IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-7066

MOORE CORP. LTD.,

Appellee,

v.

WALLACE COMPUTER SERVICES, INC.

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR DISTRICT OF DELAWARE

BRIEF FOR AMICUS CURIAE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT

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STATEMENT OF INTEREST OF THE UNITED STATES

The United States shares with the Federal Trade Commission the primary responsibility for enforcement of the federal antitrust laws, including Section 7 of the Clayton Act, 15 U.S.C. 18. Because federal enforcement resources are limited, however, the United States has a continuing concern with preserving the ability of private parties to act as private attorneys general in enforcing the antitrust laws in meritorious cases. The issue raised in this case -- whether takeover targets may seek to enforce the antitrust laws by challenging a proposed takeover as in violation of the Clayton Act -- may significantly affect the continued vigor of antitrust enforcement by private attorneys general. Moreover, the United States has an interest in assuring that the substantive provisions of Section 7 are appropriately applied to protect competition.

ISSUES PRESENTED

1. Whether, as the district court held, the target of a hostile takeover attempt always lacks standing to bring a challenge to the takeover as a violation of Section 7 of the Clayton Act.

2. Whether this Court should instruct the district court that, in a proper case, the likelihood of a substantial lessening of competition may be established by proof that an acquisition is likely to result in higher prices to a significant group of customers, even absent conventional proof of a relevant product market, submarket, market share, or market concentration.

STATEMENT OF THE CASE

Nature of the case. The original complaint in this case concerns questions of Delaware corporate law that will not be discussed in this brief.[1] The counterclaim, the subject of this appeal, is for injunctive relief for alleged violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

Course of proceedings and disposition. The complaint was filed on July 31, 1995, in the United States District Court for District of Delaware. The counterclaim was filed on September 25, 1995. On December 4, 1995, the court, the Honorable Murray M. Schwartz,

[1]There was no appeal from the district court's disposition of the original claim, and in any event the United States takes no position concerning that claim.

denied the plaintiff's motion for preliminary injunction but granted its motion to dismiss the Clayton Act counterclaim; the court also dismissed counterclaimant's motion for a preliminary injunction as moot.[2] (Order entered December 5, 1995.) On January 23, 1996, the court entered final judgment.

STATEMENT OF FACTS

1. This case arises out of the attempt by Moore Corporation Ltd. ("Moore") to acquire Wallace Computer Services, Inc. ("Wallace"). Moore is in the business of "delivering information products ('business forms' or 'forms') and services." Moore Corp. v. Wallace Computer Services, Inc., No. 95-472 MMS, slip op. at 3 (D. Del. 1995) ("Op."). Wallace, which is mainly in the computer services and supply industry (id.), also is active in the business forms business (id. at 46). Both firms are significant competitors in that business. According to Wallace's evidence, Wallace's "state-of-the-art computer technology" gives it a significant advantage in aspects of this business, and Moore has been investing substantial funds in an attempt to catch up. (Id. at 48-49.)

In early 1995, Moore approached Wallace and proposed "a possible business combination," but Wallace rejected the overture. (Id. at 4.) Then, on July 30, 1995, Moore launched a tender offer for all outstanding shares of Wallace common stock. Wallace massively resisted this takeover attempt, and Moore sued to prevent Wallace and its board of directors from doing so. Wallace counterclaimed, alleging that Moore's acquisition of Wallace would violate Section 7 of the Clayton Act; Wallace sought a preliminary injunction

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[2]The court treated other claims of the counterclaim as withdrawn. (Op. at 1 n.1.)

to block the acquisition. Moore opposed the preliminary injunction and moved to dismiss the Clayton Act counterclaim, arguing that Wallace had failed to allege sufficient antitrust injury to establish standing to bring an antitrust claim. Wallace had claimed that the alleged violation would cause it to suffer at least these harms: "'loss of independent decision making authority, loss of trade secrets, loss of employees, and loss of customers.'" Id. at 38.

2. The district court began its analysis of the antitrust standing issue with the test set forth by the Supreme Court in Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986). An antitrust plaintiff seeking injunctive relief must "allege and ultimately prove that it would suffer threatened loss or damage constituting an 'antitrust injury,'" which is "injury 'of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" Op. 38, quoting Cargill, 479 U.S. at 109.

The Supreme Court has had no occasion to apply the antitrust injury standard in the context of a suit brought by a takeover target, and, the district court said, this Court "has not faced squarely the issue of target antitrust standing." (Op. 43.)[3] Surveying "both case law and scholarly commentary subsequent to the Cargill decision," the district court "conclude[d] that the target of a hostile takeover has no standing to bring a Section 7 Clayton Act claim." (Id. at 40.)

The district court, recognizing that the circuits were split on the question of target standing, compare Anago, Inc. v. Tecnol Medical Prod., Inc., 976 F.2d 248 (5th Cir. 1992)

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[3]This Court squarely faced the issue in H.H. Robertson Co. v. Guardian Industries Corp., 50 Antitrust & Trade Reg. Rep. (BNA) 166 (Jan. 9, 1986), but that decision was vacated for rehearing en banc, 1986-1 Trade Cas. (CCH) ¶ 66,911 (3rd Cir. Feb. 12, 1986), which never occurred.

(takeover target lacked standing), cert. dismissed, 114 S. Ct. 491 (1993) with Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252 (2d Cir.) (takeover target found to have standing), cert. dismissed, 492 U.S. 939 (1989), rejected the reasoning of the Second Circuit, the one court of appeals to have endorsed takeover target standing post-Cargill. In Gold Fields, the Second Circuit found that a takeover target had standing under Cargill because its "loss of independence is causally linked to the injury occurring in the marketplace, where the acquisition threatens to diminish competitive forces." 871 F.2d at 258. But the district court concluded that because loss of independence is "intrinsic to any takeover case," the Second Circuit's reasoning "runs counter to Cargill's mandate that 'plaintiffs must show more than simply an "injury causally linked" to a particular merger.'" Op. 42, quoting Cargill, 479 U.S. at 109.

The district court found support for its conclusion in Alberta Gas Chemicals, Ltd. v. E.I. du Pont de Nemours and Co., 826 F.2d 1235 (3d Cir. 1987), cert. denied, 486 U.S. 1059 (1988), a case involving the antitrust standing of a competitor, not a takeover target, to challenge an alleged anticompetitive acquisition by a methanol producer of a potential producer of methanol. This Court concluded, after a detailed examination of each of the plaintiff's claims of injury, that the plaintiff had failed to show antitrust injury. The district court characterized this Court's position as "[r]efusing to take a lenient stance on what constitutes antitrust injury," and noted that, with respect to certain claims, this Court had observed that "the same type of harm, i.e., non-antitrust harm, would have occurred if any acquiror decided to curtail the target's production and marketing plans." Op. 42-43.

Finally, the court concluded that Wallace's alleged injuries "do not occur because of the potential lessening of competition; rather, they occur due to a change in corporate control." Id. at 43. The court referred to no facts specific to the case before it as supporting that conclusion, although it cited Burlington Indus., Inc. v. Edelman, 666 F. Supp. 799 (M.D.N.C.), aff'd, 1987 WL 91498 (4th Cir. June 22, 1987) (affirming grant of preliminary injunction on securities claims; not addressing denial of preliminary injunction on antitrust claim).

2. Although the district court predicted that this Court would "join the Anago line of cases rather [than] follow Consolidated Gold Fields," Op. 43, it recognized the risks of prediction, and to "facilitate appellate review" should its prediction turn out to be incorrect (id. at 44), it discussed at length how it would have ruled had the question of a preliminary injunction not been mooted by dismissal of Wallace's counterclaim on standing grounds. Addressing four criteria, the court found that three supported issuance of the injunction, while the fourth, likelihood of success on the merits, did not. The court said these findings would lead it to deny the injunction. (Id. at 80-81.) We address only the likelihood of success analysis here.

Wallace had alleged that the acquisition would substantially lessen competition in the market for "the sale of forms and forms services to large, forms intensive multi-location customers," or "LFICwMLs" (id. at 47), and that for most such customers, there were only three acceptable vendors (Moore, Wallace, and the Standard Register Company). The acquisition would reduce that number to two. (Id. at 45, 47.)

As the district court explained, Wallace's economic expert, Professor Hausman, analyzed the competitive effects of Wallace's acquisition by Moore through an econometric study of 51 LFICwMLs contracts, each worth more than $500,000, on which Wallace bid after January 1, 1994. (Id. at 51, 76-77.) Before the bidding, Moore held 44% of these contracts, Wallace held 18%, Standard Register held 15%, and a fourth company, Uarco, held 12%. (Id. at 51.) The bids Hausman studied led to very different results: Wallace won over 50% of the contracts, Moore about 15%, Standard Register about 12%, and Uarco none. Hausman concluded that this demonstrates that Wallace and Moore significantly compete head to head; indeed, Wallace competed against Moore about 75% of the time. (Id. at 51-52.) Hausman also examined gross margins on the contracts Wallace won and found that competition with Moore reduced those margins by 7-8%. He concluded that prices to these customers would go up by that amount on average if Wallace and Moore stopped bidding against each other as competitors (as they presumably would following the acquisition). (Id. at 53.) The district court found that Hausman's figures were "corroborated by the testimony of Wallace's Chief Executive Officer." (Id. at 77.) Professor Hausman did not define Wallace's share of the claimed LFICwMLs market, estimate the percentage of all forms sales represented by LFICwMLs, or state the number of LFICwMLs in the U.S. market; other evidence showed that roughly 170 Wallace customers fell into this grouping. (Id. at 54.)

Moore's economic expert, Dr. Addanki, did not present an econometric study. He relied on a "qualitative evaluation of competition in the business forms industry" (id. at 56), which led him to conclude that the relevant product market was no smaller than "the sale of business forms and related services." (Id. at 54.) Combined with quantitative analysis of market share data, the qualitative evaluation also led him to conclude that this market was unconcentrated and vigorously competitive, and that Moore's acquisition of Wallace would not cause competitive harm to the industry. (Id. at 54-57.)

To resolve the dispute concerning the relevant product market, the district court turned to the "criteria relating to product market definition" (id. at 62) set forth in Brown Shoe Co. v. United States, 370 U.S. 294 (1962). The Supreme Court there held that "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." Id. at 325, quoted at Op. 62. The court, however, did not address determination of the outer boundaries of a product market, but focused on the Supreme Court's recognition that "within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes," 370 U.S. at 325, and the Court's further observation that "[t]he boundaries of such a submarket may be determined by examining" certain "practical indicia." Id. See Op. 62-63.

The court then conducted a lengthy analysis of the evidence bearing on each of the "practical indicia" articulated in Brown Shoe, as well as on an additional indicium drawn from cases in this circuit. On the basis of this analysis, the court concluded that LFICwMLs were not so clearly distinguishable from other customers to constitute a market. (Op. 63-74.)

Turning to the likely effect of the acquisition on competition, the court relied on Dr. Addanki's analysis of the broad business forms and services market, which showed low concentration and concluded that significant anticompetitive effects were unlikely. (Id. at 75-76.)

Finally, the court turned to Professor Hausman's analysis, which had concluded that the acquisition would result in significantly higher prices to a significant number of LFICwMLs. It made no findings casting doubt on Professor Hausman's credibility or on the validity of his conclusions. The court indeed assumed that "Wallace has preliminarily established that when Moore competes against Wallace for LFICwMLs, those customers will receive a lower price than if the two entities did not compete." (Id. at 77.) Nor did the court find that the predicted price increase was too slight or the number of customers subjected to it too small to constitute a substantial lessening of competition under Section 7. Instead the court held:

> [A]n antitrust plaintiff cannot prevail by simply alleging a lessening of competition within a limited subset of customers . . . . The Court is willing to assume arguendo that there is a subset of LFICwMLs that would only look to Moore, Standard Register, or Wallace for their forms and forms-management services, and that these will pay higher prices if there is a Moore takeover of Wallace. Even so, Wallace's failure to show that the lessening of competition for these customers would have the effect of substantially lessening competition in the overall relevant product market is fatal.

(Op. 78.) Thus, the court concluded that, even assuming the validity of Hausman's conclusion concerning the likelihood of price increases resulting from the acquisition, Wallace could not show a likelihood of success on the merits unless it could prove a market smaller than the entire business forms industry, which, the court also concluded, it had failed to do.

SUMMARY OF ARGUMENT

The district court erred in holding as a matter of law that takeover targets do not face antitrust injury from the challenged merger and therefore lack antitrust standing. Although under Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986), takeover targets may frequently lack antitrust standing, neither Cargill nor this Court's precedents treat antitrust injury and standing as questions of law that can be determined entirely apart from the particular allegations and facts of a given case. Nor does the Fifth Circuit case the district court predicted this Court would follow treat a takeover target's claims of antitrust injury as necessarily invalid. Accordingly, this Court should vacate and remand to permit the district court to decide the motion to dismiss on the basis of the particular factual matrix presented.

This Court should further instruct the district court that, should it prove necessary to address the merits of Wallace's antitrust claim on remand, proof that an acquisition will likely result in a significant price increase for a substantial group of customers is sufficient to establish that "the effect of the acquisition may be substantially to lessen competition." 15 U.S.C. 18. Merger analysis evaluates an acquisition's "potential for creating, enhancing, or facilitating the exercise of market power -- the ability of one or more firms to raise prices above competitive levels for a significant period of time." United States v. Archer-Daniels-Midland Co., 866 F.2d 242, 246 (8th Cir. 1988), cert. denied, 493 U.S. 809 (1989). The analysis of market shares is a means to the end of evaluating the potential effect of an acquisition on price and output. To insist on that means when there is other proof sufficient to establish the prohibited effect elevates form over substance.

ARGUMENT

I. THE DISTRICT COURT'S HOLDING THAT A TAKEOVER TARGET LACKS ANTITRUST INJURY IMPROPERLY CONVERTED A FACTUAL INQUIRY INTO AN ISSUE OF LAW

The district court broadly held that "the target of a hostile takeover has no standing to bring a Section 7 Clayton Act claim" (Op. 40). The court concluded without any factual analysis that the alleged loss of customers and employees (as well as of independent decision making authority and of trade secrets) "occur due to a change in corporate control," rather than as a result of a lessening of competition (id. at 43). While Cargill may deny antitrust standing to many takeover targets, it provides no basis for a rule of law that would deny standing to takeover targets without any analysis of their actual claims of injury. Such a rule of law, moreover, finds no support in either this Court's cases or the Fifth Circuit case the district court predicted this Court would follow, Anago v. Tecnol Medical Prod., Inc., 976 F.2d 248 (5th Cir. 1992), cert. dismissed, 114 S. Ct. 491 (1993). The district court's reliance on its rule of law was an error of law. This Court's review of a grant of dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) is plenary. General Elec. Co. by Levit v. Cathcart, 980 F.2d 927, 931 (3d Cir. 1992).

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977), and Cargill establish that the federal antitrust laws do not afford a private antitrust remedy for every injury that is causally related to an antitrust violation. In Brunswick, the Court held that

Section 4 of the Clayton Act, 15 U.S.C. 4, provides a damage remedy only for "antitrust injuries," and not for other losses, even if those losses would not have occurred but for an unlawful acquisition. 429 U.S. at 486-87. The Court explained that "[e]very merger of two existing entities into one, whether lawful or unlawful, has the potential for producing economic readjustments that adversely affect some persons." 429 U.S. at 487. If compensation for all of those readjustments were available under the Clayton Act should the merger turn out to be unlawful -- but not otherwise -- recovery would be "entirely fortuitous." Ibid. Because some of the same injuries would result whether or not the merger were unlawful, permitting compensation for those injuries in the event the merger turned out to be unlawful "would authorize damages for losses which are of no concern to the antitrust laws." Ibid.

Moreover, as the claim in Brunswick illustrated, a rule allowing recovery for any injury causally related to a merger found to be illegal under the antitrust laws could undercut, rather than promote, competition. The plaintiff bowling center operators in Brunswick sought damages for profits they would have made if the defendant's acquisitions of competing bowling centers had not preserved competition in the market. Such a claim, the Court observed, is "inimical to the purposes" of the antitrust laws. 429 U.S. at 488. The Court articulated a two-part antitrust injury standard, requiring injury "of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful." 429 U.S. at 489. See Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 342-345 (1990).

In Cargill, a suit by a competitor challenging a merger, the Court applied the Brunswick antitrust injury requirement to private actions for injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. 26. The Court acknowledged that some of the considerations that counsel in favor of limiting standing in damage cases, such as the threat of multiple lawsuits or duplicative recovery, are inapplicable to injunctive actions. 479 U.S. at 111 n.6. The Court declined to confine the antitrust injury requirement to damage cases, however, observing that "[i]t would be anomalous, we think, to read the Clayton Act to authorize a private plaintiff to secure an injunction against a threatened injury for which he would not be entitled to compensation if the injury actually occurred." Id. at 112. Accordingly, the Court held that a competitor seeking to enjoin a transaction on the ground that it would lead to increased price competition lacked antitrust injury. Id. at 114-117.

Cargill erected a substantial barrier to antitrust suits brought by competitors seeking to challenge a merger, but it did not preclude competitor suits as a matter of law. It explicitly left open the possibility that a competitor could allege a "credible threat of injury from below-cost pricing," id. at 118, which would constitute a credible threat of antitrust injury. And although the Court concluded there was no such allegation in the case before it, it did so only after a careful review of the record. Id. at 118-119.

The rule of Cargill is not by its terms limited to suits brought by competitors; it also applies to antitrust suits brought by takeover targets seeking to challenge a merger.[4] But just

[4]In recommending to the Supreme Court that it not grant certiorari in Anago, the government observed that the Court might at some point wish to consider whether the general antitrust injury standard set forth in Brunswick and Cargill might appropriately be (continued...)

as Cargill does not establish a general rule denying antitrust standing to competitors challenging a merger, there is no reason to believe that the rule of Cargill always denies antitrust standing to takeover targets challenging a merger. To the contrary, Cargill suggests that a court should review the record before it with care to determine whether the plaintiff has alleged a credible threat of antitrust injury.

This Court's cases suggest the same. As the district court correctly observed, this Court in Alberta Gas Chemicals, Ltd. v. E.I. du Pont de Nemours and Co., 826 F.2d 1235 (3d Cir. 1987), cert. denied, 486 U.S. 1059 (1988), did not take a "lenient stance on what constitutes antitrust injury." (Op. at 43). It rigorously followed the course set out by the Supreme Court in Brunswick and Cargill, carefully examining each of the plaintiff's allegations in their factual context, 826 F.2d at 1241-1243, to determine whether "Alberta has asserted losses which may properly be called antitrust injury," id. at 1241. That a panel of this Circuit would conduct such an examination is hardly surprising. This Court has long taken the position that in addressing questions of antitrust injury and standing, "each situation must be analyzed on its facts." Merican, Inc. v. Caterpillar Tractor Co., 713 F.2d 958, 964 (3d Cir. 1983), cert. denied, 465 U.S. 1024 (1984). See also Bogus v. American Speech & Hearing Ass'n, 582 F.2d 277, 286 (3d Cir. 1978) ("This court has repeatedly eschewed formulation of a generally applicable conceptual test for the antitrust standing requirement

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[4](...continued)
refined when applied to the rather different factual context of a takeover target's antitrust challenge to the takeover. Brief for the United States as Amicus Curiae 7 n.6, Anago Inc. v. Tecnol Medical Products, Inc., S. Ct. No. 92-1274 (October 1993) ("Anago amicus brief").

that plaintiff's injury be caused 'by reason of anything forbidden in the antitrust laws.' Rather, we have consistently adverted to the variety and variability of factors which may be relevant in the factual situation of each particular case."); Cromar Co. v. Nuclear Materials and Equipment Corp., 543 F.2d 501, 506 (3d Cir. 1976) ("Each case . . . must be analyzed in terms of the particular factual matrix presented."). See also In re Lower Lake Erie Iron Ore Antitrust Litigation, 998 F.2d 1144, 1163-1170 (3d Cir. 1993) (lengthy factual analysis to determine antitrust standing), cert. denied, 115 S. Ct. 921 (1994). Thus this Court's antitrust jurisprudence hardly supports dismissing an antitrust case on the simple ground that the plaintiff is a takeover target and takeover targets face no antitrust injury. It instead mandates analyzing antitrust injury in the particular factual matrix presented.

The district court predicted, perhaps correctly, that this Court would "join the Anago line of cases." (Op. 43.) But that would not suffice to justify the district court's decision. Anago squarely held that a takeover target's threatened loss of independence does not constitute antitrust injury, for it "will suffer a loss of independence whether or not its takeover violates antitrust principles." 976 F.2d at 251.[5] But loss of independence is the only injury that the takeover target in Anago claimed. As the Fifth Circuit pointed out, "Although Anago presented evidence that the merger will have anticompetitive effects, such as higher prices and decreased competition, it did not show that either of these effects will

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[5]In the government's amicus brief in Anago, we explained that the Fifth Circuit's statement establishes that "the injury does not 'flow[] from that which makes defendants' acts unlawful.' Brunswick, 429 U.S. at 489," and so the takeover target's claim did "not fit readily within the Brunswick/Cargill formulation of antitrust injury." Anago amicus brief at 6-7. Cf. note 4, supra.

cause its injury." Ibid. The court did not announce what its decision would be in a case involving credible allegations of threatened injury from decreased competition.[6]

In this case, Wallace alleged four types of injury, "'loss of independent decision making authority, loss of trade secrets, loss of employees, and loss of customers.'" (Op. 38.) Without any examination of the factual matrix, or even a review of just how it was, according to Wallace, that these injuries might be brought about by that which would make the acquisition unlawful, the district court concluded that these injuries "do not occur because of the potential lessening of competition; rather, they occur due to a change in corporate control." (Id. at 43.) In support of this analysis, the district court cited a single opinion of a district court in North Carolina, which, in its antitrust aspects, had not been reviewed by the court of appeals.

Whatever may be said of loss of independence and loss of trade secrets, loss of employees and loss of customers plainly may be related to the anticompetitive impact of a merger. A merger that creates or enhances market power may lead to increased prices and reduced output, see, e.g., Joseph F. Brodley, "Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals," 94 Mich. L. Rev. 1, 84-88 (1995); that, of course, is why the antitrust laws are concerned about mergers. It follows that the anticompetitive aspect of a merger may well be the cause of the target's loss of

[6]The court observed that "once the takeover is complete, Anago and its shareholders are likely to benefit from any increased prices or decreased competition that might result." 976 F.2d at 251. That appears to be a prediction, made with modest but not overwhelming confidence, that the plaintiff in that case would not be injured at all, rather than a holding that any injury would not be antitrust injury.

employees and customers, for if the merger were pro-competitive, as some are, one would not expect increased prices and reduced output.

Moreover, the takeover process, particularly when hostile, may inflict injury on the target, and that injury, depending on the facts and circumstances, might be antitrust injury. See Anago, 976 F.2d at 253-254 (Parker, D.J., specially concurring) (suggesting that antitrust injury might result from conduct leading up to a merger, but that the Anago plaintiff failed to present such a claim). Here, the district court recognized that the pendency of its competitor's takeover bid injured Wallace's business (Op. 26 n.21). Wallace argued this injury as a basis for standing (Docket No. 71, Memorandum of Defendant Wallace Computer Services, Inc. in Response to Plaintiffs' Motion to Dismiss Wallace's First Counterclaim at 25), and the extent of such injury might well depend on whether the would-be acquiror is a competitor (so that the acquisition may be anticompetitive), as Wallace suggested (Docket No. 174, Defendant's Posthearing Memorandum at 23-24). The district court, however, did not so much as refer to this argument, or the recognized impact on Wallace's business, in the antitrust portion of its opinion.

The district court's unsupported generalization prevented it from considering whether, in the factual context of this case, Wallace had alleged a credible threat of antitrust injury. This Court should vacate and remand to allow the district court to make that determination.

II. THIS COURT SHOULD CORRECT THE DISTRICT COURT'S SERIOUS MISUNDERSTANDING OF MERGER ANALYSIS

The Court should also seize the opportunity to instruct the district court concerning the fundamentals of merger analysis. If on remand the district court determines that Wallace adequately alleged antitrust injury, it will likely be required to address the merits of Wallace's claim, whether on a renewed motion for preliminary injunction, on summary judgment, or in a trial on the merits. It has already addressed the merits in dicta intended to "facilitate appellate review." (Op. 44.) Its analysis is lengthy, clear, and, in important respects, profoundly wrong. This Court's review of the standard the district court applied in evaluating evidence addressing the merits would be plenary. Evans v. United Arab Shipping Co. S.A.G., 4 F.3d 207, 213 (3d Cir. 1993), cert. denied, 114 S. Ct. 1065 (1994). The public interest in both judicial economy and speedy justice would be well-served were the Court to review the district court's analysis of the merits of Wallace's antitrust claim, correct its errors now, and instruct it on the fundamentals of a proper analysis.

Faced with the factual conclusion, which it at least assumed to be true, that Moore's acquisition of Wallace would lead to significantly higher prices to a significant group of large customers, the district court nevertheless concluded that it could not find a likely substantial lessening of competition, because it concluded that Wallace's evidence of market definition, market shares, and market concentration was inadequate or nonexistent. Despite the court's detailed, fact-based treatment of the evidence and its citation of proper authority, its conclusion misses the point of merger analysis. It elevates the methodology conventionally used in merger analysis over the purpose for which that methodology is used, allowing form to triumph over substance.

An acquisition is unlawful if "the effect of the acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. 18. Thus, the "lawfulness of an acquisition turns on the purchaser's potential for creating, enhancing, or facilitating the exercise of market power -- the ability of one or more firms to raise prices above competitive levels for a significant period of time." United States v. Archer-Daniels-Midland Co., 866 F.2d 242, 246 (8th Cir. 1988), cert. denied, 493 U.S. 809 (1989).[7] The goal of merger analysis is therefore to determine whether an acquisition will create, enhance, or facilitate the exercise of market power.

Market definition is a frequently necessary means to this end. As this Court has explained, "the purpose of market definition is to determine whether market power exists," Weiss v. York Hospital, 745 F.2d 786, 826 (3d Cir. 1984), cert. denied, 470 U.S. 1060 (1985), or, in the merger context, will be created or enhanced. Thus, "[t]he penultimate question, towards which this preliminary inquiry into market definition is directed, is whether the defendant has market power: the ability to raise prices above levels that would exist in a perfectly competitive market." Consul, Ltd. v. Transco Energy Co., 805 F.2d 490, 495 (4th Cir. 1986), cert. denied, 481 U.S. 1050 (1987).

Market shares typically play a central role in the evaluation of an acquisition's potential to create or enhance market power. But they are a means to an end, not an end in themselves, and they are not always a necessary means. In a case brought under the Sherman Act, this Court observed that

[7]As this Court has explained, market power is "the ability to raise prices above those that would prevail in a competitive market." United States v. Brown University, 5 F.3d 658, 668 (3d Cir. 1993), citing Jefferson Parish Hospital District 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.").

> [m]arket share, of course, is only one type of evidence that may prove the defendant has sufficient market power to impose per se antitrust liability. "Market share is just a way of estimating market power, which is the ultimate consideration. When there are better ways to estimate market power, the court should use them."

Allen-Myland, Inc. v. Int'l Bus. Machines Corp., 33 F.3d 194, 209 (3d Cir.), cert. denied, 115 S. Ct. (1994), quoting Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1336 (7th Cir. 1986).

Under the Sherman Act, where similar questions of market power arise in rule of reason cases, the Supreme Court has made clear that no separate proof of market definition and market power are necessary where other evidence suffices to establish 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.'" FTC v. Indiana Federation of Dentists, 476 U.S. 447, 460-61 (1986) (quoting 7 Phillip A. Areeda, Antitrust Law 429 (1986)). This Court is in accord. See Brown University, 5 F.3d at 668 (suggesting that proof of market power is allowed only because proving the existence of actual anticompetitive effects, such as a price increase, is often impossible).

The rule should be no different under Section 7 of the Clayton Act. Because Section 7 by its terms deals with likely future effects of an acquisition ("may substantially lessen"), rather than with current effects of challenged conduct, it is often necessary to infer those effects from structural aspects of the market. Thus, litigants commonly seek to prove market power through market definition and measurement of market shares. But where there is proof by other means that a merger will likely result in significantly higher prices to a substantial group of customers as a result of the elimination of competition between the merging firms, precisely what Section 7 is intended to prevent, a court properly reaches the ultimate conclusion that the merger is likely substantially to lessen competition.

On the district court's analysis, this may well be such a case. There was evidence to show that the challenged merger would lead to a 7-8% price increase for a substantial number of large contracts because Wallace and Moore would no longer be competing for these contracts, and the district court assumed that the merger in fact would have that result. But a merger with such a result is certainly a merger that would create or enhance market power. And that is sufficient basis for finding the merger unlawful under Section 7.[8]

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[8]We do not mean to suggest that an analysis based on market definition, market shares, and market concentration and an analysis based predicted price increases should lead to different results. A finding that prices would increase to a substantial group of customers implies that sales to that customer group constitutes a relevant market for analyzing the merger. Phillip Areeda & Herbert Hovenkamp, Antitrust Law ¶ 518.1b (Supp. 1992), define a market as "any grouping of sales whose sellers, if unified by a hypothetical cartel or merger, could raise prices significantly above the competitive level." Several courts of appeals have adopted this definition. Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp., No. 95-1460, 1996 WL 98931, *12 (1st Cir. March 12, 1996); Virtual Maintenance, Inc. v. Prime Computer, Inc., 957 F.2d 1318, 1325 (6th Cir.) ("Virtual I"), vacated on other grounds, 506 U.S. 910 (1992), on remand, 11 F.3d 660, 667 (6th Cir. 1993) (reinstating all pertinent aspects of holdings in Virtual I), cert. dismissed, 114 S. Ct. 2700 (1994); H.J., Inc. v. International Telephone & Telegraph Corp., 867 F.2d 1531, 1537 (8th Cir. 1989). That the district court here may have reached different results based on two different methods of analysis raises questions about the reliability of its analysis under the Brown Shoe indicia.

This Court should instruct the district court, for purposes of its proceedings on remand, that the likelihood of a significant lessening of competition may be established by proof that the acquisition will result in a significant increase in prices to a substantial number of customers.

CONCLUSION

The Court should vacate the judgment of the district court and remand for further proceedings, pursuant to the Court's instructions.

Respectfully submitted.

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CERTIFICATION OF BAR MEMBERSHIP

Counsel for amicus United States of America are attorneys with the United States Department of Justice. As we understand the Court's rules, as federal attorneys we are not required to be specially admitted to practice before the bar of this Court.

CERTIFICATE OF SERVICE

I certify that, on this 19th day of April, 1996, I caused two copies of the foregoing BRIEF FOR AMICUS UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT to be served by hand delivery on

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