IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Civil No: 03 C 2528 (J. Zagel)
v.	)	
UPM-KYMMENE, OYJ, et al.,	)	
Defendants.	)	

**UNITED STATES' PREHEARING STATEMENT
ON THE APPLICABLE LAW**

UPM-Kymmene, Oyj's acquisition of Morgan Adhesives Company poses a substantial likelihood of reducing competition in violation of § 7 of the Clayton Act, 15 U.S.C. § 18. Because this merger threatens competition and defendants say that they will consummate the transaction before a trial on the merits can be held, the United States seeks a preliminary injunction pursuant to Fed. R. Civ. P. 65 and 15 U.S.C. § 25.

To assist the Court's evaluation of the evidence presented at the preliminary-injunction hearing, the United States files this statement amplifying the controlling legal standards.

I. Preliminary-Injunction Standards

In this preliminary-injunction proceeding, the United States need establish only "some likelihood" that the proposed transaction may substantially reduce competition. To obtain a preliminary injunction, the United States must first "meet the threshold burden of establishing (1) some likelihood of prevailing on the merits; and (2) that in the absence of the injunction, [it] will suffer irreparable harm for which there is no adequate remedy at law." *AlliedSignal, Inc. v. B.F.*

Goodrich Co., 183 F.3d 568, 573 (7th Cir. 1999). Once these threshold requirements are satisfied, a court applies "a 'sliding scale' analysis by balancing the harms to the parties and the public interest." *Id.* In balancing the harms, the court must also take into account the plaintiff's likelihood of success. "The greater the plaintiff's likelihood of success on the merits when those merits are ultimately determined after a full trial . . . the less harm from denial of the preliminary injunction the plaintiff need show in relation to the harm that the defendant will suffer if the preliminary injunction is granted." *Federal Trade Commission v. Elders Grain, Inc.*, 868 F.2d 901, 903 (7th Cir. 1989).

II. The United States is Likely to Prevail on the Merits

Section 7 of the Clayton Act prohibits acquisitions that may substantially lessen competition. In the words of the statute, an acquisition is illegal "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18.

Courts interpreting this language have followed three basic steps in analyzing a merger. A court must determine (1) the "line of commerce"–usually referred to as a product market–for assessing the transaction; (2) the "section of the country"–or geographic market–for assessing the transaction; and (3) whether the proposed transaction may substantially lessen competition in that defined product and geographic market, often referred to as the "relevant market." *See United States v. Marine Bancorp.*, 418 U.S. 602, 618-23 (1974); *United States v. Rockford Mem'l Corp.*, 717 F. Supp. 1251, 1258 (N.D. Ill. 1989), *aff'd*, 898 F.2d 1278 (7th Cir. 1990).

In challenging a merger, a "plaintiff need only prove that its effect '*may be* substantially to lessen competition'" within the relevant market. *California v. American Stores Co.*, 495 U.S. 271, 284 (1990) (quoting 15 U.S.C. § 18) (emphasis in original). Section 7 does not require proof that higher, anticompetitive prices will occur in the affected market. *Hospital Corp. of America v.*

Federal Trade Commission, 807 F.2d 1381, 1389 (7th Cir. 1986). "All that is necessary is that the merger create an appreciable danger of such consequences in the future. A predictive judgment, necessarily probabilistic and judgmental rather than demonstrable is called for." *Id.* (citing *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 362 (1963)). "[A]nd doubts are to be resolved against the transaction." *Elders Grain*, 868 F.2d at 906.

A. Product Market

In analyzing a relevant product market, the Supreme Court has considered those "commodities reasonably interchangeable by consumers for the same purposes." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956). The market "must be drawn narrowly to exclude any other product to which, within reasonable price variations, only a limited number of buyers will turn." *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 612 n. 31 (1953).

Elaborating on this concept of potential switching in the face of a price increase, the *Horizontal Merger Guidelines* define a product market by asking whether a hypothetical monopolist that sells the product (or group of products) at issue could profitably impose a small but significant, nontransitory price increase. *See* U.S. Dept. of Justice & Federal Trade Commission, 1992 *Horizontal Merger Guidelines* § 1.11 (rev. 1997). This test, often referred to as the "SSNIP test," has been applied by courts along with other provisions in the Guidelines. *See, e.g., Federal Trade Commission v. Swedish Match*, 131 F. Supp.2d 151, 160 (D.D.C. 2000); *Federal Trade Commission v. Staples, Inc.*, 970 F. Supp. 1066, 1076 (D.D.C. 1997). If in response to the price increase for the given product, enough buyers would turn to another product, making the price increase unprofitable, then the additional products should be included in the product market until a hypothetical monopolist controlling the expanded grouping of products could profitably impose the small but significant, nontransitory price increase. *U.S. Anchor Mfg. v. Rule Indus., Inc.*, 7 F.3d

986, 995-96 (11th Cir. 1993). Fundamental to this framework is the concept that some switching to another product will not suffice to demonstrate that the other product should be included in the market. *Swedish Match*, 131 F. Supp.2d at 160. Only switching on a scale sufficient to defeat the profitability of a small but significant, nontransitory price increase (often described as a 5% increase) should be considered in defining a market. *Id.* (applying 5% test).

A corollary to the Guidelines' product-market methodology is that some functional substitutability between two products is not enough, by itself, to place those products in the same product market for antitrust purposes. If, despite the functional similarity of the products, buyers of one would not switch to the other product in sufficient numbers to defeat the profitability of a small but significant, nontransitory price increase, then those functionally similar products are not in the same market. *United States v. Archer-Daniels-Midland Co.*, 866 F.2d 242, 246 (8th Cir. 1988) (finding that sugar and high-fructose corn syrup, while functionally interchangeable, were not in the same product market).

Courts have applied the hypothetical-monopolist test in a variety of contexts involving functionally similar products. In *Swedish Match*, for example, the court found that two similar tobacco products were not in the same market. One product was moist snuff, a finely ground form of tobacco that users place between their cheeks and gums and passively absorb nicotine, and the other was loose-leaf tobacco, a coarser product that users must chew to ingest the nicotine. The court concluded that while some switching between the products would take place, "the limited amount of price-based substitution" was insufficient to show that the two products were in the same market. *Swedish Match*, 131 F. Supp.2d at 164. In *Staples*, the court found that the sale of consumable office supplies through office superstores defined the relevant product market, even

though the functional interchangeability of those office supplies sold by other outlets was undisputed. 970 F. Supp. at 1074.

Defendants will undoubtedly rely on *United States v. Sungard Data Systems, Inc.*, 172 F. Supp.2d 172 (D.D.C. 2001), where the court concluded, after applying the SSNIP test, that the evidence on switching was equivocal and failed to establish that a hypothetical monopolist could profitably raise prices by 5% in the proposed market. But that case proceeded to a stipulated trial on the merits only seventeen days after the complaint was filed because the acquired firm was in bankruptcy. The presentation of evidence at trial was limited to ten hours with three expert witness, eight declarations from fact witnesses for the plaintiff, and five for the defendants. *Id.* at 179.

B. Geographic Market

A geographic market is also defined using the SSNIP test, and therefore, as is true for the product market, evidence that some buyers obtain the product from sources outside the putative geographic market does not defeat the market definition. Only when the sales from sources outside the given geographic area are sufficient to defeat the small but significant, nontransitory price increase will the geographic market have to be expanded.

As the United States explained in an *in limine* motion presented to the Court on June 3, the parties entered into a stipulation early in the investigation limiting investigative discovery of UPM outside North America. In entering this stipulation, defendants agreed that the geographic market in any litigation is no broader than the United States and Canada.

C. Anticompetitive Effects

Once the geographic and product markets are defined, analysis focuses on whether the proposed transaction may substantially lessen competition in the relevant market. A defined relevant market, together with a measure of the market's concentration, provides a means to gauge

the market power of a firm or firms within that market. Market power is the ability of a firm or group of firms "to increase price above the competitive level without losing so much business to other suppliers as to make the price increase unprofitable." *United States v. Rockford Mem'l Corp.*, 898 F.2d 1278, 1283 (7th Cir. 1990). *See also Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 27 n. 46 (1984) ("[M]arket power exists whenever prices can be raised above levels that would be charged in a competitive market.").

To determine market power, courts begin by evaluating how concentrated the market is. A transaction challenged under § 7 is *presumed illegal* if the plaintiff can show that the combined entity would have a significantly increased market share in a sufficiently concentrated market. *Philadelphia Nat'l Bank*, 374 U.S. at 363 ("[A] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.").

The Seventh Circuit continues to follow this principle: "The theory of competition and monopoly that has been used to give concrete meaning to section 7 teaches that an acquisition which reduces the number of significant sellers in a market already highly concentrated and prone to collusion by reason of its history and circumstances is unlawful in the absence of special circumstances." *Elders Grain*, 868 F.2d at 905 (citing *Hospital Corp. of America*, 807 F.2d at 1389).

A method that courts increasingly use to calculate market concentration is the HHI test or Herfindahl-Hirschman Index. *See, e.g., AlliedSignal, Inc. B.F. v. Goodrich Co.*, 183 F.3d 568, 574 (7th Cir. 1999). The HHI for a market is determined by summing the squares of the market shares

for each firm in a market. *Id.* at 574 n. 3. A market with five firms, each having a 20% market share, would have an HHI of (20 x 20) + (20 x 20) + (20 x 20) + (20 x 20) + (20 x 20) = 2000.

The *Horizontal Merger Guidelines* "define as 'highly concentrated' any market in which the HHI exceed[s] 1800, and presume that mergers in that range 'producing an increase in the HHI of more than 100 points are likely to create market power or facilitate its exercise.'" *AlliedSignal, Inc.*, 183 F.3d at 574 n. 3 (quoting U.S. Dept. of Justice & Federal Trade Commission, 1992 *Horizontal Merger Guidelines* § 1.51) (rev. 1997)).

In this case, the HHI numbers are comparable to other cases where courts have found a merger illegal. In *Hospital Corp. of America*, for example, the acquisition increased the market share of the second largest firm from 14% to 26%, with a post-acquisition HHI of 2416 to 2634. *See* 807 F.2d at 1384, *affirming* 106 F.T.C. 361, 488 (1985). The market also had a post-merger four-firm market share of 91%, with 7 firms remaining in the market post-merger. *Id.* at 1384, 1387. The court concluded, "In showing that the challenged acquisitions gave four firms control over an entire market so that they would have little reason to fear a competitive reaction if they raised prices above the competitive level, the Commission went far to justify its prediction of probable anticompetitive effects. Maybe it need have gone no further." *Hospital Corp of America*, 807 F.2d at 1388 (citing *Philadelphia Nat'l Bank*, 374 U.S. at 362-63; *Monfort of Colorado, Inc. v. Cargill, Inc.*, 761 F.2d 570, 580 (10th Cir. 1985), *rev'd on other grounds*, 479 U.S. 104 (1986)). *See also Federal Trade Commission v. Illinois Cereal Mills, Inc.*, 691 F. Supp. 1131, 1137 (N.D. Ill. 1988), *aff'd*, *Elders Grain*, 868 F.2d 901 (7th Cir. 1989) (enjoining transaction where post-merger HHI was 2606); *Federal Trade Commission v. Cardinal Health, Inc.*, 12 F. Supp.2d 34 53 (D.D.C. 1998) (increase in HHI to 2450 in one merger and to 2277 in second merger required the court to "presume that the proposed mergers pose a risk to competition").

Increasing concentration makes collusion easier, as courts have explained: "The fewer competitors there are in a market, the easier it is for them to coordinate their pricing without committing detectable violations of section 1 of the Sherman Act, which forbids price fixing." *Hospital Corp. of America*, 807 F.2d at 1387. Not only does concentration make it easier for firms to hide their collusion, concentration also makes it easier for firms to enforce their collusion and prevent cheating on higher prices. Concentration also makes it less likely that the remaining fringe not involved in the collusion can defeat coordination among the dominant firms. In a highly concentrated market, "it is easier for [firms in the market] to increase price above the competitive level without losing so much business to other suppliers as to make the price increase unprofitable." *Rockford Mem'l Corp.*, 898 F.2d at 1283. As the fringe of remaining firms becomes smaller, those firms must make a proportionately larger expansion in their output to affect the cartel price. *Id.*

1. Structural and Market Factors Conducive to Collusion

A number of factors in addition to market concentration also make coordination more likely. One important factor facilitating coordination in this market is the substantial excess capacity that UPM and Avery control in the North American market for paper labelstock–excess capacity that will substantially increase with UPM's acquisition of MACtac. As the Seventh Circuit has said, "excess capacity . . . is itself an incentive to collude." *Rockford Mem'l Corp.*, 898 F.2d at 1285. *See also In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d at 657 ("excess capacity . . . makes price competition more than usually risky and collusion more than usually attractive").

One way that excess capacity facilitates collusion is that it allows swift punishment for undercutting the elevated cartel price; it also raises the costs of a price war, making firms hesitate more before risking such grievous losses. *Id.* For similar reasons, excess capacity also deters entry by making the investments necessary to enter less attractive. *Id.* "And since entry into the industry

is slow . . . colluding sellers need not fear that any attempt to restrict output in order to drive up price will be promptly nullified by new production." *Elders Grain*, 868 F.2d at 905.

Another factor that facilitates collusion is UPM's longstanding supply relationship with Avery. UPM's sale of label paper to Avery gives them similar cost structures both because label papers constitute a substantial proportion of the cost of labelstock and because UPM supplies Avery with the papers at prices similar to those paid by UPM's Raflatac subsidiary. Similar costs facilitate coordination on prices, much as selling a standardized product does, by making it easier for firms to arrive at a mutually profit-maximizing price. *See, e.g.,* Richard A. Posner *Antitrust Law* 75 (2d ed. 2001) ("The more alike the firms in a market are with respect to the structure of their costs and (a related point) to their production methods, the easier it will be for them to collude. The optimal cartel price is a function of a firm's costs, and it will therefore be different for each firm in the market if the firms have different costs.").

Avery and UPM's close supply relationship also raises another important consideration making collusion more likely–a history of cooperation among competitors in the market. "[A] market in which competitors are unusually disposed to cooperate is a market prone to collusion. The history of successful cooperation establishes a precondition to effective collusion–mutual trust and forbearance, without which an informal collusive arrangement is unlikely to overcome the temptation to steal a march on a fellow colluder by undercutting him slightly." *Hospital Corp. of America*, 807 F.2d at 1388.

2. Direct Evidence of Likely Anticompetitive Effects

Cooperation also may evolve into price coordination itself, the ultimate harm that merger enforcement seeks to prevent, and where such evidence of coordination is available, it is persuasive evidence for blocking a merger. *See Elders Grain*, 868 F.2d at 905 (noting "a history of efforts to

fix prices in the industry–a history that predates the market structure even more prone to collusion that the challenged acquisition created"); *Rockford Mem'l Corp.*, 717 F. Supp. at 1286 ("[T]he Rockford hospitals attempted to collectively boycott the signing of a Blue Cross contract in the hopes of gaining more money from Blue Cross."). This case is unusual–and even more troubling than the merger in *Hospital Corp. of America*–because there is striking evidence of pre-merger horizontal coordination on the price of labelstock between Avery and UPM's Raflatac. And this evidence of the transaction's likely anticompetitive effects is not merely limited to UPM's and Avery's past attempts to coordinate on price, but also includes direct evidence of discussions between senior management of UPM's Raflatac and MACtac asserting that post-merger labelstock prices will increase.

Direct evidence of price coordination or of a transaction's likely anticompetitive effects can greatly simplify a court's analysis of the transaction. Measures of market definition and concentration are used as means to determine the ultimate objective of an antitrust inquiry–the possession of market power or, in the merger context, increasing market power. "[T]he purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition." *Wilk v. American Medical Ass'n*, 895 F.2d 352, 360 (7th Cir. 1990) (quoting *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 460-61 (1986)).

Evidence of coordination in an industry can make unnecessary much inquiry over market definition. "Very few firms that lack power to affect market prices will be sufficiently foolish to enter into conspiracies to fix prices. Thus, the fact of agreement defines the market." Robert H. Bork, *The Antitrust Paradox* 269 (1978). *See United States v. Sargent Electric Co.*, 785 F.2d 1123,

1127 (3d Cir. 1986) (Evidence of coordination "tends to define the relevant market. . . . [I]ts very existence supports an inference that it would have an effect in a relevant market.").

The Supreme Court has also applied this reasoning. Under the Sherman Act, where market power is gauged under the rule of reason in a manner that parallels the methods used in merger enforcement, the Supreme Court has ruled that no separate proof of market definition is necessary when other evidence establishes the finding of ultimate concern:

> Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction of output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'

Indiana Federation of Dentists, 476 U.S. at 460-61. This perspective on market definition under the Sherman Act should apply to market definition under the Clayton Act. *Cf. Rockford Mem'l Corp.*, 898 F.2d at 1282 ("A transaction violates section 1 of the Sherman Act if it restrains trade; it violates the Clayton Act if its effects may be substantially to lessen competition. . . [T]he interpretations [of these two statutory provisions] have, after three quarters of a century, converged.").

The Seventh Circuit has also applied the point made in *Indiana Federation of Dentists*. *See Toys "R" Us v. Federal Trade Commission*, 221 F.3d 928, 937 (7th Cir. 2000) ("[T]he share a firm has in a properly defined relevant market is only a way of estimating market power, which is the ultimate consideration. The Supreme Court has made it clear that . . . [another] way[] of proving market power . . . is through direct evidence of anticompetitive effects.") (citing *Indiana Federation of Dentists*, 476 U.S. at 460-61; *Ball Memorial Hospital, Inc. v. Mutual Hospital Insur., Inc.*, 784 F.2d 1325, 1336 (7th Cir. 1986)). And as the court observed in *Ball Memorial Hospital*, "When there are better ways to estimate market power, the courts should use them." *Ball Memorial Hospital*, 784 F.2d at 1336.

The market concentration and structure here themselves demonstrate that the merger may substantially lessen competition, but the evidence that UPM and Avery have coordinated in the past on labelstock pricing in the United States and the assertions by senior management of UPM's Raflatac and MACtac that post-merger labelstock prices will increase powerfully reinforce the structural evidence that the merger will harm consumers and is illegal.

D. Efficiencies

Defendants have claimed that the merger will achieve efficiencies. Although the Supreme Court has never endorsed an efficiency defense to an otherwise illegal merger, *see, e.g., Philadelphia Nat'l Bank*, 374 U.S. at 371; *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967), both lower courts and the *Horizontal Merger Guidelines* have recognized the possibility of an efficiency defense, provided that defendants meet stringent requirements and offer convincing proof. *See United States v. Rockford Memorial Corp.*, 717 F. Supp. 1251, 1288-89 (N.D. Ill. 1989), *aff'd*, 898 F.2d 1278 (7th Cir. 1990); *Horizontal Merger Guidelines* at ¶ 4. When the post-merger market is as concentrated as it is in this case, and the merger increases that concentration as much as this transaction does, courts have required defendants to prove "extraordinary efficiencies." *H.J. Heinz Co.*, 246 F.3d at 720 (citing *University Health*, 938 F.2d at 1223; 4A Areeda, *et al., Antitrust Law* ¶ 971f, at 44). These heightened standards are necessary to ensure that the merger does ultimately benefit consumers, notwithstanding the initial showing that it is anticompetitive. *Cf. Rockford Memorial*, 717 F. Supp. at 1289 (efficiency claims must satisfy a "very rigorous standard"); *United States v. United Tote, Inc.*, 768 F. Supp. 1064, 1084-85 (D. Del. 1991) ("even if the merger resulted in efficiency gains, there are no guarantees that these savings would be passed on to the consuming public").

To satisfy an efficiency defense, defendants must prove, by "clear and convincing evidence," *Rockford Memorial*, 717 F. Supp. at 1289, that their claimed efficiencies: (1) will actually be achieved and are not based on speculation, *University Health*, 938 F.2d at 1222-23; (2) are merger specific, and can be achieved "only through the merger and in no other manner," *Rockford Memorial*, 717 F. Supp. at 1289; (3) will be passed on, providing a "significant economic benefit to consumers," *id.*; and (4) will outweigh the merger's anticompetitive effect, providing a "net economic benefit" for the consumer, *id.* at 1291.

III. The Equities Weigh in Favor Granting an Injunction

Defendants have argued that a preliminary injunction will harm them because their deal will likely collapse if they must wait until the fall for a trial on the merits. As an initial matter, however, when evaluating parties' claims that a merger agreement cannot survive past the parties' announced deadline, courts have questioned why the deal will cease to be worthwhile during the time required for a trial. "If the merger makes economic sense now, the [merging parties] have offered no reason why it would not do so later." *Federal Trade Commission v. H.J. Heinz Co.*, 246 F.3d 708, 726 (D.C. Cir. 2001). Litigation over mergers has often lasted long enough not only for a decision in the district court, but also in the court of appeals. Defendants' claims of urgency must be viewed with skepticism.

The more important point, however, is that even if this deal would fall apart after a preliminary injunction is entered, that fact alone does not weigh heavily in balancing the equities. The demise of this merger would be significant only if it would have delivered benefits to the public by increasing output and lowering prices. In other words, the deal must be more than simply the trading of assets. Judge Easterbrook made this point in *Ball Memorial Hospital*: "[I]n attempting to weigh the equities of granting or denying a preliminary injunction in the antitrust setting, the pro or

anti-competitive effects *on the market at large* should be an important factor in the district court's analysis." 784 F.2d at 1334 (emphasis added).

Judge Posner later more fully developed the requisite focus on marketwide effects in *Elders Grain, Inc.*, 868 F.2d at 904. On one side of the equities balance, he noted the merging parties' claim that their deal would not survive if a preliminary injunction were granted. In weighing this claim, Judge Posner concluded that the defendants failed to show that the merger "would result in a significant increase in output" benefitting consumers. *Id.* Though it may have been true, as the defendants maintained, that the acquired firm would be sold to someone else, the defendants were unable to identify what benefits would be lost to the economy if a different acquirer emerged. *Id.* The merging parties' assertions that they would achieve benefits from the merger that others could not were unduly "vague." *Id.* The D.C. Circuit made the same point when it concluded that two merging companies failed to show how entering a preliminary injunction "would deny consumers the procompetitive advantages of the merger." *H.J. Heinz Co.*, 246 F.3d at 726. *See also Federal Trade Commission v. University Health, Inc.*, 938 F.2d 1206, 1225 (11th Cir. 1991); *United States v. Ivaco*, 704 F. Supp. 1409, 1430 (W.D. Mich. 1989).

Set against the merging parties' private interest is the public's interest in competition. If a merger is consummated before a trial on the merits, but is subsequently found to be illegal, then the benefits of competition will be lost not only during the course of the litigation, but also likely "forever, for it is difficult to undo a merger years after it has been consummated." *Elders Grain*, 868 F.2d at 904. An acquiring company, found to have engaged in an illegal acquisition, has every incentive to ensure that the firm it is forced to disgorge will not emerge as a serious competitor. The difficulty of undoing mergers was a major reason for Congress' enactment of the Hart-Scott-Rodino Act to facilitate pre-consummation merger challenges. The Act's legislative history explained that

when courts had found post-consummation mergers illegal, the scrambling of the parties' assets often made meaningful relief impossible: "During the course of the post-merger litigation, the acquired firm's assets, technology, marketing systems, and trademarks are replaced, transferred, sold off, or combined with those of the acquiring firm. Similarly, its personnel and management are shifted, restrained, or simply discharged." H.R. REP 94-1373 at *8 (1976).

In light of the difficulty of unscrambling merged firms, courts have held that a federal enforcement agency that establishes some likelihood of success on the merits "need not prove irreparable injury to obtain a preliminary injunction." *Elders Grain*, 868 F.2d at 903. *Cf. California v. American Stores Co.*, 495 U.S. at 295 ("proof of the violation of law may itself establish sufficient public injury to warrant relief").

The evidence presented at the preliminary-injunction hearing will show that defendants' merger jeopardizes competition and that this Court should grant the United States an injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of this Memorandum in Support of Plaintiff's Motion to Compel were served this 6th day of June, 2003, upon each of the parties listed below:

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