerber, and Milnot's financial constraints, it is not surprising that Beech-Nut has for years been in steady decline. FF ¶¶ 62-70. The FTC has offered no rebuttal evidence to suggest there will be any "turn-around" in the Beech-Nut business absent the deal. Beech-Nut has for years had steadily declining market share, declining unit sales, declining distribution ("ACV"), declining innovation, and a stated lack of incentive or interest in challenging Gerber on pricing, promotion, product mix, etc. PX 34; FF ¶¶ 62-70, 77-78. Beech-Nut is not competing in any meaningful sense today, and, as important, can be expected to be even less competitive tomorrow. FF ¶¶ 463-65.

120. The public and private equities in allowing the sale of Beech-Nut to a company that wants it, and is better able and incentivized to make the business grow, are apparent and must be weighed in favor of allowing the deal to close. *See In re Proctor & Gamble Co.*, 63 F.T.C. 1465, 1580 (1963) ("[a] merger that results in increased efficiency of production, distribution or marketing may, . . . increase the vigor of competition.")

B. No One But Heinz Has Expressed Interest In Beech-Nut.

121. Among the private equities to be considered is the right of a seller to exit a business. Milnot has been owned for past seven years by an equity capital firm, Madison Dearborn Partners. DX 435 at 000022; FF ¶ 3. Madison Dearborn Partners wants sell to Milnot — it has made the strategic decision to sell, and no longer invest in, the baby food business, and it has contracted with viable, committed buyer in Heinz. Meader Tr. 813, 856; DX 435; FF ¶ 310. Respecting and facilitating this type of "ease of exit" is — like removing barriers to entry — a recognized antitrust good. *Great Lakes Chem. Corp.*, 528 F. Supp. at 98 ("[T]he proposed acquisition will encourage entry ... by preserving reasonable opportunities to exit."); *In re Pillsbury Co.*, 93 F.T.C. 966, 1041 (1979) (Commissioner Pitofsky) ("Long-term competitive considerations require preservation of ease of entry and opportunity for businessmen to take

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DX 623.

entrepreneurial risks. The other side of that coin is a largely unarticulated policy, a clear corollary to the first, which would preserve exit opportunities. ...)

122. The FTC has not seriously claimed — nor can it — that there is any other buyer "waiting in the wings." Defendants have shown that Madison Dearborn conducted a focused, organized process to try to sell the business to a firm other than Heinz, and there were no other bidders. Not one. FF ¶¶ 310-24.

123. Implicitly acknowledging that there is no other buyer for Milnot, the FTC has raised the possibility — without offering any evidence — that perhaps Heinz and Beech-Nut could enter into a joint venture instead of merging. They cannot.

124. As Heinz's Ken Campbell (who conducted the Heinz efficiencies study) testified, the Heinz Pittsburgh plant could not even produce the 270 stock keeping units (the combined Beech-Nut and Heinz product offering). Campbell Tr. 703. It would not be technically feasible to do so. *Id.* Milnot CEO Scott Meader also testified that a joint venture would not be efficient or pursued. Meader Tr. 846 (Meader "never" contemplated a joint venture with Heinz or jarred baby food; "it wouldn't make any sense" because it would require a "shut down of our Canajoharie plant, which would be permanent and irreversable"). The FTC offered no evidence to rebut these facts.

CONCLUSION

On balance, there is one overarching question in this case: absent this merger, ***who will compete with Gerber?*** The answer to this question clearly tilts the balance toward denying injunctive relief. To hold otherwise will forever entrench Gerber's monopoly power, monopoly pricing and monopoly actions; suffocate innovation and push a declining industry further down the slope of neglect; deprive American consumers of lower prices; deprive Americans of baby food innovations Europeans enjoy; and deprive American grocers of category innovation they have endorsed and eagerly anticipate.

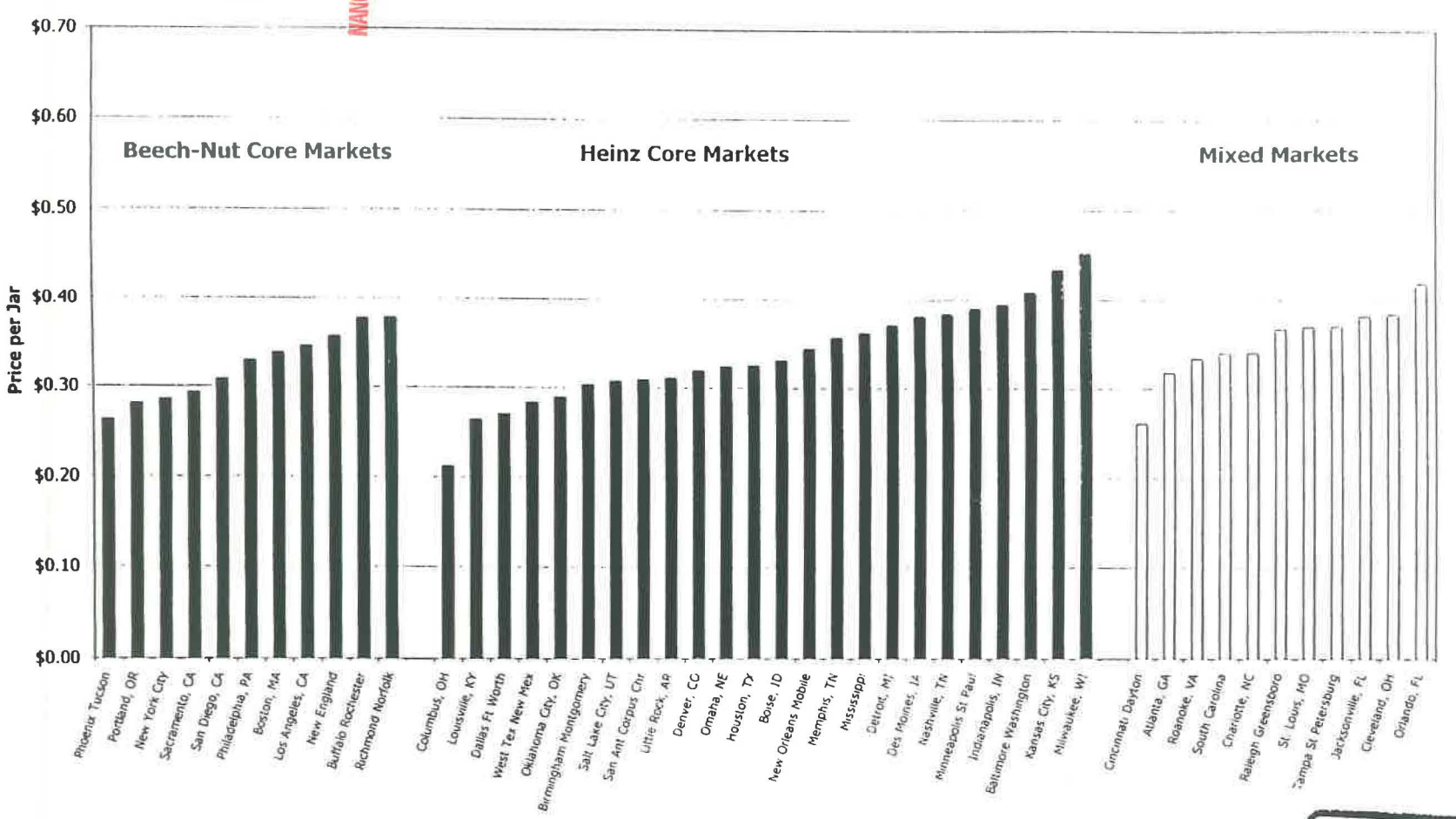
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Defendants' Post-Trial Brief and Conclusions of Law was served by hand delivery this 15th day of September, 2000, upon:

Paul Nolan
Federal Trade Commission
601 Pennsylvania Ave., N.W.
Room S-3115
Washington, D.C. 20580

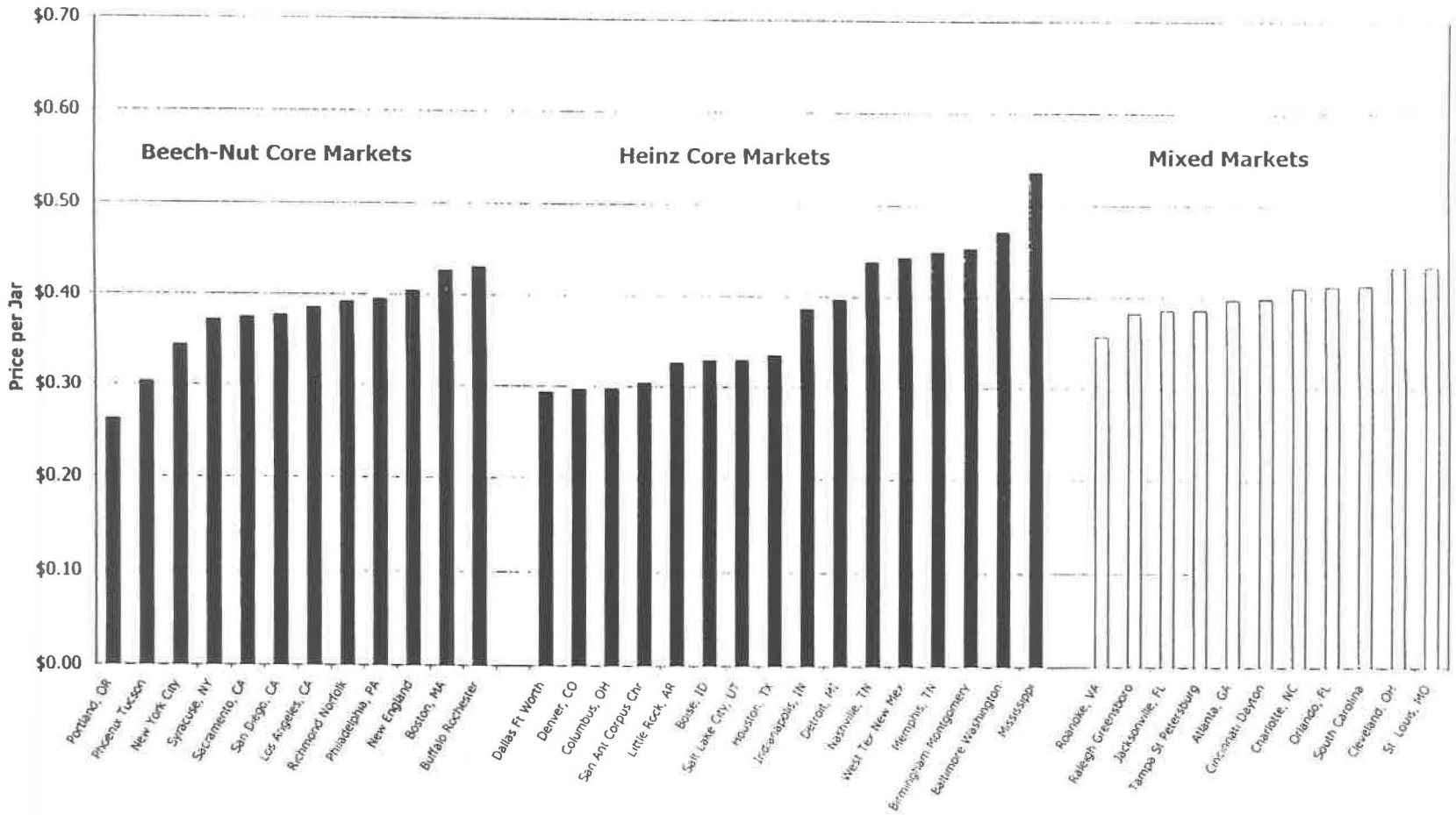
Michael P. A. Cohen (D.C. Bar No. 435024)

Heinz Prices
Adjusted For Differences In Costs of Retail Groceries
Based on 10% Filter
BB2 Traditional Jars
1999[1]



[1] Data ends November 21, 1999.
Source: IRI and ACCRA.

Beech-Nut Prices
Adjusted For Differences In Costs of Retail Groceries
Based on 10% Filter
BB2 Traditional Jars
1999[1]



[1] Data ends November 21, 1999.
Source: IRI and ACCRA.

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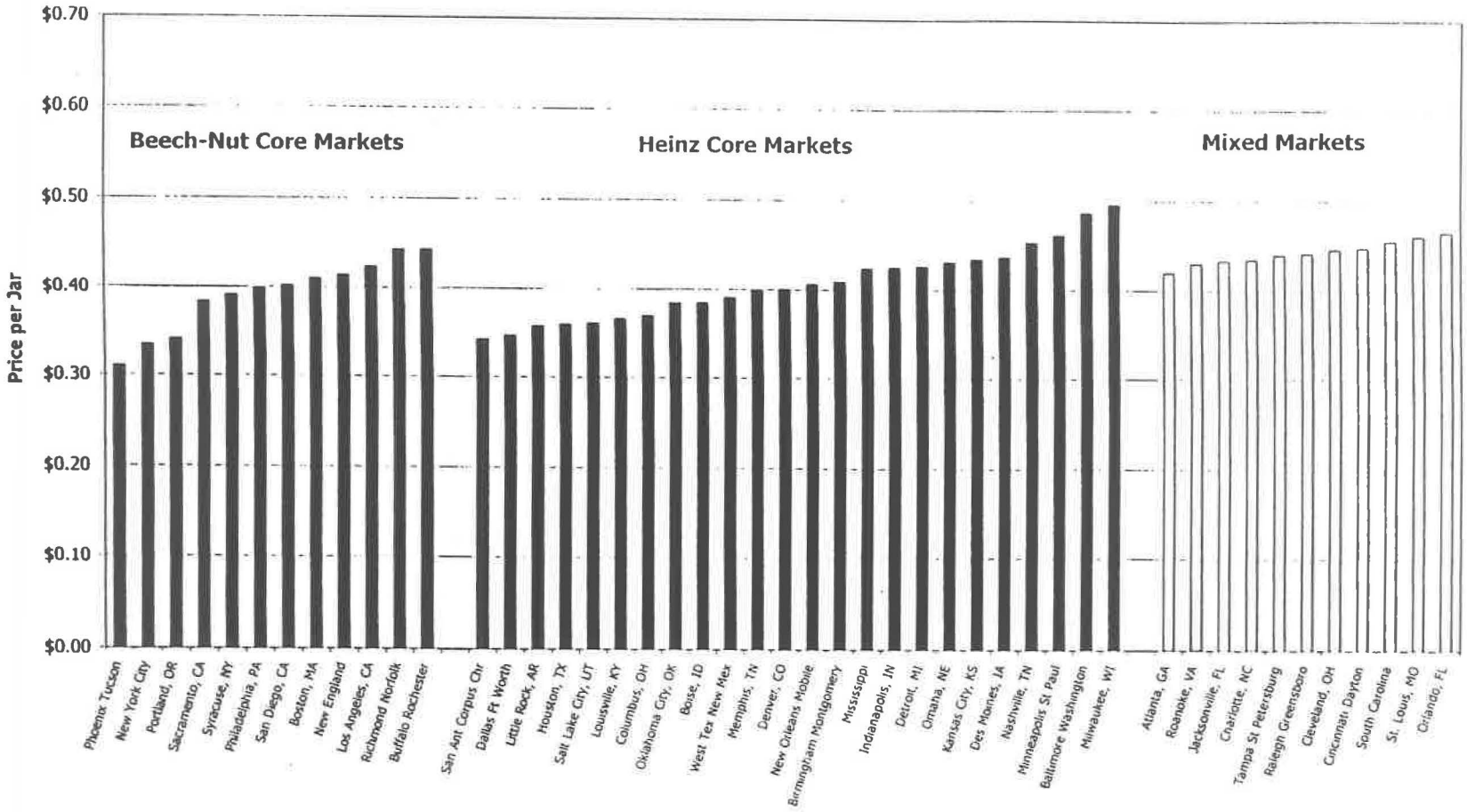
Gerber Prices
Adjusted For Differences In Costs of Retail Groceries
Based on 10% Filter
BB2 Traditional Jars
1999[1]



[1] Data ends November 21, 1999.
Source: IRI and ACCRA.