

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION
600 Pennsylvania Ave. N.W.
Washington, D.C. 20580

Plaintiff

v.

H.J. HEINZ COMPANY
600 Grant St., 60th Floor
Pittsburgh, PA 15219

and

MILNOT HOLDING CORPORATION
100 South Fourth St.
St. Louis, Mo 63102

Defendants

CASE NUMBER 1:00CV01688
JUDGE: James Robertson
DECK TYPE: Antitrust
DATE STAMP: 07/14/2000

Civil Action No.:

FILED

JUL 14 2000

**NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT**

**COMPLAINT FOR PRELIMINARY INJUNCTION PURSUANT TO
SECTION 13(b) OF THE FEDERAL TRADE COMMISSION ACT**

Plaintiff, the Federal Trade Commission ("FTC" or "Commission"), by its designated attorneys, petitions the Court, pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), for a preliminary injunction enjoining defendant H.J. Heinz Co. ("Heinz"), including its domestic and foreign agents, divisions, subsidiaries, affiliates, partnerships, or joint ventures, from acquiring through a merger or otherwise any stock, assets, or other interest, either directly or indirectly, of Milnot Holding Corporation, the parent company of Beech-Nut Nutrition Corp. ("Beech-Nut"); thereby maintaining the status quo during the pendency of an administrative proceeding, challenging defendants' proposed combination, that will be commenced

by the Commission pursuant to Section 5 of the FTC Act, 15 U.S.C. § 45, and Sections 7 and 11 of the Clayton Act, 15 U.S.C. §§ 18 and 21.

JURISDICTION AND VENUE

1. Jurisdiction is based on Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), and 28 U.S.C. §§ 1337 and 1345. Venue is proper under Section 13(b) of the FTC Act; 28 U.S.C. § 1391(b) and (c); and Section 12 of the Clayton Act, 15 U.S.C. § 22.

THE PARTIES

2. The Commission is an administrative agency of the United States Government established, organized, and existing pursuant to the FTC Act, 15 U.S.C. § 41 *et seq.*, with its principal offices at 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The Commission is vested with authority and responsibility for enforcing, *inter alia*, Section 5 of the FTC Act and Section 7 of the Clayton Act.

3. Defendant Heinz is a for-profit corporation existing under the laws of the State of Pennsylvania, with its principal place of business in Pittsburgh, Pennsylvania. Heinz is one of the largest food products manufacturers in the United States with total revenues exceeding \$9 billion. Heinz is the third largest seller of baby food in the United States with total sales in Fiscal Year 2000 exceeding \$101 million. Heinz's worldwide baby food sales exceed \$1 billion annually.

4. Defendant Milnot Holding Corporation is a for-profit corporation existing under the laws of the State of Delaware, with its principal place of business in St. Louis, Missouri. Beech-Nut is a subsidiary of Milnot and is currently the second largest seller of baby food in the United States with sales exceeding \$139 million in Fiscal Year 2000.

5. Heinz and Milnot are engaged in commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

6. Heinz and Milnot agree that they are subject to the personal jurisdiction of this Court for purposes of this litigation.

SECTION 13(b) OF THE FTC ACT

7. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), provides in pertinent part:

(b) Whenever the Commission has reason to believe--

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public--

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. 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, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond

THE PROPOSED MERGER AND THE COMMISSION'S RESPONSE

8. On or about Feb. 28, 2000, Heinz and Madison Dearborn Capital Partners, the parent of Milnot Holding Corporation and Beech-Nut entered into an agreement whereby Heinz would acquire 100% of the voting securities of Milnot for approximately \$185 million.

9. On July 7, 2000, the Commission authorized the commencement of an action under Section 13(b) of the FTC Act to seek a preliminary injunction barring the proposed merger

during the pendency of administrative proceedings.

10. The defendants have informed the Commission that they may consummate the proposed merger any time after 11:59 p.m. on Wednesday, July 19, 2000.

11. In authorizing the commencement of this action, the Commission determined that such an injunction is in the public interest and that it has reason to believe that the aforesaid proposed merger would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act because it may substantially lessen competition or tend to create a monopoly in markets for the manufacture and sale of prepared baby food and segments thereof, specifically jarred baby food.

LIKELIHOOD OF SUCCESS ON THE MERITS AND NEED FOR RELIEF

12. The Commission is likely ultimately to succeed in demonstrating, in administrative proceedings to adjudicate the legality of the proposed merger, that the proposed merger would violate Section 7 of the Clayton Act. In particular, the Commission is likely ultimately to succeed in demonstrating, *inter alia*, that:

a. The relevant line of commerce (i.e., the product market) in which the competitive effects of the proposed merger may be assessed is the manufacture and sale of prepared baby food and segments thereof, specifically jarred baby food.

b. The relevant sections of the country (i.e., the geographic markets) within which to assess the competitive effects of the proposed merger is the United States and smaller geographic markets therein.

c. For over 60 years there have been only three competitors in the United States baby food market -- Gerber Corporation, Beech-Nut and Heinz and this merger would

leave only two firms controlling the entire prepared baby food market. This market is already highly concentrated and will become substantially more so if the proposed acquisition is consummated. An HHI, or Herfindahl-Hirschman Index of 1800 characterizes a highly concentrated market. The proposed acquisition would increase the HHI about 400 points to approximately 5700, a substantial increase in an already highly concentrated market.

- d. Substantial and effective entry into the relevant markets is difficult.
- e. The effect of the proposed acquisition, if consummated, may be to substantially lessen competition in markets for the manufacture and sale of prepared baby food and segments thereof, specifically jarred baby food, in the United States and smaller geographic markets therein by, among other things:
 - i. substantially increasing concentration, and further heightening barriers to entry, thereby increasing the likelihood of successful anticompetitive coordinated interaction, and actual or tacit collusion among the two remaining firms;
 - ii. eliminating substantial head-to-head competition and potential competition between Heinz and Beech-Nut in the manufacture and sale of baby food in the United States; and
 - iii. eliminating Beech-Nut as a substantial, independent, and competitive force in the market.

13. The reestablishment of Heinz and Beech-Nut as independent viable competitive entities if they were to merge would be difficult, and there is a substantial likelihood that it would

be difficult or impossible to restore the businesses as they originally existed. Furthermore, it is likely that substantial interim harm to competition would occur even if suitable divestiture remedies could be devised.

14. For the reasons stated above, the granting of the injunctive relief sought is in the public interest.

WHEREFORE, the Commission requests that the Court:

1. Preliminarily enjoin defendants Heinz and Milnot, and all affiliates of defendants, from taking any further steps to consummate, directly or indirectly, their proposed merger of their businesses, or any other acquisition of stock, assets, or other interest, either directly or indirectly;
2. Maintain the status quo pending the issuance of an administrative complaint by the Commission challenging such acquisition, and until such complaint is dismissed by the Commission or set aside by a court on review, or until the order of the Commission made thereon has become final; and

3. Award such other and further relief as the Court may determine to be proper and just, including costs.

Respectfully submitted,

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