OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-473

TITLE CARGILL, INC., AND EXCEL CORPORATION, Petitioners V. MONFORT OF COLORADO, INC.

PLACE Washington, D. C.

DATE October 6, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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CARGILL, INC. AND EXCEL CORPO- :
RATION, :
Petitioners :
v. : No. 85-473
MONFORT OF COLORADO, INC. :

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Washington, D.C.

Monday, October 6, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:59 p.m.

APPEARANCES:

RONALD G. CARR, ESQ., Washington, D.C.; on behalf of the Petitioners.

LOUIS R. COHEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; for the United States and Federal Trade Commission, as amici curiae, in support of Petitioners.

WILLIAM C. McCLEARN, ESQ., Denver, Colorado; on behalf of the Respondent.

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C O N T E N T S

PROCEEDINGS

CHIEF JUSTICE REHNQUIST: We will hear arguments next in Cargill v. Monfort.

Mr. Carr, you may proceed whenever you're ready.

ORAL ARGUMENT OF RONALD G. CARR, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. CARR: Mr. Chief Justice, and may it please the Court:

This case presents two issues. The first issue is whether the plaintiff, Monfort of Colorado, in seeking to prevent the acquisition by one of its rivals, Excel Corporation, of another of its rivals, Spencer Beef, established the kind of injury to itself necessary to support relief under Section 16 of the Clayton Act.

The second issue is whether the acquisition could be thought substantially to lessen competition under the standards this Court has employed in applying Section 7's prohibition.

Under this Court's decision in the Brunswick case, these two issues necessarily are interrelated, analytically, and in light of the purposes of the antitrust laws.

In Brunswick, the Court held that a damages plaintiff, in order to get relief, must establish that his injury will flow from the anticompetitive effects of the act he challenges. In other words, the plaintiff's theory and proof of violation must be congruent with his theory and proof of injury. The injury must flow from what makes the act in question unlawful.

All of the purposes that the Brunswick requirement was intended to serve apply just as much under Section 16 as they do under Section 4.

The basic purpose of the Brunswick rule was to assure that the antitrust remedies are invoked and are deployed in circumstances that serve the pro-competitive purposes of the antitrust laws.

In Section 16 actions quite as much, and perhaps even more, than Section 4 actions this purpose is implicated. Indeed, in Section 16 actions, if the injunction can be applied to what may be pro-competitive conduct, the public loses the benefit of that enhanced competition altogether.

In this case, exactly that problem is revealed by the record. And the rulings below would allow that danger to take place, and disserve the purposes of the antitrust laws.

QUESTION: How does any -- under your approach, how does any merger damage competition, or could it ever?

MR. CARR: An acquisition -- if you mean competitors as opposed to competition, it can indeed. But an acquisition can harm competitors in any one of a number of ways.

QUESTION: Well, I know. But how can it harm competition?

MR. CARR: An acquisition can harm competition by so significantly increasing concentration --

QUESTION: That what?

MR. CARR: -- and raising entry barriers as to make the market perform less competitively.

QUESTION: Well, that may be so. But then who could ever sue for it besides the government?

MR. CARR: In the event that an acquisition had those effects, the standard effects predicted by Section 7 horizontal merger analysis, consumers, large-scale consumers particularly, would have an interest in preventing the acquisition. In this instance where the --

QUESTION: But no -- it would never -- nobody in the same trade level could sue? No competitor could sue?

MR. CARR: The usual consequences of a horizontal acquisition is to diminish competition. That's when it's objectionable under Section 7.

QUESTION: But it wouldn't hurt a competitor?

MR. CARR: It would not hurt a competitor.

QUESTION: Would it ever? Would it ever hurt a competitor? Could a competitor ever object to a merger?

MR. CARR: There are kinds of horizontal acquisitions that we believe could hurt a competitor. If the acquisition involved market shares so significant that --

QUESTION: That what?

MR. CARR: -- they raise a credible threat, a genuine threat, of predatory activity, then, if the market circumstances are such as to give some palpable basis --

QUESTION: You mean predatory activity like lowering prices to drive somebody else out of business?d

MR. CARR: Genuinely predatory conduct. That is to say, the kind of conduct in which a firm with a dominant market position --

QUESTION: So it almost has to be monopolization?

MR. CARR: As a practical matter, predation is impossible unless the firm, the would-be predator, has at least close to a dominant market position.

QUESTION: It also requires an intent, does it not?

MR. CARR: Well, of course. The predator has to be willing, as well as able, to deploy that dominant market position in such a way as to drive rivals from the market. It is an elaborate and difficult scheme --

QUESTION: (Inaudible) cause of action on a competitor?

MR. CARR: Consumers are directly injured by any sort of significantly increased concentration in the market that gives rise to the possibility of oligopolistic conduct. But oligopolistic --

QUESTION: Which is like what? Raising prices?

MR. CARR: Raising prices, reduce supply.

QUESTION: Which wouldn't hurt competitors?

MR. CARR: Far from it. Any competitor, faced with the possibility of diminished competition, that is, an increased likelihood of oligopolistic conduct, market interdependence, whether tacit or express collusion, should, faced with such an acquisition, be delighted.

QUESTION: Mr. Carr, is there a difference in your view between Section 7 of the Clayton Act and Section 2 of the Sherman Act?

MR. CARR: Yes, indeed, there is.

QUESTION: What is the difference?

MR. CARR: Section 2 of the Sherman Act looks to the achievement, whether through --

QUESTION: The power to affect price.

MR. CARR: -- active conduct or otherwise a monopoly position.

QUESTION: Enough power to get the price up a little bit. Do you have to get the same degree of power under Section 7?

MR. CARR: In order to show a violation of Section 7, no.

QUESTION: So in this case it's at least theoretically possible that there could have been a violation of Section 7 but no impact on price at all; is that right?

MR. CARR: The purpose of Section 7 is to predict probably future impacts on market conditions. As a consequence --

QUESTION: What if a trial judge concluded in this case that there's no impact on price now, but when the industry gets sufficiently concentrated, it's predictable that it would be? And that with this merger, that evil day will arrive in 10 years instead of 20 years, just -- it moves the process of concentration up a little bit. Would a competitor have a cause of action under those --

MR. CARR: No, it would not. Section 7

horizontal merger standards, those that the District Court used here to determine that there was a violation, predict the likelihood --

QUESTION: (Inaudible) could, under Justice Steven's hypothetical?

MR. CARR: Both the government and consumers could sue.

QUESTION: But no competitor?

MR. CARR: A competitor can't sue precisely because --

QUESTION: Well, how could even a consumer sue under my hypothetical? Because for the next 10 years, things are going to be very competitive. It'll just take awhile before you get the monopolistic condition in the market to have any impact on price.

MR. CARR: Well, the consumer can, based on the facts that we've been discussing, predict a possible or probable future effect of the kind that Section 7 forbids, of tendencies toward increased concentration and reduced competition, which under the --

QUESTION: What if the defendant came in and said, yes, but in the 10-year interval between arriving at that period of time -- concentrated market in our present condition, we can have even more intensive competition than we've had in the past while the process goes on? Could the consumer still sue?

MR. CARR: It's difficult to know how that mechanism could operate. If indeed, the 10 years --

QUESTION: Well, just the facts in the oil industry under the Standard Oil case. Isn't that what happened? There was very intense competition until they got a large enough segment of the industry, and then the prices went up.

MR. CARR: Well, what happened, as I recall, under the Standard Oil case is, there was a kind of competition which was of a sort that led to increased concentration and a monopoly.

QUESTION: Through a whole bunch of mergers.

MR. CARR: Partially -- partially through mergers. But that is not the consequence that Monfort predicted here, nor is the mechanism the same.

On the record here, Monfort challenged the acquisition solely on the ground -- as a substantive antitrust -- Section 7 matter, solely on the ground that the acquisition would increase concentration in the markets, and hence, diminish competition at some reasonably foreseeable point in the future.

QUESTION: Do you think Monfort proved enough to -- that if the government had brought this suit and proved exactly what Monfort did, that there would have been a Section 7 violation made out?

MR. CARR: Had the government established the facts -- we, of course, believe that on the merits the facts do not show an antitrust violation. But assume for the moment that they did, there would be no question that the government --

QUESTION: No, I asked you, on the facts that were proved by Monfort in this case, if the government had brought the case, proved the same facts, would a Section 7 violation have been made out?

MR. CARR: No, we believe not. The correct standards of analysis, this Court's decision in General Dynamics and other cases, suggest that the analysis applied to the facts below was incorrect; that in fact these markets would continue --

QUESTION: Well, is that your major point in this case? Or is it that they didn't make out an antitrust injury?

MR. CARR: Our point is both, that an attempt --

QUESTION: The Court of Appeals found at least there was a Section 7 violation.

MR. CARR: The Court of Appeals concluded that the District Court's analysis on the Section 7 merits was not clearly erroneous. There were various findings of fact which the District Court made were not clearly erroneous.

QUESTION: So it's easier for you to go the antitrust injury route?

MR. CARR: Well, we go both.

QUESTION: Well, I know you do. But you don't have to eat up some District Court's findings.

MR. CARR: We don't believe that on the Section 7 merits it's necessary to disturb the District Court's findings of fact in order to conclude that the analysis that applied to those facts --

QUESTION: Well, we review the District Court's findings here under the same standard as the Court of Appeals do.

MR. CARR: That's right. But we believe that the Court of Appeals misapplied the clearly erroneous standard. And in fact, the problem in the District Court's decision that we attempted to identify in the briefs below, and that we've discussed in the briefs to this Court is not that the particular findings of fact were incorrect, or incorrectly reflected the market realities. The problem was the inferences drawn from those factual findings for purposes of answering the ultimate Section 7 question, which is to say, what is the effect of this acquisition on the future performance of these markets.

QUESTION: And in terms of Section 7, how did it affect competition?

MR. CARR: How is it -- how did it affect, and how is it likely to affect competition. In order to make that sort of judgment, it's not possible to look, as the District Court here did, to conditions of rivalry under very and intense market -- a market that's intensely competitive.

The answer -- the question can be answered only by positing a possibility that the leading firms in the market will begin to behave collusively or attempt to behave collusively or oligopolistically, and asking, what would happen then? What sorts of competition would be called into play? What sorts of new entry might occur? What the fringe firms --

QUESTION: You say, Mr. Carr, it has to be done this way that you're explaining to us. But isn't that itself kind of a factual statement? Why did the District Court have to adopt your approach to it rather than the one it in fact adopted?

MR. CARR: Because I think the approach we're urging, Mr. Chief Justice, is the only approach consistent with the purposes of Section 7.

Section 7 asks, what is the likely effect of this acquisition on competition? Is this acquisition likely substantially to diminish competition in the market?

The only way that question can be answered is by looking to the effects of the acquisition on likely future market performance. If the danger that is a source of concern -- and the plaintiffs' contention is that the acquisition will increase concentration, and that that will lead to an increased likelihood of interdependent or collusive conduct, then the only sensible way of answering the Section 7 question is to posit that sort of conduct, and try to predict, based on the best material and evidence available, what the likely reactions are going to be. Can in fact this -- these firms, the merging firms and their principal rivals, come together and interdependently control market price and reduce its output.

QUESTION: Suppose we find -- and I know it's your case that we can't find, but suppose we find that it would; and that the end result of this whole process would be an oligopolistic market. Is it your contention that there would still be no standing because this plaintiff must assert that it went out of business in the intermediate phase of competition, assuming no predation theory but just fierce competition which this plaintiff says will drive them out of business, resulting in an oligopolistic market of which they are not a part; would they have a standing in that situation?

MR. CARR: No. No, they would not.

QUESTION: Why not?

MR. CARR: Because their injury flows from intense competition. And if, indeed --

QUESTION: Yes, but can't you look at the thing as a unit? Isn't -- do you just have to look at the oligopoly? Can't you look at the whole process that leads to the oligopoly, and say that if it does lead to the oligopoly, the submersion of this company, which is part of the process that leads to that oligopoly, gives them standing?

MR. CARR: The question is, how does the acquisition lead to the oligopoly? The acquisition, according to the plaintiff here, both in its brief to the trial court and its brief to the Court of Appeals, could lead to the oligopoly ultimately and in the long run only by increasing the relative efficiency of Excel, its efficiency relative to other firms in the market.

If, indeed, the mechanism by which the acquisition leads to oligopoly is via increased efficiency -- and efficiencies uniformly will serve the benefit of consumers -- those efficiencies ultimately and inevitably would be achieved through market evolution in some way, sooner or later.

In other words, the injury that's being complained about is an injury from the normal economic evolution of the market, functioning competitively. And it in no way --

QUESTION: The market always works?

MR. CARR: I'm sorry?

QUESTION: The market always works?

MR. CARR: No, the point is not that the market always works, but that the antitrust laws are designed to identify only those circumstances in which firms behave anticompetitively, or, through their voluntary actions, increase the likelihood that the markets in which they participate are likely to perform anticompetitively.

And it's vitally important that the antitrust remedy of an injunction against acquisitions be restricted to those circumstances.

These kinds of questions are extraordinarily difficult to answer with any confidence at all in their accuracy. The data that are available to answer them are very thin, are very hard to come by. The cases must be tried rapidly because of the timetables of these acquisitions. And no economists, except in the most extreme market circumstances, would ever say that he knows with complete confidence what the likely effects of an acquisition would be.

But exactly for that reason, it's critical that the plaintiff before the Court, and asking for the Court's judgment on these sorts of difficult questions, assert a kind of harm that is at least consistent with the anticompetitive theory on which he's relying to establish a violation.

QUESTION: Mr. Carr, I take it you're not urging the position of the Solicitor General, that there can never be standing for a competitor to sue? Rather, you are arguing on these facts, no substantive claim of anticompetitive conduct was made out?

MR. CARR: As a matter of policy, as a matter of general principle, it may be that the rule the Solicitor General is urging is very wise. But it is not necessary to adopt that rule in order to decide this case. There simply is no question in this that what the plaintiff was relying upon to show injury departs radically from what it was relying on to show an antitrust violation on the merits. On the one side, diminished competition in order to show a violation. On the other side, enhanced efficiencies and heightened competition in order to show that somehow the acquisition would injure Monfort.

QUESTION: This case isn't on the pleadings or summary. This case was tried, was it not?

MR. CARR: This case was tried, and the record is available.

QUESTION: And the question is, if it's essential to prove an antitrust injury, your claim is they didn't prove it?

MR. CARR: They didn't prove an antitrust injury at all.

QUESTION: Do you agree with the District -- with the Court of Appeals that the standard of proof for antitrust injury in an action for an injunction is less than in an action for damages?

MR. CARR: No, I think that the Brunswick principles require that the Brunswick standard be applied with equal rigor in actions under Section 16. And I see no possible basis for a distinction.

QUESTION: Mr. Carr, if I understood your response to Justice White earlier, although you don't agree with the government, in theory, that a competitor can't sue, as a practical matter, that's what your theory ends up with, isn't it?

MR. CARR: No. A competitor who can show that an acquisition causes a genuine threat of predatory or other exclusionary conduct --

QUESTION: Other than predation.

MR. CARR: There are other kinds of exclusionary conduct. For example, a foreclosure of supply. Or foreclosure of customers. Those are the kinds of anticompetitive harm that can lead directly to the elimination of a competitor; that can substantially diminish the competitiveness of the market. And acquisitions have been found unlawful on those grounds. That sort of theory of violation would be perfectly consistent with the theory of injury.

What we believe you cannot do is to assert, on the one hand, as Monfort did here, that the acquisition will diminish competition, and on the other, it will increase.

QUESTION: There is a gray area you get to, whether -- when intense competition turns into predation.

MR. CARR: It is often by no means easy to tell when it does -- when it is competitive and when it's predatory. For exactly that reason --

QUESTION: Well, I know, but in a Section 7 case, that may change the burden of -- of a plaintiff's burden.

MR. CARR: But the courts have been extraordinarily concerned in antitrust cases with making exactly that distinction, and developing tests to make it, precisely because of the danger the competitors may challenge competitive conduct.

Equally, in Section 7 cases, where you're looking to future predictions of harm, exactly the same sort of care must be taken, and these sorts of allegations of predatory conduct approached with extreme skepticism.

The use of the term "predatory" in the courts below has absolutely no meaning.

QUESTION: So certainly you don't think a competitor is going to make out a case of antitrust injury if, as Justice Scalia has proposed, he alleges that they are going to compete so fiercely that I'm just going to have to go out of business?

MR. CARR: No. Fierce competition is simply not an antitrust violation, and doesn't make the acquisition unlawful.

QUESTION: That is not predation. That's just competition?

MR. CARR: Precisely.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Carr. We'll hear from you, Mr. Cohen.

ORAL ARGUMENT OF LOUIS R. COHEN, ESQ.,

ON BEHALF OF THE UNITED STATES AND

THE FEDERAL TRADE COMMISSION AS AMICI CURIAE

IN SUPPORT OF PETITIONERS

MR. COHEN: Mr. Chief Justice, and may it please the Court:

The Court of Appeals recognized in this case that a competitor cannot legitimately object to the merger of two of its rivals on the ground that the merger will reduce competition and raise prices, but because, the Court of Appeals said, the competitor would surely benefit from such a transaction.

The transaction might violation Section 7, and consumers or customers -- here, we're talking about customers like Safeway and A&P -- customers might have -- would have standing to challenge a merger on that ground; but not competitors.

Let me answer the question that I think was implicit in some of the questions addressed to Mr. Carr, which is, why shouldn't we let any interested person, particularly, a well informed competitor, challenge a merger on the ground that it will reduce competition?

First, the statute, Section 16, says that the plaintiff must allege threatened loss or damage. And this Court said as long ago as the Borden case in 1954 that this must be of a sort personal to the plaintiff.

Perhaps more important, though, the statute was wise, because there's a real fox-guarding-the-henhouse problem here. The competitors' incentive is to favor mergers that will decrease competition and raise prices, and to oppose mergers that will increase competition and lower prices. And if the only person opposing a merger is a competitor, as here, that's probably because his instinct tells him the merger will intensify competition. And I mean no respect to overworked District judges when I say that the competitor's informed instinct may be more reliable than the outcome of a trial full of economists' charts on whether -- on issues as elusive as this.

Monfort in fact brought this case because it feared intensified competition. Mr. Monfort testified on direct examination eloquently on the point. He said, IBP decides they want to stay number one. Excel decides they want to be number one. They simply increase their production by working Saturdays, by being very aggressive in the marketplace, and that without ever talking to each question.

Question: Do you believe this would occur if this acquisition is approved?

Answer: I most certainly do. That is why I am here today.

QUESTION: Mr. Cohen, I agree with you (inaudible) that the incentives are as you say. But how do you get from that to the rule of interpreting a statute that you're urging upon us? It seems to me the equivalent is to say, it's very unlikely that a little man will beat up a big man; and therefore, we will not allow any tort actions by big men asserting that they've been assaulted by little men.

Now, it's very plausible that the vast majority of those suits are likely to be frivolous suits or harrassing suits. But how do you find a rule of law in the statute that says competitors can't sue? It's a convenient rule, but where is it in the statute?

MR. COHEN: Justice Scalia, we're not urging that a little man -- this was a billion-dollar-a-year little man, Monfort -- that a little man may not sue and say, he hit me. If there is evidence of predatory pricing that has occurred, there is a suit under Section 2 of the Sherman Act.

What we are urging is that competitors not be allowed to label the kind of intensified competition that Monfort feared, the kind of future intensified competition, to label that predatory. Because the consequence of allowing standing on that ground is to allow any competitor who wants to get into court and challenge a merger that he fears will be pro-competitive, the opportunity --

QUESTION: Although others can label it that way? You allow other people to come in and say that just fierce competition is predation. But you will not allow competitors to make the same allegation in court. And I just find it hard to see in the statute any principle that will enable us to allow some people to make the allegation and not other people.

MR. COHEN: No. In fact, we think that the notion of predatory pricing is, as this Court observed last year in the Matsushita case, so irrational a form of conduct on the form of predators, and so rare in fact, that no plaintiff, including the United States, ought to be allowed to challenge a merger solely on the ground that future competitive activity will be predatory.

It's like saying, Cohen has said he'd like a bigger house and he obviously can't afford it on his government salary, so we better enjoin him from robbing the bank.

QUESTION: So, I take it, then, if the government had brought this suit and proved precisely what Monfort did, you would say the government should have lost?

MR. COHEN: If the government had brought this suit alleging future --

QUESTION: And offered the same evidence that Monfort did, you say the District Court should have ruled against the government?

MR. COHEN: The government would have had standing to allege that the merger would reduce competition --

QUESTION: Yes.

MR. COHEN: -- and raise prices, which is our usual allegation --

QUESTION: But it should have lost?

MR. COHEN: Well, we think -- we don't have a position on whether this merger -- we didn't bring a suit. We looked at it. We decided not to. We don't have a position on whether this merger should have been enjoined. We don't think the District Court decided the merits correctly.

QUESTION: But as far as you're concerned, we should -- we could, consistent with your position, assume there was a second -- that the government on this evidence could have proved a Section 7 violation, but that nevertheless, Monfort should lose because of the lack of antitrust injury?

MR. COHEN: That's right. That's correct.

QUESTION: (Inaudible) I'm in some confusion now. I thought you had said in response to my question that you wouldn't allow the government to make these arguments any more than you'd allow -- which was contrary to my reading of your briefs. Now if that's --

MR. COHEN: There really were --

QUESTION: That isn't a party standing question. It's really a substantive question about what will establish an antitrust violation.

MR. COHEN: Justice Scalia, there really were two quite contrary contentions made for purposes of standing and the merits here by Monfort, who did bring it.

Monfort alleged standing on the ground that there would be intensified competition that would lower prices and drive it out of business. Monfort then alleged on the merits that there would be reduced competition and higher prices.

We are arguing that a competitor does not have standing to make either sort of claim, the first because there is no violation in intensified competition, the second because there is no injury if the consequence is reduced competition and higher prices.

The government certainly has standing to make the second kind of claim.

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We think that the problem with a predatory pricing claim is both a substantive problem and a standing problem. It's a substantive problem because --

QUESTION: Mr. Cohen, may I ask you, with respect to the second kind of claim that the government may ask, what is your view of the proximity in time that must be alleged and proved when the change in the price structure might occur in order to establish a violation? Does it have to prove that immediately following the merger there will be an impact on price, in your judgment?

MR. COHEN: No. It does have to prove, under the Brown Shoe case, a reasonable probability that the change in structure in the market will lead to a reduction in competition.

QUESTION: Sooner or later?

MR. COHEN: Yes. But the scenario under which prices go one way for 10 years and then start to go the other way is a scenario that I, frankly, don't understand. It doesn't reflect a profitable or feasible strategy for any competitor to adopt.

QUESTION: Well, is it correct that just under your view as a competitor may not sue because in the interim competition is more intense, also, a consumer could not sue, or a customer also could not sue?

Because they would also benefit. Everybody benefits from increased competition.

MR. COHEN: I don't think that the customer, Safeway, has an interest in suing to block this merger if it thinks --

QUESTION: What it really boils down to is that no private party can sue until the market is affected; is that right?

MR. COHEN: No, a private party can sue on the basis of an expectation that the consequence of the combination will be to reduce competition and increase prices.

And if Safeway had thought that that would be the consequence of this acquisition, they would have brought suit.

QUESTION: Mr. Cohen, I suppose that some mergers might hurt competitors in nonprice ways that are anticompetitive, like foreclosing a source of supply, or something of that kindas.

MR. COHEN: It is not, Justice O'Connor, the government's position that competitors may not sue -- categorically may not sue on any theory. We would not let competitors sue on either of the two theories that are involved in this case.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cohen.

Mr. McClearn, we'll hear from you now.

ORAL ARGUMENT OF WILLIAM C. McCLEARN, ESQ.,

ON BEHALF OF RESPONDENTS

MR. McCLEARN: Mr. Chief Justice, may it please the Court:

Before turning to the question of standing, I'd like to take just a moment to describe why this suit was brought and what, substantively, is at issue here.

Monfort brought this suit because Mr. Monfort believed the acquisition seriously would affect competitive conditions in the beef packing industry.

Monfort's father had been a cattle feeder since the 1920s. The company went into the beef packing business in the early 1960s. As the industry moved through a period of transition following, inefficient firms disappeared, and efficient firms, including Monfort, survived.

A leading firm, IBP, emerged; a second leading firm, Excel, assumed a strong second position; both with resources vastly in excess of those of my client.

By 1983, when this suit was brought, this was a no-growth industry. It had gone through a period of transition. It had stabilized. And it was not growing.

Monfort perceived that this acquisition would significantly increase the power of Excel, and would result in the leading companies becoming even more dominant than they previously had been. He saw that future growth in this industry would not be due to efficiencies. He believed that the increased market power created in Excel by this acquisition would ultimately force his company out of business not because it was less efficient but because it had fewer -- far fewer -- financial resources than the dominant firms.

QUESTION: Would you spell -- what would be the consequences of its having far fewer financial resources?

MR. McCLEARN: The consequences as found by the District Court, and as I think really are the essence of what the injury claim is here, Mr. Chief Justice, are these:

Following the acquisition here, Excel would have a very substantially increased market share, something over 20 percent. It would also have the enormous financial resources of its parent and related companies. And thirdly, and most importantly, it would have the intent, which we demonstrated, to take market share from particularly its smaller rivals, of whom my client is one. And lastly, what this acquisition did for Excel was to give it plants in a geographic location where it could, and indeed as the District Court found, there was a distinct possibility that it would, target cne of my client's plants for selective price cutting, below-cost pricing.

QUESTION: I had intended by my question to ask you what the connection was between the lack of financial resources of your client, and the potential antitrust injury. Because I thought you said that what your client lacked in this forthcoming battle was financial resources.

MR. McCLEARN: That is true.

QUESTION: And how is that going to effect it?

MR. McCLEARN: Because my client, under the circumstances posed, and indeed, under the circumstances found by the District Court, could not withstand a period of losses for the length of time that Excel could. And --

QUESTION: This is on the predatory pricing hypothesis?

MR. McCLEARN: Yes, it is. And I think --

QUESTION: (Inaudible.)

MR. McCLEARN: Well, I think I need -- it needs to be said, Your Honor, that -- counselor quoted, for example, from the trial transcript as to what Mr. Monfort said about competition. He did indeed say that the industry was competitive and had been competitive in the past. But what he also said was: I can compete with these people if they price at or above cost. I cannot compete with them below cost.

QUESTION: Was there any assertion -- was there any particular reason to think that they were going to sell below cost?Ld

MR. McCLEARN: Yes, there was.

QUESTION: In his testimony?

MR. McCLEARN: Yes, there was.

QUESTION: As I recall his testimony, he said something like, well, it depends on how you compute cost. They keep their books differently from ours.

MR. McCLEARN: No. What he said is, I don't know what their costs are. And indeed, he shouldn't know what their costs are. But let's assume, and I know that he does assume, that we are essentially operating on the same costs. What this record does not show is that there is any difference in the efficiencies of the Excels of the world and my client.

And therefore, if you are going to take market share, which Excel has clearly and specifically said it's going to do, it can only do that by going below cost, at least in selective circumstances. And that necessarily has to follow, unless you can establish that you are more efficient than I am.

QUESTION: Or unless you believe you're more efficient, in which case you would make the same statement. Do you have any evidence of predatory intent other than the fact that they are a company with more resources? Can one assume predatory intent whenever you're dealing with a company with greater resources which has said that we're going to try to expand our share of the market, which I assume, by the way, is what every company says? Do you know of any company that doesn't want to expand its share of the market?

MR. McCLEARN: Of course not. But I think what you have to look at in those circumstances is, what is the purpose and what is the legislative intent behind Section 7?

And Section 7 -- the problem with Section 7, to the extent it has one, is that it does require a prediction of future events. And that's what the District Court did in this case?

QUESTION: And it's enough to predict predation that you're dealing with a company that has a lot of money and that wants to increase its market share? That alone is some unusual evidence of predation?

MR. McCLEARN: No. I don't -- I think you have to go on, and I think you have to --

QUESTION: Well, then, what more do we have here?

MR. McCLEARN: You have the point --

QUESTION: That's my point. If you're running a predation theory. Frankly, I didn't see your theory below as being a predation theory.

MR. McCLEARN: The one thing that I think has got to be put to rest, my client is not concerned about increased competition. We do not take the position that competition, simply because they are bigger and we are smaller, is somehow violative of Section 7. I think you can assume a circumstance where that might exist.

For example, the economist called by the defendants in this case would not agree that a combination of IBP and Excel would, on its face, be improper. People, I suppose, can come to differing conclusions. I think he was wrong on that.

But the point that we make here is that the District Court did look at Section 7. He did look at what the purpose of Section 7 was. He looked at the market. He looked at the degree of concentration. He looked at the trend of concentration. He really did follow this Court's precedents, I think.

QUESTION: Mr. McClearn, to come to the conclusion that predatory pricing will ensue from a merger, don't you have to find, as a matter of fact, that one of the merged companies intend to drive the rest out of the market after they have sufficiently cut costs, cut prices? It isn't just a general kind of a vague movement toward intense competitiveness. Doesn't it require specific intent?

MR. McCLEARN: Absolutely not, I would say, Mr. Chief Justice. And the reason is this: That's the requirement of Section 2. If in fact I have to prove a Section 2 case, we can put Section 7 aside; it would have no purpose.

QUESTION: Well, but if we're talking about predatory pricing, and I thought this was the definition that was repeated most recently in Matsushita, it's the intent to cut prices, drive -- so that your competitor can no longer stay in the market. And then, when they have dropped out, you raise the prices and take the benefit finally of all the losses you've sustained.

Now, that, to me, requires a specific intent. That's a plan.

MR. McCLEARN: But there is a considerable difference, I submit to your, sir, between Matsushita and this case.

One is, that was a Section 1 and a Section 2 case where the specific intent was required. More importantly, that case involved an alleged predation by a whole series of companies.

QUESTION: It may be that you can succeed in this case without proving predatory pricing, but I don't see how you can prove predatory pricing without proving more in the way of intent than you can see.

QUESTION: What intent do you have?

MR. McCLEARN: Sir?

QUESTION: What do you have in the record to show intent specifically?

MR. McCLEARN: What there is in the record --

QUESTION: Yes, sir.

QUESTION: -- Justice Marshall, is the fact that as a result of this acquisition Excel will have a market share something over 20 percent. It acknowledged in its own papers that a 20 percent market share -- and we cite it in our brief -- will create price influence.

Secondly, we have documents, again from its own file, saying that it intends to inhibit the market share of smaller competitors. That's my client, among others.

Thirdly, we have, as the District Court found, the resources, the market, the economic client, that would permit it to do that.

Now, that doesn't really say that it will. But the District Court, in those circumstances, is required to make a prediction.

QUESTION: Excuse me --

QUESTION: They took a whole lot of individual points, no one of which would do anything, and combined them to make the intent.

MR. McCLEARN: I think that's true, although I would not agree with you, sir, that I have to prove intent, because that isn't what Section 7 is intended to do. It really isn't, I don't think. I don't think the legislative --

QUESTION: (Inaudible) cut in prices isn't exactly Section 7.

MR. McCLEARN: Well --

QUESTION: I mean, because antitrust wasn't set up to keep prices at the right level.

MR. McCLEARN: It certainly was not.

QUESTION: So then you have to show something in addition to cutting prices. That's all the Chief Justice was saying.

MR. McCLEARN: Well --

QUESTION: Cutting prices alone doesn't do it.

MR. McCLEARN: What we did show, and what the District Court found, and indeed, what the Court of Appeals also found, was that the concentration of these markets in this industry, as a result of this acquisition, and when you looked at that in the light of the trend toward concentration over the past generation, clearly brought this case as a matter of substantive Section 7 law, within the precedents of this Court and the legislative history of Section 7.

So then you have to take the next step, properly so, under Brunswick, and say, all right, if you really did prove a Section 7 violation, that's all well and good. But how would it impact your client? And the District Court did that.

And we think that we showed that. Not to a certainty, because you can't look to the future and say, this will happen. But you can look to the future, and you can take the economic facts that you have, and you can say, I believe it is probable that this will happen.

QUESTION: Mr. McClearn, let's assume that. Let's assume you even have to show less. Let's assume that all you have to show is that there is more likely to be a predatory intent here than there would in the normal case.

How do you derive that merely from the fact that here you have a company with deep pockets which will ultimately have 20-some-odd percent share of the market? To succeed in predatory pricing, don't you need enough of the market share, or enough capacity, at least, to meet the entire market demand? Otherwise, you sell your 25 percent below cost. There's no more of the goods left. Your competitors, far from being driven out, are then able to supply the other 75 percent at a handsome profit.

So you're losing money and they're gaining money.

MR. McCLEARN: Justice Scalia, that's Matsushita. That's not this case.

The difference here -- and believe me, I understand that prediction is required, because that's what the statute mandates.

QUESTION: Granted.

MR. McCLEARN: But to the extent that a company such as Excel has a motive and has the resources and has the market structure, it can target a client such as mine. It doesn't have to drive out the market with its 25 percent. It would surround one of my client's plants --

QUESTION: How could it surround -- you have a 12-state market. I thought that that was what you argued, and that's what the lower court found.

MR. McCLEARN: No --

QUESTION: How can you target a single plant if it's conceded that the market is a 12-state area?

MR. McCLEARN: Well, it was conceded, it was found, we did argue it. But that is quite different from saying that you cannot target a particular plant.

The argument that is made on the 12 states assumes that there is price uniformity and that cattle just flow within that 12-state area.

QUESTION: That's what a market means.

MR. McCLEARN: Yeah, but the judge didn't find that. He found that it was a market, but he did not find that there was uniformity of price. And in fact --

QUESTION: Excuse me. You have a single market with a disuniform price throughout -- in different pieces of it. That's a strange phenomenon, isn't it?

MR. McCLEARN: A not uniform price. A disuniform -- I don't know exactly what that means. But I do know that there was not a finding of uniformity of price, which I think in no way denigrates the finding of a 12-state market. And the result of this acquisition really would be to permit Excel to surround one of my client's plants with several. And to the extent they wished, to be selectively -- to selectively target that plant, the economic circumstances really would permit them to do it.

I might say --

QUESTION: (Inaudible.)

MR. McCLEARN: Oh, I'm sure it does. There's a --

QUESTION: What would its balance sheet show?

MR. McCLEARN: The balance sheet in 1983 would show that my client -- total sales were something like, I think, $900 million.

QUESTION: That's a profit and loss statement.

MR. McCLEARN: Sir?

QUESTION: What's the total assets?

MR. McCLEARN: The total assets would have been about, in 1983, somewheres around $50- to $60 million.

QUESTION: And gross sales just under $100 million?

MR. McCLEARN: Just under a billion. And the net earnings for 1983 would have been, I believe, about $15 million.

The beef industry, Justice Powell, is a debt-heavy industry. Return on sales, the record is clear and the findings reflect, are less than one percent, for Excel as well as for Monfort, and I think the others.

QUESTION: Your client is number four in the market?

MR. McCLEARN: I think the record indicated it was number five. But it was close to number four. I mean, four and five were close together.

One cf the things that it seems to me the court below did was to give effect to the -- what I understand the purposes of Section 7 to be; and really, one of the basic purposes of the antitrust laws. And that is, that businesses are expected to acquire profits not at the -- not by acquiring competitors but by internal expansion and growth.

And that, it seems to me, is a fundamental principle that is at issue here.

QUESTION: But if that were true, the Section 7 would have simply would have banned any acquisition, rather than saying, only those acquisitions which will substantially lessen competition are bad, wouldn't it?

MR. McCLEARN: It is not a ban, and I appreciate that. But certain as between -- as a policy matter, it is the policy of the antitrust laws to encourage growth by its internal expansion as opposed tc acquisition.

Now, of course, we all know that plenty of acquisitions take place. And indeed, there has been, to some extent, a shift of economic philosophy in recent years. I expect it will shift again in the future.

QUESTION: But certainly a good bedrock place to look for the policy of Section 7 is the language of Section 7, I would assume.

MR. McCLEARN: The language, the legislative history, and this Court's precedents, is what I would say, Mr. Chief Justice.

One of the things that occurs, and that the government suggests in its papers, is that somehow or other allowing competitors to sue here would lead to a flurry of abusive suits. Now, as one of the members of the Court suggested, there really isn't anything in the language of Section 7 that says you can draw a distinction between permitting or a competitor or a supplier or a consumer to bring this lawsuit. And I quite agree with that.

The notion, however, that the government advances here is that somehow allowing a competitor to bring a suit will cause all manner of spurious suits is simply belied by the record that we cite; the fact that there have been, I guess, a half a dozen competitor lawsuits in the last several years out of 5,000 or thereabouts acquisition transactions.

There really are all manner of tools that courts use everyday -- Rule 11, Rule 12, Rule 56 -- to deal with anything that is perceived to be an abusive suit. And surely that must not be a valid reason for preventing my client from bringing this suit.

The other point that I think deserves making, and it is noted in the briefs, and that is, there really are only two issues before this Court, in our view. The first is, do we have standing to bring a suit? Does our complaint allege a violation of Section 7?

And the second point is: Did we prove a violation of Section 7?

It is a fact that the Tenth Circuit did not review the finding of threatened injury. Now, that point is disputed in our briefs. But I submit to the Court that you cannot find, in the opinion of the Tenth Circuit, a review of the finding of the District Court of threatened injury.

QUESTION: Why does that prevent us from reviewing it?

MR. McCLEARN: I think it does not. But I believe it is -- it has been this Court's practice not to do so. That -- the failure of the Tenth Circuit to review -- and of course it found, it says, that that issue was not raised on appeal by my opponents -- was not cited as a ground for error by them here, nor in any kind of a petition for reconsideration at the Tenth Circuit.

It clearly is not jurisdictional. And indeed, as I have argued to you, even if you were to go ahead and review the finding of threatened injury, I think that we have made our record sufficient on that point.

QUESTION: Mr. McClearn, let's assume that the courts below hadn't proceeded on a predation theory. And as I told you before, that's the way I read their opinion; that what they're talking about is cost-price squeeze, that is that, simply, the increased ability of this company to compete will drive out the plaintiff. Let's assume that that's what they said. And that this would lead to an oligopoly market, thereby harming the public interest in the way that the law proscribes.

What reason would there be to believe that it would lead to an oligopoly market? How could an oligopoly market be maintained in this industry, with the entry being as easy as it seems to me it would be, once other people had been driven out?

Specifically, you assert that the manufacturing equipment is not useable for other purposes. So no matter how many people you drive out, the equipment would be lying there idle. So that if anybody wants to come back in, they can pick it up for a song and get right back into the business.

How do you have an oligopoly problem?

MR. McCLEARN: I think you asked two questions.

QUESTION: I think it's all one.

MR. McCLEARN: All right. You're talking about the barrier to entry problem. First of all, the District Court clearly, specifically, and on a complete record, found that there were significant barriers to entry.

Secondly, if you did have the oligopoly that you suggest -- let's assume for purposes of your question that only IBP and Excel are left -- the notion that somebody would be willing to invest the sums of money to come in and compete with those two companies seems to me to fly in the face of almost any reality.

It would be about like suggesting that somebody would say, well, look at the profits that Ford and General Motors are making. Why shouldn't I go into the car manufacturing business in the United States? And I don't think anybody would do that.

QUESTION: But the United States just did it recently.

MR. McCLEARN: I guess I'm not familiar with what you're --

QUESTION: I'm talking about the Chrysler bailout.

It surely depends on how much it costs you to pick up the equipment that is to be used tc manufacture the competitive product.

MR. McCLEARN: I respectfully disagree with you, because it seems tc me it is the perception of the entrant or the would-be entrant as to how long he is going tc be able to survive, and hcw long there will be super-competitive prices if he enters.

And clearly, anybody facing a duopoly like that would believe, if they had the power to exclude all previous competitors, they're not going to sit idly by and just let he come in --

QUESTION: You forget, we're assuming no predation. We're assuming no predation here. We're assuming it's just fierce competition he has to confront. Why wouldn't it pay him to come intc an industry that seems to be making a higher than normal profit by picking up the equipment of those ccmpanies that have gone out of business, and which equipment is just lying around?

MR. McCLEARN: Well, I don't know that you can assume no predation. The District Court, among other things, found what it called psychological barriers. But what it really was talking about, I think, was simply the fact that you have an entrenched company or companies with existing customers and distribution systems and all of that.

And that is a very substantial noncost barrier to anybody that would enter a high-cost industry. That's, I suppose, why you need to look to the future when you're trying to make a Section 7 prediction, the best that a judge can do. The statute requires a district judge to make those predictions.

He takes the best evidence he's got. He makes a judgment, in this case, I submit, a thorough and thoughtful judgment, a judgment that has been affirmed by the Court of Appeals after a pretty careful review. And that's all he can do.

QUESTION: Mr. McClearn?

MR. McCLEARN: Yes, sir.

QUESTION: This complaint was brought three years ago. Did you have a merger agreement? How is the deal to be consummated? By a merger agreement?

MR. McCLEARN: You mean the one that we attacked?

QUESTION: Yes.

MR. McCLEARN: There was at least a buy and seel agreement.

QUESTION: Is that a binding contract?

MR. McCLEARN: Sir?

QUESTION: You had a binding contract?

MR. McCLEARN: Well, my opponents did. I attacked the merger.

QUESTION: I understand that.

MR. McCLEARN: Yes. There was a binding contract.

QUESTION: What's the status of that contract today, three years later?

MR. McCLEARN: I don't know.

QUESTION: Were there any outs in it? Is the case moot? You'd probably like to have it moot, I suppose.

MR. McCLEARN: No, I think it is not moot. That subject has been raised, Justice Powell, as a reason by -- particularly by the Department of Justice as to why suits by competitors should be frowned about.

QUESTION: It's a favorite way to defeat a takeover.

MR. McCLEARN: In this case, Your Honor, this case was tried on the merits. Within 2-1/2 months from the date that we filed our complaint, and 2-1/2 months before the closing date of the transaction that we sought to enjoin.

If the judge -- and since the judge ruled in our favor, since he found merit to our complaint, then indeed, that transaction, at least for the moment, should have been enjoined.

If we had not brought a meritoricus complaint, I assume that he would have found against us. And the transaction could have gone forward.

It doesn't seem to me that you can carve out merger transactions from any other kind of business and maybe some nonbusiness transactions, and say they sort of deserve special treatment at the hands of the courts.

You either bring a meritorious complaint, or you don't. And that's what the Court must decide.

QUESTION: Mr. McClearn, you have claimed standing up here, although you did not below, not just in your capacity as a manufacturer of boxed beef, but also on the basis that Monfort is a supplier of fed cattle.

MR. McCLEARN: That's true.

QUESTION: Now, as I recall, it was conceded below that suppliers of fed cattle would have standing. If that was so, why didn't you -- and if indeed you are so clearly a supplier of fed cattle, why didn't you simply say, well, we're that, too, below?

MR. McCLEARN: The fact of the matter is as you describe it. The reason we didn't below, Justice Scalia, was that in 1983, which really wasn't very long ago, it seemed so totally clear to us that no one had a better claim to standing than a competitor.

Indeed, I confess, we looked at the question, but we didn't look very far. We looked at Professor Areeda, for example, who just said, of course competitors have got standing.

And I -- and I have to say to you that I did not, as a standing matter, regard it as a serious question.

QUESTION: The Professor is on your opponent's brief.

MR. McCLEARN: He is.

If there are no further questions, thank you very much.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. McClearn.

The case is submitted.

(Whereupon, at 2:57 p.m., he case in the above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#85-473 - CARGILL, INC., AND EXCEL CORPORATION, Petitioners V.

MONFORT OF COLORADO, INC.

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BY Paul A. Richardson

(REPORTER)