MERGER ANTITRUST LAW

LAW 1469
Georgetown University Law Center
Fall 2024

Tuesdays and Thursdays, 3:30 pm – 5:30 pm
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CLASS 18 WRITTEN ASSIGNMENT

Instructions

Submit by email by 5:00 pm on Monday, October 28
NOTE THAT THE RETURN DATE IS THE DAY BEFORE CLASS[1]
Send to wdc30@georgetown.edu
Subject line: Merger Antitrust Law: Assignment for Class 18

Assignment

Calls for a memorandum of law.

INSTRUCTIONS[2]

This is an untimed *not-graded* homework assignment. You may consult any written source, including, without limitation, the class notes, cases, outlines (commercial or otherwise), books, treatises, the Internet, Westlaw, and Lexis-Nexis. If this were an exam question, you would have to do your own work and not talk about the problem with any student or other person until after the return date. But since this is a only practice exam question, feel free to discuss the problem with others in the class. The idea here is to learn how to write an answer to this type of hypothetical, so do whatever works best for you.

Present your analysis in a well-organized, linear, and concise manner. Think about your answer before writing. *Remember Pascal's apology*: "I am sorry that this was such a long letter, but I did not have the time to write you a short one." Clarity of thinking and exposition are much more important than throwing in the kitchen sink. Do not, for example, tell me things you know are not relevant to the answer; it will just cost you time, and you will not get any credit for extraneous material. Penalties will be levied for excessive length, verbosity, or lack of organization.

The "facts" in the hypothetical should be complete in that they present what is known at the time the analysis is requested. As in life, some information you would like to have may simply not be available. Analyze the facts as they are presented in the question.

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[1] I will distribute the instructor's answer/feedback memorandum on Monday night.

[2] With two exceptions—namely, this homework assignment is not graded and you may work with others in preparing your own answer—these instructions are identical to the one you will receive for the graded homework assignment. My expectation, which is subject to discussion and change, is that I will give out the graded homework assignment on Friday, November 8, and it will be due on *Wednesday, November 20, at 8:00 pm*. Note that this is the day *before* Class 24. I would like to review your answers before we discuss the problem in Class 24.

It should go without saying that, outside of this assignment, you should not believe anything in the statement of any hypothetical fact situation. I have taken considerable liberties in fashioning the problems and have ignored reality whenever it was convenient.

This homework assignment is final. Do not expect any clarifications or corrections. If you believe there is an error or inconsistency in the problem, please state your assumptions about the issue in your discussion of that issue. You may email me if you wish, but I will either not respond or respond to the class as a whole. *For this reason, and more importantly, because we will continue working on cases that may further illuminate concepts relevant to the homework assignment, I suggest you wait until shortly before the due time to submit your answer.*

You should assume that all demand, inverse demand, and residual demand curves are linear, that marginal costs are constant, and that all firms maximize their profits given their residual demand curves and marginal costs. You also should assume that the requisite effect on interstate commerce is present and that the transaction involves the acquisition of stock or assets, so you do not have to address these elements in your analysis of a possible Section 7 violation.

Ice Cream Merger

You are an attorney at the FTC, and your group is reviewing Clare's pending acquisition of Bennie's, two manufacturers of ice cream. The acquisition is for all cash, and Clare's is paying a 40% premium for Benny's stock. Melissa Brown, your section chief, has asked you to prepare a memorandum recommending whether the FTC should seek a preliminary injunction blocking the transaction from a federal district court pending a resolution of the merits in an administrative trial. In particular, Ms. Brown is seeking your analysis of how strong the FTC's prima facie case of a Section 7 violation is likely to be and whether the FTC can defeat the defenses the merging parties advanced during the investigation. Ms. Brown also would like you to address how the court is likely to balance the equities and what the court is likely to decide on the ultimate question whether to enter the FTC's requested preliminary injunction. The transaction's success will turn on the outcome of the Section 13(b) proceeding because Clare's and Benny's have told the staff that they will terminate their transaction if the district court enters a preliminary injunction and will not litigate the merits in an adjudicative proceeding.

The FTC's investigation has revealed the following facts.

The industry recognizes two types of ice cream: premium ice cream and regular ice cream. Premium ice cream has more butterfat content, less overrun (that is, less air, which makes it more creamy), and more calories than regular ice cream. Premium and regular ice cream are made on the same machines. Switching is gallon-for-gallon and involves negligible switching costs. The marginal costs of producing premium and regular ice cream, however, differ because of the difference in the cost of ingredients. The marginal cost of producing premium ice cream is \$2.80 per gallon, while the cost of producing regular ice cream is \$2.40 per gallon. Marginal costs, which are constant, have not changed in recent years and are not expected to change in the future.

Notwithstanding this ease of switching on the production equipment, Clare's, which entered into the manufacture of premium ice cream three years ago, is the only regular ice cream manufacturer that has begun new production of premium ice cream over the last ten years. A second firm, Dino's, entered into the manufacture of premium ice cream four years ago, but Dino's did not produce regular ice cream and entered the market de novo.

Ice cream products are differentiated by content and brand. While prices can and have varied among brands within both premium and regular ice cream, actual prices charged by manufacturers during the investigation have converged—with no sign of collusion—throughout the country to $4.00 per gallon for premium ice cream and $3.00 per gallon for regular ice cream.[3] The following chart gives sales for ice cream manufacturers:

Ice Cream											
	Premium Ice Cream				Regular Ice Cream				All Ice Cream		
Manufacturer	Gallons	Revenues	Profits	Revenue Share	Gallons	Revenues	Profits	Revenue Share	Total Revenues	Revenue Share	Total Profits
Clare's	43.8	$175	$53	5.0%	1,608.3	$4,825	$965	31.7%	$5,000	26.7%	$1,018
Breyers	8.8	$35	$11	1.0%	1,588.3	$4,765	$953	31.3%	$4,800	25.6%	$964
Al's	393.8	$1,575	$473	45.0%	808.3	$2,425	$485	15.9%	$4,000	21.4%	$958
Benny's	350.0	$1,400	$420	40.0%	0.0	$0	$0	0.0%	$1,400	7.5%	$420
Turkey Hill	0.0	0	$0	0.0%	300.0	$900	$180	5.9%	$900	4.8%	$180
Blue Bell	8.8	$35	$11	1.0%	205.0	$615	$123	4.0%	$650	3.5%	$134
Izzy's	8.8	$35	$11	1.0%	138.3	$415	$83	2.7%	$450	2.4%	$94
Wells	8.8	$35	$11	1.0%	88.3	$265	$53	1.7%	$300	1.6%	$64
Dino's	43.8	$175	$53	5.0%	0.0	$0	$0	0.0%	$175	0.9%	$53
Eddy's	8.8	$35	$11	1.0%	0.0	$0	$0	0.0%	$35	0.2%	$11
Store brands (10)	0.0	0	$0	0.0%	338.3	$1,015	$203	6.7%	$1,015	5.4%	$203
	875.0	$3,500	$1,050	100.0%	5,075.0	$15,225	$3,045	100.0%	$18,725	100.0%	$4,095

Note: Gallons and revenues are in millions

There are high cross-elasticities of demand between brands within each ice cream segment and low cross-elasticities between individual products across these two segments. So, for example, if one premium ice cream manufacturer were to increase its price while the other premium ice cream manufacturers held their prices constant, the higher-priced manufacturer would lose 20% of its volume to its premium brand rivals and no volume to regular ice cream. The converse is true for regular ice cream brands.

For a 5% uniform increase in the price across all brands of premium ice cream, however, each premium brand would lose 16.67% of its unit sales to regular ice cream and none to other brands of premium ice cream or non-ice cream products. For a 5% uniform increase in the price of all brands of regular ice cream, each regular brand would lose 7.5% of its unit sales to premium ice cream and none to other brands of regular ice cream or non-ice cream products. When the price of all brands of ice cream (premium and regular) is increased by 5%, there would be no switching between premium and regular brands of ice cream, but each brand of premium ice

[3] I appreciate that this is a very counterfactual assumption. I could make the problem more realistic by introducing different prices for different products, but then you would have to deal with some arithmetical complications in applying the hypothetical monopolist test that I am sure you would rather avoid.

cream would lose 3% of its unit sales to non-ice cream alternatives, while each brand of regular ice cream would lose 5% of its unit sales to non-ice cream alternatives.

Clare's (the buyer) is the largest manufacturer of regular ice cream and the third largest manufacturer of premium ice cream. Benny's (the target) is the second-largest manufacturer of premium ice cream but manufactures no regular ice cream. In its meetings with the staff, Clare's discussed its deal rationale and made five arguments in defense of the transaction:

Clare's deal rationale:

1. Clare's is buying Benny's to become a more significant player in premium ice cream. Clare's began manufacturing and selling premium ice cream only three years ago. While Clare's has invested almost all of its premium ice cream profits in advertising its premium brands, it has only achieved a market share of 5%. This rate of growth is too slow for Clare's management. Clare's believes its inability to gain market share more quickly is primarily due to its reputation as a regular ice cream manufacturer, where Clare's is known as a large but undistinguished producer with little of the "flair" associated with premium ice cream brands. Following the merger, Clare plans to drop Clare's premium brand name and consolidate all its premium operations into Benny's brand, one of the best brands in the premium ice cream business.
2. Clare's plans to invest its savings from the acquisition in the premium ice cream business, aggressively take on Al's, the premium ice cream market leader, and grow the merged firm's volume and market share.
3. Since entering the premium ice cream space, Clare's has introduced many new premium ice cream flavors, some of which have become quite popular. Before Clare's entry, the other premium ice manufacturers only rarely introduced a new flavor. After Clare's entry, Al's and Benny's have been introducing new flavors to match the Clare's flavors that have become popular. Clare's says that it will bring its spirit of innovation to the management of Benny's.
4. The merged firm can save $60 million in annually recurring overhead costs by consolidating management, back office, and sales operations and eliminating almost all of Benny's corresponding operations. The staff does not dispute these numbers.
5. The merged firm can save another $30 million in operating costs by consolidating production. Clare's smallest plant makes 200 million gallons of regular ice cream and currently makes no premium ice cream. The merged firm can close this plant and move the production into Benny's single plant, which is new and currently has 350 million gallons of excess capacity. The staff does not dispute these numbers.

Clare's antitrust arguments:

1. The relevant market in which to analyze the transaction is the manufacture and sale of all ice cream in the United States.[4] The characteristics, interchangeability of use, and supply-side substitutability are sufficient under judicial precedent to make all ice cream the relevant market. This market also satisfies the hypothetical monopolist test

[4] The staff agrees that the relevant geographic market is the Unitd States.

under the Merger Guidelines. Within this relevant market, the merger is too small to create a competitive problem.

2. Even if the market is technically defined as premium ice cream, the HHIs based on actual sales are not all that high. The shares are even lower when, under the Merger Guidelines, regular ice manufacturers are considered participants in the market even if they do not currently make premium ice cream. When the participation of these manufacturers is properly attributed with market shares of premium ice cream due to the ease of supply-side switching, the transaction does not trigger the *PNB* presumption under either judicial precedent or the Merger Guidelines.

3. Dino's, which entered four years ago and today has the same share as Clare's in premium ice cream, has also been trying to grow in premium ice cream (primarily by investing in advertising). The staff has confirmed this. Moreover, in an interview with the staff, Dino's said it would continue to aggressively invest in its brand name reputation whether or not Clare's and Benny's merge. Clare's submits that Dino's continuing efforts to grow will ensure that the market remains competitive postmerger.

4. In addition to its innovation in new flavors, Clare's has successfully built its premium ice cream market share by holding the line on price increases when other manufacturers were attempting to institute price increases. Clare's says that it will bring the same philosophy of holding the line on price increases and innovating to the management of the merged firm. The staff confirmed that Al's has sought to lead a price increase for premium ice cream on many occasions, including before Clare's entry. All of the other premium ice cream manufacturers followed Al's lead. When Clare's entered, however, Clare's resisted following Al's lead in raising prices. Al's continued to raise prices periodically, but at a much lower magnitude than before Clare's entered into the premium ice cream business, and all of the other premium ice cream manufacturers except Clare's followed Al's price increase. It is also undisputed that Clare's is a leader in creating new flavors of premium ice cream and that Al's and Benny's both responded to Clare's successful innovations with matching innovations of their own.

5. The merger will produce substantial efficiencies that will offset any possible anticompetitive effect of the transaction.

MEMORANDUM OF LAW VERSION

Note: This answer is much longer and more detailed in the explanation than anything I would expect for a graded homework assignment or an exam answer. I prepared this to explain further the law and reasoning, not as a model exam answer. You should be thinking about what "boilerplate" descriptions of legal concepts and economic tools you should prepare in advance to copy and paste into the exam answer. You should also be thinking about strategies for writing a more compact memorandum that addresses each element of the prima facie case and each defense.

To: Melissa Brown

From: Dale Collins

Clare's/Benny's Ice Cream Merger

You have asked me to assess whether the FTC should be able to obtain a preliminary injunction blocking the pending acquisition by Clare's of Benny's, two manufacturers of ice cream, from a federal district court pending a resolution of an FTC challenge in an administrative trial. In particular, you have asked me to assess how strong the FTC's prima facie case of a Section 7 violation is likely to be and whether the FTC can defeat defenses the merging parties have advanced in the investigation. You have also asked me to address how the court is likely to balance the equities and what the court is likely to ultimately decide on the petition to enter the FTC's preliminary injunction.

For the reasons explained below, the Commission should prevail in its petition for a preliminary injunction under Section 13(b) of the FTC Act blocking Clare's acquisition of Benny's pending the conclusion of the administrative adjudication of the merits of the Commission's Section 7 claim against the transaction. On the facts found in the investigation, the Commission has a strong likelihood of being able to prove to the district court that Clare's proposed acquisition of Benny's would violate Section 7 in the nationwide manufacture and sale of premium ice cream and separately in the nationwide manufacture and sale of all ice cream. The *PNB* presumption is easily satisfied in premium ice cream, and although more borderline in all ice cream, there is additional evidence of consumer harm resulting from anticompetitive unilateral and coordinated effects in both markets.[5] Consumers are likely to be harmed by both an increase in prices and a

[5] **Note to students**: Since there is such a strong case in premium ice cream, it is not necessary to also plead an all ice cream market. Clare's, however, is arguing that an all ice cream market is the only relevant market and, in that market, there is not likely anticompetitive effect resulting from the merger, so somewhere in the memorandum you will have to evaluate whether all ice cream is a relevant market. There are two ways to rebut this argument: (1) show that all ice cream is not a relevant market, or (2) even if it is, show that the merger will have an anticompetitive

reduction in the rate of product innovation as a result of the merger. The various expansion, repositioning, innovation efficiencies, and cost efficiencies defenses advanced by the parties are either not verifiable, contradicted by the facts, or fail to show they are sufficient to negate the upward pricing pressures and the reduced incentives to innovate that the merger would likely create. The equities, especially the public's interest in effective antitrust enforcement and effective relief, weigh heavily in favor of entering a preliminary injunction. The equities weighing against the entry of the injunction are, at most, only the delay in the receipt of the private monetary benefits of the merger to the merging parties and their shareholders, and these benefits will never materialize if the merger is found to be unlawful on the merits. The court should enter the injunction after finding it to be in the public interest.

Introduction

Section 7 of the Clayton Act prohibits mergers and acquisitions "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. By its terms, a Section 7 violation contains three essential elements: (1) a relevant product market ("line of commerce"), (2) a relevant geographic market ("section of the country"), and (3) a reasonably probable anticompetitive effect in the relevant market (that is, the combination of the relevant product market and the relevant geographic market).

The Commission may seek injunctive relief to enjoin a transaction pending the resolution of the Section 7 merits in an administrative proceeding under Section 13(b) of the Federal Trade Commission Act "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest." 15 U.S.C. § 53(b). The public interest standard requires courts to "measure the probability that, after an administrative hearing on the merits, the Commission will succeed in proving that the effect of the [proposed transaction] may be substantially to lessen competition" in violation of the Clayton Act. *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 22 (D.D.C. 2015).[6] As a matter of precedent, the Commission meets this standard if it "has raised questions going to the merits so

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effect in that market. I chose to evaluate Clare's argument as part of the prima facie case, but it would have been perfectly OK to evaluate it when assessing the defense.

6 **Note to students**: You do not have to cite cases in the graded homework assignment or the exam. However, you may find it helpful to prepare some boilerplate with case quotes and citations to address a legal principle (as the above text illustrates). The instructions to the graded homework assignment and the exam instructions will provide:

> As we discussed in class, you may cut and paste short passages ***from materials you have created*** to introduce a concept, a rule of law, a legal principle, or an economic proposition or formula. You may include quotes from cases in the materials you create for this purpose, but if you do so prepare the quote and cite the case (in proper Blue Book form) as you would in a brief. You are prohibited from copying/cutting and pasting any other prewritten text (written prior to starting your exam) into your take-home exam responses, regardless of who authored the text.

I suggest that you prepare a document to collect all of these boilerplate passages in one place. For convenience, I informally call this document a "cheat sheet," although, to state the obvious, since it is permitted under the exam instructions it does not involve cheating.

serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals." *Id*. at 23. However, although never explicitly recognized in their opinions, the federal courts, as a practical matter, appear to apply more of a permanent injunction standard in Section 13(b) proceedings. The courts recognize that if the court enters a blocking preliminary injunction, the deal will not survive the additional time necessary to litigate the merits, and instead, the parties will terminate their merger agreement. In practical effect, then, a preliminary injunction is a permanent injunction, and most courts appear to decide Section 13(b) petitions accordingly. This means we should assess the likelihood of success of our Section 13(b) petition as if we were requesting a permanent injunction, although we will write our briefs using the Section 13(b) preliminary injunction standard.

Clare's acquisition of Benny's is a horizontal acquisition since it involves competitors in the production and sale of ice cream generally and premium ice cream in particular. In horizontal cases, courts have adopted a three-step burden-shifting procedure:

1. The plaintiff bears the burden of proof in market definition, market shares, and market concentration within the relevant market sufficient to trigger the *PNB* presumption (explained below) or otherwise make out a prima facie case of anticompetitive effect.[7]
2. Once the plaintiff has made a prima facie showing of a Section 7 violation, the burden of production shifts to the defendant to adduce evidence sufficient to create a genuine issue of fact on at least one element of the prima facie case for the trier of fact to decide.
3. If the defendant discharges its burden of production, the burden of persuasion returns to the plaintiff to prove in light of all of the evidence in the record that the merger is reasonably probable to have an anticompetitive effect in a relevant market.

See United States v. Baker Hughes, Inc., 908 F.2d 981, 982-83 (D.C. Cir. 1990). Although not required, the plaintiff may strengthen its prima facie case by presenting additional evidence supporting a finding that the transaction is anticompetitive. Courts apply a "sliding scale" approach to the defendant's burden in Step 2 above so that the stronger the plaintiff's prima facie case, the higher the defendant's quantum of proof to discharge its burden of production for putting the plaintiff's prima facie case in issue. *Id*. at 983.

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[7] **Note to students:** You will see that I have modified the first step in the *Baker-Hughes* rule slightly by adding "or otherwise make out a prima facie case of anticompetitive effect." In horizontal cases, courts phrase Step 1 in terms of establishing a prima facie case of anticompetitive effect through the *PNB* presumption. Although technically there is no requirement to employ the *PNB* presumption to make out the prima facie case, I know of no horizontal case where the presumption was not used. In nonhorizontal cases, however, there are no presumptions of anticompetitive effect, so Step 1 will require the plaintiff to make out its prima facie case of anticompetitive effect through affirmative evidence. Hence, the modification. For an application in a vertical case, see *United States v. AT&T Inc*., 310 F. Supp. 3d 161, 191 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019) (which we will examine late in the course).

Both the 2010 and 2023 DOJ/FTC Merger Guidelines focus more on competitive effects and do not strictly require a showing of a relevant market. Courts, however, have not adopted this view of the law. To obtain a preliminary injunction, the Commission will have to petition a federal district court, which will require the showing of a relevant market under prevailing case law precedent. As to the showing of anticompetitive effects, the courts continue to employ the *Philadelphia National Bank* presumption in assessing a prima facie case. They also have accepted the theories of anticompetitive harm in the Merger Guidelines to further strengthen the prima facie case. Accordingly, I will analyze the transaction under the usual judicial framework:

1. The prima facie Section 7 case
    a. The relevant product market
    b. The relevant geographic market
    c. Market shares, concentration, and the *PNB* presumption
    d. Additional evidence supporting the prima facie case
2. The defendants' arguments
3. Conclusion on Section 7 legality
4. Weighing of the equities
5. Conclusion

1. The prima facie Section 7 case

The plaintiff must present evidence that permits the trier of fact to find the existence of each of the three essential elements of a Section 7 violation: (1) the relevant product market ("line of commerce"), (2) the relevant geographic market ("section of the country"), and (3) a reasonably probable anticompetitive effect in the relevant market.

a. The relevant product market

We should allege two relevant product markets: premium ice cream and all ice cream. There are two complementary approaches to product market definition: the *Brown Shoe* "outer boundaries"/"practical indicia" criteria and the hypothetical monopolist test. Both proposed markets satisfy both tests.

First, under *Brown Shoe*, the "outer boundaries" of the relevant product market "are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). Today, courts regard "reasonable interchangeability of use" as synonymous with cross-elasticity of demand. Moreover, "within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id*. (internal citations and footnotes omitted). But this list is not exhaustive, and courts may consider any evidence probative of cross-elasticity of demand. The original purpose of the *Brown Shoe* "practical indicia" was to enable the finding of relevant "submarkets" within larger markets defined by the "outer boundaries" test. Modern courts, however, do not view submarkets as any different from markets and regard the *Brown Shoe* "practical indicia" as factors qualitatively probative of reasonable interchangeability of use and high cross-elasticity of demand. The *Brown Shoe* test is qualitative in nature.

Second, the original "hypothetical monopolist test," which was introduced by the Merger Guidelines in 1982 and now adopted in one form or another by the courts, deems a product grouping ("candidate market") as a relevant market if a hypothetical monopolist of all products in the product group could profitably raise the prices in the product grouping by a "small but significant nontransitory price" (SSNIP), usually taken to be 5% for a period of one year. The hypothetical monopolist test is a quantitative test. The 2010 and 2023 Merger Guidelines have modified the hypothetical monopolist test in two significant ways:

1. Originally, the hypothetical monopolist test only deemed the smallest product grouping that satisfied the test to be a relevant market (the "smallest market principle"). Under the 2010 and 2023 Merger Guidelines, while the smallest market principle remains the preferred approach, a larger market can be used where appropriate to reflect the economic realities.[8]
2. Originally, the hypothetical monopolist test required the hypothetical monopolist to increase the prices uniformly of all products in the candidate market. Under the 2010 Merger Guidelines, the hypothetical monopolist is now permitted to raise the prices of one or more products selectively while leaving the prices of the other products constant, provided that at least one of the products subject to the price increase is a product of a merging firm.[9] The hypothetical monopolist test requires only that the hypothetical monopolist be able to profitably raise the price of a *single* product in the product group for the product grouping to be a relevant market.[10]

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8 **Note to students**: As we have discussed in class, prior to 2010 the agencies on occasion had alleged relevant markets that satisfied the smallest market principle but did not look like any market or product grouping the industry or its customers had ever recognized. Courts tended to hold this departure from the "business realities" against the agency in rejecting the agency's market definition. The 2010 Merger Guidelines rectified this problem by recognizing broader markets that reflect the business realities. The FTC did this, for example, in alleging its market for DDIY tax preparation software in *H&R Block*. The FTC defined the market to include all DDIY tax products, even though smaller markets consisting of any two of the three major products satisfied the hypothetical monopolist test.

9 **Note to students:** The 2023 Merger Guidelines appear to eliminate the requirement that at least one of the products subject to the price increase is a product of a merging firm, but a horizontal merger will not result in an anticompetitive price increase unless one of the constitutent merged firms increases its price.

10 **Note to students:** I could have added a third change—the arguable shift from a profitability interpretation of the HMT to a profit-maximization interpretation. As we discussed in class, however, the agencies in practice continue to use a profitability test in their investigations and, in court, the majority of courts have continued to use

The courts have adopted these modifications. In particular, modern courts use the one-product SSNIP test to define relevant markets when products are differentiated. *See, e.g.*, *FTC v. IQVIA Holdings Inc.*, 710 F. Supp. 3d 329, 369 (S.D.N.Y. 2024); *FTC v. Meta Platforms Inc.*, No. 5:22-CV-04325-EJD, 2023 WL 2346238, at *15 (N.D. Cal. Feb. 3, 2023); *FTC v. Shkreli*, 581 F. Supp. 3d 579, 626 (S.D.N.Y. 2022); *FTC v. RAG-Stiftung*, 436 F. Supp. 3d 278, 293 (D.D.C. 2020); *FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 47 (D.D.C. 2018); *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 198 (D.D.C. 2017); *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 20 (D.D.C. 2017); *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 121 (D.D.C. 2016); *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 33 (D.D.C. 2015); *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 51-52 (D.D.C. 2011).

Premium ice cream. Premium ice cream satisfies the *Brown Shoe* "outer boundaries" and "practical indicia" criteria. Although the investigation did not determine the numerical value of the cross-elasticities between products within premium ice cream, it did reveal that the cross-elasticities between premium ice cream products are high. The investigation showed that if one premium ice cream manufacturer were to increase its price while the other premium ice cream manufacturers held their prices constant, the higher-priced manufacturer would lose 20% of its volume to its premium brand rivals, indicating a high cross-elasticity between premium ice cream brands. Conversely, under these circumstances, the higher-priced manufacturer would lose no volume to regular ice cream, indicating that the cross-elasticity at the individual firm level between premium ice cream and regular ice cream is low. Moreover, premium ice cream satisfies a number of the *Brown Shoe* practical indicia: the industry recognition of premium ice cream as distinct from regular ice cream, premium ice cream has differentiating characteristics (namely, more butterfat content, less overrun, and more calories than regular ice cream), premium ice cream costs more to manufacture ($2.80 v. $2.40 per gallon), and, probably most importantly, premium ice cream has a significantly higher price ($4.00 v. $3.00 per gallon at wholesale) and 50% higher percentage margin (30% = 1.20/4.00 v. 20% = $0.60/$3.00) compared to regular ice cream. The judicial precedent, then, strongly supports a premium ice cream market.

Premium ice cream products, however, fail the hypothetical monopolist test under a uniform SSNIP test. We can implement the uniform SSNIP test using percentage critical loss. The percentage critical loss for a product grouping with a uniform SSNIP (δ) of 5% and a uniform margin of 30% is:[11]

the profitability test, and the instances in which the two tests diverge will be rare. Accordingly, there is no need to discuss the profit-maximization test, although there would be no harm in dropping a footnote to it.

11 **Note to students**: It is helpful if you show your work. Students in the past have been known to make arithmetical mistakes that resulted in a mistaken antitrust outcome. If you show your work (and you can copy and paste formulas) and you make a mistake, I will be able to tell whether the mistake was arithmetical or conceptual. That said, pay attention to your intuitions. If your intuitions (and the *Brown Shoe* tests) are telling you one thing but the HMT is reaching a different result, double check your work!

$$\%CL = \frac{\delta}{\delta + m} = \frac{5\%}{5\% + 30\%} = 14.3\%$$

The investigation revealed that a 5% uniform increase in the price across all brands of premium ice cream, however, would result in each premium brand losing 16% of its unit sales to regular ice cream and none to other brands of premium ice cream. Since the percentage actual loss is greater than the percentage critical loss, this implementation of the hypothetical monopolist test fails to establish premium ice cream as a relevant market.

Alternative: Brute force accounting

Rather than apply the percentage critical loss formula, you could have done a brute force accounting:

Gain on inframarginal sales		
\$SSNIP = δp =	\$0.20	
$\%\Delta q$ =	16%	from hypothetical
q =	875	from hypothetical
$\Delta q = q \times \%\Delta q$ =	140	
$q_2 = q - \Delta q$ =	735	
Gain = q_2 × \$SSNIP =	147	
Loss on marginal sales		
p =	4.00	from hypothetical
mc =	2.80	from hypothetical
\$$m = p - mc$ =	1.20	
Δq =	140	from above
Loss =\$$m \times \Delta q$ =	168	
Net gain to HM		
Gain – loss =	-21	FAILS CRITICAL LOSS TEST

End of note

Consistent with the 2010 Merger Guidelines, however, modern courts have held that a product grouping to be a relevant market if a hypothetical monopolist could profitably impose a SSNIP on some or even only *one* of the products in the grouping, provided one of these products is a product of a merging firm.[12] Since premium ice cream products are differentiated by content and

12 **Note to students:** Since premium ice cream consists of differentiated products, you could—and indeed, should—have proceeded to the one-product SSNIP recapture test without performing a critical loss test. I performed

brand (and by prices in the past), we can apply a one-product SSNIP test. A one-product SSNIP δ for product i is profitable to the hypothetical monopolist if and only if:

$$R_i > R^i_{Critical} = \frac{\delta p_i}{\$m_{RAve}} \left(= \frac{\$\text{SSNIP}_i}{\$m_{RAve}} \right),$$

where R_i is the actual recapture ratio with the candidate market for product i, p_i is the price of the product subject to the SSNIP, and $\$mR_{Ave}$ is the recapture share-weighted average margin of the recapturing products in the candidate market. When, as here, prices and margins in the candidate market are equal, then the above condition reduces to:

$$R^i_{Critical} = \frac{\delta}{m}$$

$$= \frac{5\%}{30\%} = 16.67\%,$$

where δ is 5% and the percentage margin for premium ice cream is 30%. The investigation revealed that if the price of only one brand of premium ice cream were increased, that brand would lose 20% of its volume to other brands of premium ice cream and no volume to regular ice cream (or presumably other, non-ice cream products).[13] This indicates that:

$$R_i \approx 100\% > R^i_{Critical} = 16.7\%,$$

for all premium ice cream brands, including Clare's and Benny's. Since the actual recapture ratio for Clare's (or alternatively, Benny's) is greater than the critical recapture ratio for a one-product SSNIP, premium ice cream is a relevant product market under a one-product SSNIP implementation of the hypothetical monopolist test.[14]

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a critical loss test (1) because students in the past have done so, and (2) to show that in a differentiated products market, a candidate market can be a relevant market even if it fails a critical loss test.

13 **Note to students**: The hypothetical was deficient in that it failed to make explicit that there was little, if any, diversion to non-ice cream products. When this happens, clearly state any needed assumptions and proceed with the analysis. Any assumptions should be in the spirit of the hypothetical (e.g., don't assume that significant numbers of lost marginal premium ice cream customers switched to steaks!).

14 **Note to students:** I wrote this hypothetical so that a premium ice cream market would fail a percentage critical loss test but would pass a one-product SSNIP test. In this feedback memorandum, I wanted to emphasize that the passage of one implementation of the HMT is all that the Merger Guidelines require. I also wanted to emphasize that if the *Brown Shoe* factors and your intuitions tell you that the market is one thing, but that product grouping fails the HMT, you should (1) check your math, and (2) check if there is another HMT implementation that you can use that the candidate market might pass. That is especially true if the failed implementation is a critical loss test. As we discussed in class, one-product SSNIP tests typically generate smaller markets than critical loss tests because in the former there is recapture in the candidate market while in the later there is no recapture. So failing the critical loss test here should immediately indicate that you should be looking for reasons and ways to apply a one-product SSNIP test.

Note 1 to students: You also could have done a one-product SSNIP recapture test through brute force accounting:

Apply SSNIP to Clare's

Gain on inframarginal sales

	Premium	
\$SSNIP =	\$0.20	
$\%\Delta q$ =	20.00%	From hypothetical
q =	43.80	from hypothetical (table)
Δq =	8.76	
$q_2 = q - \Delta q$ =	35.04	
Gain =	7.01	

Loss on marginal sales

$\$m$ =	1.20	
Δq =	8.76	
Loss =	10.51	
NET Clare's =	-3.50	

Gain on recapture sales

R_i =	100.00%	from hypothetical
Recapture = $R_i \times \Delta q$ =	8.76	
$\$m_o$ =	\$1.20	from hypothetical
Gain =	\$10.51	
NET HM =	\$7.01	

You could have performed the same analysis for Benny's. When you apply a one-product SSNIP test, you should apply it to a product of the merging firm. But once you have found a product where the hypothetical monopolist would find it profitable to increase that product's price by a SSNIP, you have established that the candidate market satisfies the hypothetical monopolist test.

Indeed, there was no reason to start with a critical lost test in this hypothetical. Critical loss tests usually apply in homegeous candidate markets that support only one price and do not support recapture with a uniform SSNIP. One-product SSNIP tests are applied to differentiated candidate markets that can support recapture. Here, the hypothetical was explicit that premium ice cream was differentiated: "Ice cream products are differentiated by content and brand. While prices can and have varied among brands *within both premium and regular ice cream*, actual prices charged by manufacturers during the investigation have converged . . . ." (emphasis added). Premium ice cream is not a "brand," so differentiation by brand indicates differentiation within premium ice cream and not just differentiation between premium and regular ice cream. The second sentence is more explicit, saying that prices can and have varied within premium ice cream. But I admit that this is all a bit too subtle for an exam question and I should have been even more explicit in the writing.

I started with Clare's and found the one-product SSNIP recapture test satisfied, so there was no need to apply the test to Benny's. If you had started with Benny's, you would also have found the test satisfied, so there would have been no need to apply the test to Clare's.

Note 2 to students: Some of you may have used the aggregate diversion ratio test for a uniform SSNIP à la Warren-Boulton in *H&R Block*. The critical recapture rate $R^U_{Critical}$ is:

$$R^U_{Critical} = \frac{\delta}{\delta + m} = \frac{5\%}{5\% + 30\%} = 14.3\%,$$

The test then says that if all of the actual R_i^U's are equal to or greater than the critical recapture rate and at least one R_i^U is strictly greater than the critical recapture rate, then the candidate market satisfies the HMT. Here, the investigation revealed that increasing the price for any given brand of premium ice cream will result in 100% of its lost sales being recaptured by other premium ice cream brands (that is, each R_i is 100%). But these are one-product SSNIP recapture rates, not uniform SSNIP recapture rates. If we use one-product SSNIP recapture rates as a proxy for uniform SSNIP recapture rates, the test only provides a *presumption* that the hypothetical monopolist will be able to profitably increase the price of all products in the candidate market by the SSNIP. Here, however, we have actual uniform SSNIP recapture rates and therefore cannot use one-product recapture rates as proxies. The evidence shows that with a 5% uniform price increase in all premium ice cream brands, 16% of its unit sales are to regular ice cream but none to other brands of premium ice cream or non-ice cream products. This gives a 0% uniform SSNIP recapture rate for each premium ice cream brand, and so premium ice cream fails the uniform SSNIP recapture test.[15]

End of note

All ice cream. Since the merging parties defend their transaction in part on the grounds that the relevant market is not premium ice cream but rather all ice cream, we also should examine all ice cream as a potential relevant product market.[16]

All ice cream satisfies the *Brown Shoe* "outer boundaries" test. According to the facts revealed by the investigation, although the cross-elasticity between *individual* premium ice cream

[15] **Note to students:** Remember that this is only a *sufficiency* test. The test essentially says that when all of the prices in the candidate market are increased uniformly, the recapture for each product is enough to make the price increase for that product at least break even and, for at least one product, be strictly profitable. It is not a necessary test because it does not account for situations where one product loses money but the hypothetical monopolist more than makes up this loss through the net profit gains of other products. Accordingly, the failure of the test does not necessarily mean that the candidate market is not a relevant market.

[16] **Note to students**: You will need to address whether all ice cream is a relevant market in light of the defense that the merging parties are raising. You could do it when analyzing the defenses, but the better place would be do it here in the market definition section, especially since there is an argument that the merger is anticompetitive even in an all ice cream market.

products and regular ice cream products is relatively low, the cross-elasticity between the two *categories* of ice cream products is relatively high. The investigation revealed that a 5% uniform increase in the price across all brands of premium ice cream would result in each premium brand would lose 16% of its unit sales to regular ice cream and none to other brands of premium ice cream or non-ice cream products. Regular ice cream, then, is a significant constraint as a category on price increases by premium ice cream as a category. Likewise, for a 5% uniform increase in the price of all brands of regular ice cream, each regular brand would lose 7.5% of its unit sales to premium ice cream and none to other brands of regular ice cream or non-ice cream products. This indicates that premium ice cream as a category is a constraint on price increases of regular ice cream as a category.[17] Moreover, the aggregate demand for all ice cream is not very elastic: the investigation revealed that a uniform 5% SSNIP across all ice cream products would cause each brand of premium ice cream to lose only 3% of its unit sales, all to non-ice cream alternatives, and each brand of regular ice cream to lose only 5% of its unit sales, all to non-ice cream alternatives. This indicates a low cross-elasticity and the absence of reasonable interchangeability between ice cream and non-ice cream alternatives. The *Brown Shoe* practical indicia also support a finding of an all-ice cream market: the industry and the public recognize ice cream as distinct from other types of foods, ice cream has peculiar characteristics and uses, is produced using unique production facilities, and has distinct prices from non-ice cream products.[18]

All ice cream is also a relevant market under the Merger Guidelines. Indeed, with selective SSNIPs and the elimination of the smallest market principle, if a candidate market satisfies the hypothetical monopolist test, then any superset of that candidate market also satisfies the hypothetical monopolist test. Since we have already shown that premium ice cream is a relevant market, then all ice cream is a relevant market.

Note to students: Although not necessary, you could have performed a critical loss test to show that all ice cream is a relevant market under the Merger Guidelines:

The traditional hypothetical monopolist test with a uniform price increase shows that all ice cream is a relevant product market under a 5% SSNIP. We can test this using percentage critical loss analysis. The formula for percentage critical loss %CL is:

[17] **Note to students**. You could convert the data provided in the problem into cross-elasticities or diversion ratios between the two categories of products, but since we do not have numerical tests for what is "high" cross-elasticity or diversion ratio, this would not be an effective use of your time. Rather, consider this a judgment call, so just state your judgment. There are a lot of judgment calls in antitrust practice. Ms. Brown may disagree with your judgment, but she will recognize the judgment call if it is reasonably supported by the facts. I will use the same standard in grading the answer.

[18] **Note to students**: Not necessarily explicit in the hypothetical, but good, common sense points to make in the memorandum. Since the points were not explicit in the hypothetical, however, I would not hold a failure to make the points to be a deficiency in the memorandum.

$$\%CL = \frac{\delta}{\delta + m},$$

where δ is the SSNIP (here, 5%) and m is the percentage gross margin. Here, premium ice cream and regular ice cream have different margins, so we do not have a single margin to apply to an all-ice cream market. However, since when all lost sales go to non-ice cream alternatives when the prices of both premium ice cream and regular ice cream are increased by 5% (i.e., there is no recapture by any ice cream product), if premium ice cream and regular ice each separately satisfy their respective critical loss tests, then a hypothetical monopolist will be able to raise prices by 5% across all products. The percentage critical losses for premium ice cream and regular ice cream are:

$$\%CL_{\text{premium}} = \frac{5\%}{5\% + 30\%} = 14.3\%$$
$$\%CL_{\text{regular}} = \frac{5\%}{5\% + 20\%} = 20.0\%,$$

Since the actual loss for premium ice cream is 3% and the actual loss for regular ice cream is 5%, both are significantly less than their respective critical losses when the prices of all ice cream products are increased by a 5% SSNIP. Consequently, with a 5% SSNIP, the hypothetical monopolist would make money on premium ice cream products and separately on regular ice cream products. Since the hypothetical monopolist could profitably raise prices by a 5% SSNIP on each type of ice cream, all ice cream is a relevant product market.

More generally, think of the relationship between the critical loss test for a homogeneous candidate market (essentially making it a single product) and a one-product critical recapture test. The one-product critical recapture test recognizes that, in some circumstances, the hypothetical monopolist can offset the losses sustained by the firm on the product with the SSNIP through recapture by other products in the candidate market, making the one-product SSNIP profitable for the hypothetical monopolist. A critical loss test for a single firm will always fail since the firm is already at its profit-maximizing levels of price and output. But when, as here, the "product" (here, premium ice cream brands) is produced by multiple firms competing with one another, the prevailing market prices will be below the profit-maximizing price of a hypothetical monopolist. In this situation, a subset of competing products within a larger candidate market can satisfy a critical loss test without the need for recapture.

End of note

Although premium ice cream is the relevant product market under the smallest market principle, the 2010 Merger Guidelines eliminated that principle as a strict requirement. We should allege both premium ice cream and all ice cream as relevant product markets. While, as shown below, the FTC's case in a premium ice cream market is very strong, by alleging a relevant market of all ice cream products and then showing anticompetitive effects in that market as well, as a litigation tactic we can soundly preempt Clare's argument that the merger is not problematic in an all ice cream market.

b. The relevant geographic market

The relevant geographic market is the United States.

The second essential element of a prima facie Section 7 case is the relevant geographic market. In *Philadelphia National Bank*, the Supreme Court has defined the relevant geographic market to be "the area of effective competition . . . in which the seller operates, and to which the purchaser can practically turn for supplies." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 359 (1963) (emphasis removed). The relevant geographic market may also be assessed using the hypothetical monopolist test.

Brand name ice cream is sold nationwide. There are no store brands of premium ice cream and store brands account for only 6.7% of revenues in regular ice cream. Each manufacturer of premium ice cream and regular ice cream (taken separately) sells its product at a uniform price throughout the country. Courts have held that where the companies in the relevant product market sell their products nationwide at uniform prices, the United States is a relevant geographic market. The Merger Guidelines recognize this principle as well. Moreover, using the hypothetical monopolist test, we know that a hypothetical monopolist could profitably raise prices by 5% across all products across the country. (The math is the same here as in the relevant product market analysis above.) These facts confirm that the relevant geographic market is the United States.

This analysis is sufficient to establish the national market as the relevant geographic market. While there may be smaller geographic markets within the nationwide market, the facts stated in the investigation record do not allow us to analyze this. Moreover, since, as will be shown below, the merger violates Section 7 in both a nationwide premium ice cream and an all-ice cream market, it is unnecessary to examine the competitive effects in any smaller markets to obtain a preliminary injunction.

c. Market shares, concentration, and the *PNB* presumption

In *Philadelphia National Bank*, the Supreme Court held that "a merger which produces a firm controlling an undue percentage of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it is must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." *United States v. Philadelphia National Bank*, 374 U.S. 321, 363 (1963). Specifically, the court held that a combined firm with at least 30% share and an increase in the 2-firm concentration ratio from 44% to 59% was sufficient to constitute "undue market share" and cause a "significant increase in concentration" to predicate the

PNB presumption. The 2010 Guidelines provide that mergers in markets with a postmerger HHI above 2500 and a delta of 200 or more "will be presumed to be likely to enhance market power" and be sufficient to predicate the *PNB* presumption. Although the Guidelines are not binding on courts, modern courts frequently cite the Guidelines as supporting authority when finding mergers that increase the HHI by 200 or more points and result in a postmerger HHI of 2500 satisfy the predicates for the *PNB* presumption. *See, e.g.*, *FTC v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 172 (3d Cir. 2022); *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 988 F.3d 690, 704 (4th Cir. 2021); *United States v. Anthem, Inc*., 855 F.3d 345, 349 (D.C. Cir. 2017); *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 347 (3d Cir. 2016); *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd*., 778 F.3d 775, 786 (9th Cir. 2015); *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 568 (6th Cir. 2014); *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 128 (D.D.C. 2016) ("Staples' proposed acquisition of Office Depot is therefore presumptively illegal because the HHI increases more than 200 points and the postmerger HHI is greater than 2,500."). The Guidelines also provide that in moderately concentrated markets (that is, markets with an HHI between 1500 and 2500), transactions that increase the HHI by more than 100 points "potentially raise significant competitive concerns and often warrant scrutiny." The 2023 Guidelines reduce these thresholds and consider mergers that increase the HHI by 100 or more points and result in a postmerger HHI of 1800 satisfy the predicates for the *PNB* presumption. It remains to be seen whether courts will adopt these lower thresholds, although one already has. *See FTC v. Tapestry, Inc.*, No. 1:24-CV-03109 (JLR), 2024 WL 4564523, at *39 (S.D.N.Y. Oct. 24, 2024).

Premium ice cream. In premium ice cream, the transaction combines Benny's, the number 2 firm with a 40% share, with Clare's, a firm tied for number 3 with a 5% share, giving the combined firm a 45% share. The transaction would increase the HHI by 400 points to 4080:

Premium Ice Cream

	Revenues ($millions)	Share	HHI
Al's	$1,575	45.00%	2025
Benny's	$1,400	40.00%	1600
Clare's	$175	5.00%	25
Dino's	$175	5.00%	25
Eddy's	$35	1.00%	1
Breyers	$35	1.00%	1
Blue Bell	$35	1.00%	1
Izzy's	$35	1.00%	1
Wells	$35	1.00%	1
	$3,500	100.0%	3680

Combined share	45.0%
Delta	400
Postmerger HHI	4080

The resulting combined market share (45%), market concentration, HHIs, and delta would exceed what the courts have accepted in the past as sufficient to predicate the *PNB* presumption. The combined firm's share of 45% significantly exceeds the 30% threshold set in *Philadelphia National Bank*, and the transaction would result in a significant increase in concentration by eliminating one of the four top firms and increasing the 2-firm concentration ratio from 85% to 90%. Measured by the 2-firm concentration ratio, in *Philadelphia National Bank,* the market concentration increased by 15 percentage points. Here, while the increase is only 5 points, the *PNB* market was much less concentrated both premerger (44%) and postmerger (59%). By contrast, here the market premerger was already highly concentrated (85%). Given the extremely high level of premerger market concentration, the 5-percentage point increase to 90% should be seen as a merger to duopoly and sufficient to indicate as much, if not more, of a competitive problem than in *PNB* itself.[19]

The transaction also violates the Merger Guidelines, which the courts regard as informative, although not binding. The market postmerger is "highly concentrated" with a postmerger HHI of 4080 (above the 2500-point threshold), and the transaction increases the HHI by 400 points (above the 200-point threshold), making the merger presumptively anticompetitive.

All ice cream. In an all-ice cream market, the transaction combines Clare's, the number 1 firm with a 26.7% share, with Benny's, the number 4 with a 7.5% share, giving the combined firm a 34.2% share. The transaction would increase the HHI by 399 points to 2329:

[19] **Note to students**. I have absolutely no authority for this. Remember, this is an argument that the concentration statistics in this merger are worse from a competition perspective than the concentration statistics in *PNB* and therefore *PNB* itself is authority for predicating the presumption. It is not a coordinated effects argument (that will come later in additional evidence of anticompetitive effect). But since this is memorandum to the section chief, I am entitled—if not expected—to make an argument of this type. Ms. Brown may reject it, but on the other hand she may think it is both creative and compelling.

All Ice Cream

	Revenues ($millions)	Share	HHI
Clare's	$5,000	26.7%	713
Breyers	$4,800	25.6%	657
Al's	$4,000	21.4%	456
Benny's	$1,400	7.5%	56
Turkey Hill	$900	4.8%	23
Blue Bell	$650	3.5%	12
Izzy's	$450	2.4%	6
Wells	$300	1.6%	3
Dino's	$175	0.9%	1
Eddy's	$35	0.2%	0
Store brands (10)	$1,015	5.4%	3
	$18,725	100.0%	1,930
Combined share		34.2%	
Premerger HHI			1,930
Delta			399
Postmerger HHI			2329

Although the FTC has not recently challenged a transaction in this range, the combined share of 34.2% and an increase in the 2-firm concentration ratio from 53.2% to 59.8% arguably could satisfy the *PNB* presumption under the facts of *Philadelphia National Bank*.[20] Moreover, the change in the HHI of 399 and the resulting postmerger HHI of 2329, while not presumptively unlawful under the 2010 Merger Guidelines, is high enough to trigger the PNB presumption under the revised 2023 Merger Guidelines. While most modern complaints filed by the FTC and DOJ have larger HHI statistics, especially in postmerger concentration, there is judicial precedent for finding a Section 7 violation with shares and concentration in the same range as we have here. *See, e.g.*, *United States v. UPM-Kymmene OYJ*, No. 03 C 2528, 2003 WL 21781902 (N.D. Ill. July 25, 2003) (complaint alleging combined market share of 20%, delta of 190, and postmerger HHI of 2990); *see also In re Evanston Northwestern Healthcare Corp.*, No. 9315, 2007 WL 2286195, at *4 (FTC Aug. 6, 2007) (combined market share of 35%, delta of 384, and postmerger HHI of 2739).[21]

But even if the court was not willing to find that the Commission had established the predicates of the *PNB* presumption in an all-ice cream market on these structural numbers alone, when the

[20] **Note to students**: This is much more of a stretch than the last argument. The postmerger HHI is essentially the same as in *PNB*, but the change here is only 5 percentage points as opposed to the 15 in *PNB*. If I were Ms. Brown, I probably would not find this argument very compelling, but I would give you credit for taking the shot. Same for the grading.

[21] **Note to students**: It is important to cite judicial precedent here. The *Northwestern Evanston* statistics are great, but they are from an FTC administrative decision and not strictly precedent in a federal district court proceeding, which is why I put them behind a "see also" signal.

court considers the additional evidence discussed below, it should find that the Commission has established a prima facie case of anticompetitive effect in the all ice cream market.

d. Additional evidence supporting the prima facie case

Modern courts and the Merger Guidelines recognize that mergers are anticompetitive under Section 7 when they have a reasonable probability of increasing prices, reducing market output, reducing product or service quality, or reducing the rate of technological innovation or product improvement in the market compared to what would have happened in the market on a going-forward basis in the absence of the transaction.

Here, the Commission can provide additional evidence that the transaction is reasonably likely to increase prices and reduce innovation in premium ice cream. In particular, the acquisition is likely to increase the likelihood and success of coordinated interaction in the sale of premium ice cream between Al's and the combined firm generally and in particular through the elimination of Clare's as a maverick in both premium ice cream pricing and innovation. Although, for the reasons explained below, this is not a good case in which to advance a unilateral effects theory on price, an innovation unilateral effects should be successful in court.

Coordinated interaction theory. The coordinated interaction theory asks whether the merger is likely to increase the ability and incentives of a sufficient number of firms in the market to engage in successful tacit collusion. There are two conditions for the coordinated interaction theory to apply: (1) the market must be susceptible to tacit coordination, and (2) the merger must make tacit collusion either more likely or more successful.

Here, the premium ice cream market is susceptible to tacit coordination premerger. The premium ice cream market is characterized by two dominant firms (Al's and Benny's) that collectively account for 85% of premium ice cream sales premerger. There is evidence of firms in the premium ice cream market attempting to tacitly coordinate their behavior: Al's had led price increases in the market that were followed by all other firms (including Benny's) before Clare's entry. After Clare's entry, Al's continued to lead price increases. Other firms followed, but Clare's did not, mitigating the magnitude of the price increases.

Moreover, Clare's acquisition of Benny's will likely increase the probability and effectiveness of postmerger tacit coordination in premium ice cream. Clare's, which entered the premium ice cream market only three years ago and is a much smaller firm than Benny's, is a maverick that had disrupted the ability of Al's and Benny's to raise prices. Clare's premerger refusal to follow Al's price leadership, as well as its innovative efforts in developing new types of premium ice cream, were designed to increase Clare's market share and enable it to become a larger, more profitable player in the premium ice cream market.

After Clare's acquires Benny's, it will have achieved that goal, obtaining a 45% market share and becoming tied for the number 1 position in premium ice cream sales. Antitrust law is predicated on firms acting in their profit-maximizing interests. Here, the question for the court is whether Clare's postmerger is likely to maximize its profits by seeking to increase its market share by continuing its premerger strategy of holding the line on prices and developing new products. Or will Clare's postmerger change strategies and tacitly coordinate with Al's to raise premium ice cream prices? Given Clare's postmerger market share, it must take new customers primarily from Al's if Clare's is to grow its market share. Clare's is likely to recognize that Al's will meet Clare's competition, and the result likely will be lower market prices, if not a price war, and a concomitant reduction in profits. However, tacitly coordinating with Al's to increase prices is likely to increase Clare's profits significantly. This indicates that Clare's most likely will cease being an aggressive price competitor postmerger in premium ice cream.

Moreover, for the same reason, Clare's profit-maximizing incentive postmerger is likely to stop innovating new products. Clare's has been a strong innovative force in premium ice cream in recent years as it attempted to build its brand and market share, introducing a number of new varieties of premium ice cream. However, to be successful, innovation would have to attract customers away from Al's. This, in turn, would likely attract a competitive response from Al's, either by increasing its innovation effects or lowering its prices. While this response would be good for consumers, it would be bad for Clare's profits. Recognizing this, Clare's is likely to cease being as innovative postmerger as it was premerger, which also has the advantage of increasing profits by reducing innovation and related marketing costs. Al's, which had not been an innovator before Clare's entry, would likely also cease its innovative activities, resulting in an anticompetitive coordinated effect.

Unilateral effects. Both the courts and the Merger Guidelines recognize the theory of a unilateral effect. This theory of unilateral effects goes to the elimination of significant "local" competition between the merging firms so that the merged firm can raise prices independently of how other incumbent firms react. The 2010 Merger Guidelines explain:

> A merger between firms selling differentiated products may diminish competition by enabling the merged firm to profit by unilaterally raising the price of one or both products above the premerger level. Some of the sales lost due to the price rise will merely be diverted to the product of the merger partner and, depending on relative margins, capturing such sales loss through merger may make the price increase profitable even though it would not have been profitable prior to the merger.

2010 DOJ/FTC Horizontal Merger Guidelines § 6.1.

Under the 1992 Merger Guidelines, the unilateral effects theory applied whenever: (1) the two merging firms were each other's closest competitors, and (2) their combined market share was greater than 35%. The 2010 and 2023 Merger Guidelines relaxed these requirements so that the firms only need to be close competitors to each other (although not necessarily the closest) and eliminated the 35% combined share requirement.

A unilateral effects theory on price does not apply to Clare's acquisition of Benny's. Premerger, Clare's, and Benny's have the same margin, and postmerger Clare's will consolidate its premium ice cream products under a single brand. In this case, there is no local competition unilateral effects story on price to tell: when margins are the same premerger, a unilateral effects theory depends on the postmerger diversion from one brand to the other brand of the combined firm. When the combined company has only one brand postmerger, there can be no diversion. Here, since Clare's will eliminate its brand of premium ice cream and consolidate its premium business into the Benny's brand, there can be no intrafirm diversion across premium brands of the combined firm. While the merged firm will have two brands—Clare's in regular ice cream and Benny's in premium ice cream—as explained in the market definition analysis above, there is little or no cross-elasticity between premium and regular ice cream in either direction for a one-product price increase. Consequently, there will be little diversion from one of the merged firm's brands to its other brand in the event of a single-product price increase. If there is no diversion, there can be no recapture, so the elimination of local competition unilateral effects theory on price does not apply to the transaction.

On the other hand, this transaction would have an anticompetitive unilateral effect on innovation. As noted above, Clare's has been a strong innovative force in premium ice cream in recent years as it attempted to build its brand and market share, introducing a number of new varieties of premium ice cream. As the investigation revealed, today Clare's is uniquely innovative. If, as argued above, its incentives to innovate would significantly decrease due to the merger, the rate of innovation in premium ice cream would decrease even if all of the other firms continued innovating at their respective premerger rates. This anticompetitive unilateral effect on innovation is present in both the premium and all-ice cream markets.

e. The prima facie case: Summary

Application of the *Brown Shoe* "outer boundary" and "practical indicia" factors, as well as the hypothetical monopolist test, show that two relevant product markets in which to analyze the transaction are premium ice cream and all ice cream. A relevant geographic market is the United States. The *PNB* presumption will establish a prima facie case of anticompetitive effect within this national premium ice cream market and likely in the all-ice cream market as well. Moreover, the prima facie case is strengthened because the acquisition will eliminate Clare's premerger incentives to be a maverick in both pricing and innovation in premium ice cream. Clare's acquisition of Benny's will give it a 45% market share and tie it with Al's as the number 1 seller of premium ice cream. Having achieved a dominant position in premium ice cream, it likely will be in Clare's profit-maximizing incentive to tacitly coordinate with Al's to raise premium ice cream prices and to cease its new product development, all of which will harm consumers of premium ice cream.

2. The defendants' arguments

The defendants make five arguments in defense of the transaction: (1) the only relevant market is all ice cream and in this market the merger is too small to create a competitive problem; (2) even if premium ice cream is the relevant market, the HHIs based on actual sales, which are not that high, should be further downgraded in their probative value of anticompetitive effect given the supply-side substitutability between regular ice cream and premium ice cream; (3) Dino's, which entered four years ago and today as the same share in premium ice cream as Clare's, will continue to grow its business aggressively and its efforts will ensure that the premium ice cream market remains competitive postmerger; (4) Clare's, which will control the merged firm, will continue its philosophy of growing market share through competitive pricing and product innovation in premium ice cream and so benefit consumers; and (5) the merger will produce substantial efficiencies that will offset any possible anticompetitive effect of the transaction. None of these arguments should successfully rebut the presumption that the transaction is anticompetitive.[22]

The evidence shows that premium ice cream is a relevant market and the transaction is anticompetitive in this market. As shown above, the nationwide manufacture and sale of premium ice cream is a relevant market under both judicial *Brown Shoe* and Merger Guidelines hypothetical monopolist tests. The *PNB* presumption is easily satisfied in premium ice cream, and there is additional evidence of consumer harm resulting from anticompetitive unilateral and coordinated effects in the market. In particular, the acquisition is likely to increase the likelihood and success of coordinated interaction in the sale of premium ice cream between Al's and the combined firm generally and in particular through the elimination of Clare's as a maverick in both premium ice cream pricing and innovation. If a merger or acquisition has the requisite anticompetitive effect in any one relevant market, it violates Section 7. *See* Clayton Act § 7, 15 U.S.C. § 18 (stating violation may occur "in *any* line of commerce . . . in *any* section of the country) (emphasis added).

The evidence shows that the transaction is anticompetitive in an all-ice cream market. The merging parties argue that they compete in a relevant market of all ice cream. They note the merger would combine the number 1 and a distant number 4 manufacturers of ice cream, reduce the number of leading national brands from nine to eight, and result in a merged firm with only a 34.2% share in a moderately concentrated market.

We need not contest the all-ice cream market. All ice cream satisfies the *Brown Shoe* outer boundaries" test and "practical indicia" as well as the uniform-SSNIP hypothetical monopolist test, so our only argument to reject the market is the smallest market principle. We need not

[22] **Note to students**: I have reorganized the order of these defenses somewhat differently than the order in which they were presented by the hypothetical to put related defenses together. But I suspect that, given the time limits, thinking about a more logical organization is not worth the investment of time, and organizing the section around the arguments in the order they were presented ensures that all of the arguments will be covered.

make that argument, which could be problematic in court given the 2010 and 2023 Merger Guidelines' rejection of this requirement since the transaction is anticompetitive in the all-ice cream market for the reasons discussed in analyzing the prima facie case. The transaction is likely to result in an increase in price to some customers of premium ice cream as well as a reduction in the rate of new premium product development because, as discussed above, Clare's—a maverick premerger—will no longer have the profit-maximizing incentive postmerger to hold the line against premium product price increases or to continue to innovate new premium products. As with price, a merger may be anticompetitive if it only has an anticompetitive innovation effect in a segment of a larger market; the reduction in innovation resulting from the merger does not have to affect all products in the relevant market.

Rapid entrants and new entry defenses. Clare's argues that even if the relevant market is limited to premium ice cream, supply-side substitutability with regular ice cream will ensure that the premium ice cream market remains competitive after the merger.

This is a rapid entrants defense. The idea of the defense is that firms are likely to enter rapidly into production or sale of a product in the relevant market, without incurring significant sunk costs of entry and exit, in response to a market price increase and that this new entry would be sufficient to prevent any anticompetitive effect from the merger. Here, the merging parties argue that the entry of regular ice cream firms into the production of premium ice cream requires no sunk costs or entry or exit, can occur rapidly, and would be sufficient to offset any anticompetitive effect from the merger.

The court should reject this argument. Although, as the staff found during the investigation, the same machines are used for both premium ice cream and regular ice cream and there are negligible costs in switching from the production of regular ice cream to premium ice cream (apart from the cost differences in ingredients), there exist very substantial reputational barriers to entry and expansion that will prevent supply-side substitutability from ensuring that the transaction will not reduce competition. Despite Clare's and Dino's aggressive efforts to grow in premium ice cream, neither could obtain more than a 5% market within three years of entry. Indeed, the investigation revealed that Clare's purchased Benny's because it did not believe it could grow its market share significantly in the coming years on its own. Clare's is the largest manufacturer of regular ice cream, and if it faced these reputational barriers, then other regular ice cream manufacturers would as well. Moreover, the significant price differential ($4.00 v. $3.00) and especially the margin differential (30% v. 20%) between premium ice cream and regular ice cream, in light of the technical ease of supply-side substitution, strongly indicate that reputation is a significant barrier to entry or expansion into premium ice cream. This makes supply-side substitutability from regular ice cream to premium ice cream insufficient to constrain supracompetitive pricing. Fianlly, the parties have not argued that rapid entry would be sufficient to protect the market from an anticompetitive decrease in the rate of innovation in premium ice cream products resulting from the merger.

For the same reasons, there is no entry defense here.

Expansion defense. Clare's argues that Dino, another relatively new entrant, is similarly positioned to Clare's in premium ice cream and will protect the market (whether premium ice cream or all ice cream) from any anticompetitive effect resulting from the merger. This is an expansion defense. An expansion defense has the same elements as an entry defense: the expansion must be sufficiently timely, likely, and sufficient to "deter or counteract any competitive effects of concern so the merger will not substantially harm customers." The burden of making a prima facie defense of an expansion defense is on the merging parties. Here, the parties have not made their prima facie showing and the investigation record strongly suggests that they will not be able to do so at trial.

First, Clare's bears the burden of making a prima facie case showing that Dino's expansion will be sufficient to offset whatever anticompetitive tendencies the merger may create. This requires a showing that the upward pricing pressure caused by the merger will be offset by the downward pricing pressure resulting from Dino's expansion. But Clare's has only *asserted* that the downward pressure exerted by Dino's expansion will offset the upward pricing pressure of the merger. Clare's has not shown, for example, how much expansion is required by Dino's to offset the upward pricing pressure of the merger, much less than Dino's will expand by the required amount. After four years, Dino's has achieved a market share of only 5%—the same market share that Clare's achieved after three years. Even if Dino's continues to grow its market rate at its historical rate—about 50% per year—in another two years, Dino's will have a market share of only a little over 11%.

Second, as a growing incumbent firm in the market, the court should only look at the *incremental* growth Dino's would achieve beyond what it would have grown in the absence of the merger. To the extent that Dino's would have exerted downward pressure in the market in the absence of the merger, that downward pressure could not count as part of the defense. Instead, only the incremental growth should count, and neither Clare's nor Dino's has offered any evidence as to what this incremental growth would be.

Third, even if Dino's is successful in eventually replacing the downward pricing pressure that Clare's would exert in the absence of the merger, it will take some time for Dino's to achieve the requisite growth. During this time, the merged firm will be able to raise prices and harm consumers in violation of Section 7.

Finally, even if Dino's incremental expansion was sufficient to replace the downward pricing pressure that Clare's exerted premerger in a timely fashion, an increase in prices is not the only anticompetitive effect likely to result from the merger. Clare's was also an aggressive innovator of new premium ice cream products, many of which achieved consumer acceptance and became popular. There is no evidence in the record that Dino's has been or is likely to become an innovator of new premium ice cream products.

Clare's will continue postmerger to price and innovate aggressively. In its presentations to the investigating staff, Clare's argues that its plan for the merged company is to invest its savings from the merger in the premium ice cream business, aggressively take on Al's (the premerger premium ice cream market leader), and further grow the merged firm's volume and market share. As noted above, however, Clare's premerger incentives to price and innovate aggressively were designed to increase its market share and become a larger, more profitable firm. After the merger, it will have achieved its goal of becoming a larger firm. Moreover, Al's and the combined firm will account for 90% of all premium ice cream sales. Given that they will both have equal market shares, they are also likely to have similar profit-maximizing incentives and strategies. Under these conditions, it almost surely will be in the combined firm's profit-maximizing interest to follow Al's lead in raising prices—or even to lead price increases itself—since the opportunity costs of *not* doing so will be so high. Given this profit incentive, Clare's claim that it will continue to price and innovate aggressively postmerger as it did premerger after the merger should not be credited.

Cost efficiencies defense. The Merger Guidelines recognize an efficiency defense when (similar to entry) the efficiencies will negate the anticompetitive effect shown in the proof of the prima facie case. Courts have been more cautious in recognizing the validity of the principle of an efficiencies defense because of statements in earlier Supreme Court cases (*Brown Shoe* and *Procter & Gamble*) that efficiencies will not save an anticompetitive merger. However, most courts have been willing to assume, at least for the purpose of analysis, that the efficiencies defense described in the 2010 Horizontal Merger Guidelines is a cognizable defense. No court, however, has yet to find on the facts that the elements of an efficiency defense were satisfied. As with the entry defense, an efficiency defense is a *negative* defense: the efficiencies must negate the anticompetitive effect the merger otherwise would have. Moreover, to be cognizable, courts and the merger guidelines require the efficiencies to be merger specific and verifiable in addition to being sufficient to overcome the otherwise anticompetitive effect of the merger.

When, as here, the anticompetitive concern is higher prices postmerger, to be a defense the efficiencies must generate sufficient downward pressure on prices to offset the upward pressure resulting from the merger's reduction of competition. Because a profit-maximizing firm will set prices and output so that its marginal revenue will equal its marginal cost, only changes in marginal costs resulting from the merger will affect the merged firm's prices. Here, the efficiencies of the transaction—eliminating duplicative administrative and sales overhead, streamlining their combined sales force, and taking advantage of some excess capacity to consolidate production and reduce the number of the merged firm's operating plants—are all fixed costs that will not affect marginal cost. Accordingly, even assuming that the efficiencies are merger specific and verifiable, they cannot be expected to be passed on to customers and hence will generate no downward pricing pressure sufficient to prevent an anticompetitive price increase. Moreover, there is no evidence in the investigation record that these cost efficiencies will offset to any degree the reduced incentives to innovate resulting from the merger. Under these circumstances, a court should reject an efficiencies defense on the merits.

3. Conclusion on the likelihood of success on the Section 7 merits

Under the standards used in the Horizontal Merger Guidelines and by the courts, the FTC should be able to (a) establish its prima facie case that the merger violates Section 7 by likely increasing prices and reducing product innovation in both a nationwide premium ice cream and a nationwide all ice cream, and (b) defeat the rapid entrants/expansion/entry, management incentives, and cost efficiencies defenses of the merging parties. This proves a likelihood of success on the merits of proving a Section 7 violation in both markets.

4. Weighing the equities

In addition to assessing the Commission's likelihood of success of the merits of its Section 7 claim in a full administrative adjudication, Section 13(b) of the FTC Act also requires the court to weigh the equities to determine whether this relief would be in the public interest. 15 U.S.C. § 53(b). In this weighing, the court must consider both public and private interests. The public interest considers the relative costs and benefits to the public of allowing the merger to close during the pendency of the litigation of the merits or alternatively preventing the closing until the end of that proceeding on the merits. The private interests include the corporate interests of the merging parties. *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 172 (D.D.C. 2000). Here, as in every other case where the court has found the requisite likelihood of success on the merits, the balance of the equities weighs in favor of granting the injunction.

The public equities. The FTC's showing of a likelihood of success creates a presumption in favor of granting preliminary injunctive relief. *See FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 352 (3d Cir. 2016); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 726 (D.C. Cir. 2001); *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1507 (D.C. Cir. 1986); *FTC v. Hackensack Meridian Health, Inc.*, No. CV 20-18140, 2021 WL 4145062, at *30 (D.N.J. Aug. 4, 2021), *aff'd*, 30 F.4th 160 (3d Cir. 2022); *FTC v. Peabody Energy Corp.*, 492 F. Supp. 3d 865, 918 (E.D. Mo. 2020); *FTC v. RAG-Stiftung*, 436 F. Supp. 3d 278, 291 (D.D.C. 2020); *but cf. FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 116 (D.D.C. 2016) ("[I]f the FTC is unable to demonstrate a likelihood of success on the merits, the equities alone cannot justify an injunction."). In addition, where the FTC can show a likelihood that the proposed transaction will substantially lessen competition, there is a strong public interest in ensuring that the FTC can order effective relief if it succeeds on the merits at trial. *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 86 (D.D.C. 2015). Courts have long held that the only way to ensure that effective relief—often a blocking permanent injunction—can be ordered after trial is to prevent the companies from merging during the pendency of the litigation. The long-accepted judicial view is that relief is unlikely to be fully effective if the parties are permitted to consummate their transaction, even if subject to a hold separate order, and the court must unwind the transaction after the conclusion of the merits trial. *See FTC v.*

PPG Indus., Inc., 798 F.2d 1500, 1506-09 (D.C. Cir. 1986). "Section 13(b) [of the FTC Act] itself embodies congressional recognition of the fact that divestiture is an inadequate and unsatisfactory remedy in a merger case." *Heinz*, 246 F.3d at 726. The public equities weighing in favor of a preliminary injunction here are especially strong since Clare's had announced that it will discontinue its premium brand and sell premium ice cream only under the Benny's brand as well as close one of its production facilities once the merger closes. If the court does not grant a preliminary injunction and the deal is allowed to close, it may be impossible to completely roll back these changes and restore the status quo ex ante if the deal is ultimately found to violate Section 7 and a permanent injunction of divestiture is entered.

The merging parties argue that the entry of a blocking preliminary injunction would deny consumers the procompetitive advantages of the merger and that this public equity weighs against the entry of a preliminary injunction. But the parties do not argue that the merger would result in *reduced* prices to consumers. The most they argue is that the public will be deprived of the increased innovation in premium ice cream products that Clare's says it will bring to the combined company. But as demonstrated above, regardless of what Clare's says today, it is likely to be in Clare's profit-maximizing interest postmerger to adopt Benny's premerger business philosophy of raising prices and not innovating. Moreover, an administrative proceeding on the merits is likely to last no more than another year or so, so if a preliminary injunction is entered and the merging parties ultimately prevail and consummate their merger, any benefits will only be temporarily delayed.

The private equities. The private equities are the additional profits Clare's believes it will earn from the merger and the premium Benny's shareholders will earn from the premium price Clare's is willing to pay for their shares. At most, these benefits will only be delayed by a year or so by the entry of a preliminary injunction if the merging parties prevail on the merits at trial. Moreover, if the Commission ultimately concludes on the merits that the transaction would violate Section 7, it will enter a permanent blocking cease and desist order prohibiting the consummation of the transaction so that the merging parties will never receive the claimed benefits.

Even if the parties, as they have represented, will terminate the transaction if the district court enters a preliminary injunction and not litigate the merits in an adjudicative proceeding, that is not a private equity the court should credit. Courts almost universally are unmoved by this representation, reasoning that the decision whether to litigate the merits in an FTC administrative proceeding is completely in the control of the merging parties. If the merging parties do not wish to litigate the merits in an administrative proceeding, it must be because either the private benefits of the merger are not that great or the probability of their success on the merits is low. In either case, the unwillingness of the merging parties to litigate the merits shows that the private equities here are weak at best.

The weight of the equities. The public interest in effective antitrust enforcement and the ability to order effective relief strongly outweigh any potential public or private benefits in allowing the merger to occur during the pendency of the merits trial, benefits that, at worst, would only be delayed by a year or so.

5. Conclusion

For the reasons stated above, the Commission should prevail in its petition for a preliminary injunction under Section 13(b) of the FTC Act blocking Clare's acquisition of Benny's pending the conclusion of the administrative adjudication of the merits of the Commission's Section 7 claim against the transaction.