Class 13-14 slides

Unit 6: Clare's/Benny's Ice Cream Merger

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October 9, 2025

Grading philosophy

- My approach
  1. I read all answers twice and blind grade them each time with a letter grade
  2. If the grades for an answer differ significantly between the first and second reads, I read the answer for a third time and reconcile the differences
  3. I rank order the exams by letter grade in descending order and apply the prescribed curve for the course
  4. UNLESS the quality of the exams does not break significantly at a change in the grading curve, in which case I include the exam in question in the group to which it is most comparable (and fight with the Dean if required)

I grade an answer on the proper application of legal precedent and economic principles and its logic, completeness, and persuasiveness, not whether you approached the problem the same way I did or reached the same conclusion

I do not expect anyone to spot and properly analyze all issues in the hypothetical

Grading philosophy

- My approach—A little more detail

I grade exams along three dimensions.

1. *Professional quality*. I evaluate each exam as if I were a law firm partner or mid-level agency official receiving the memorandum. A high raw grade goes to memoranda that are well organized, address all major issues and most minor ones, and provide tight analysis supporting their conclusions—essentially, work that would need minimal revision before sending to a client or senior official. Conversely, a low raw grade goes to memoranda that miss major issues, contain flawed analysis of identified issues, reach poorly supported conclusions, and would require major reworking before professional use.
2. *Horizontal equity*. I aim for horizontal equity across the class, so that memoranda of similar quality submitted by different students this year receive the same grade.
3. *Vertical equity*. I seek to preserve vertical equity across years, so that a grade (say, an A-) indicates the same quality of work as in previous years.

With these factors in mind, I apply the law school's curve to generate the exam's final letter grade.

Suggestion: How to approach the problem

1. Ask the setup questions
2. Read the hypothetical straight through quickly to spot the major issues
3. Read the hypothetical again more slowly
   Annotate the hypothetical in the margin
4. Outline an answer—pay attention to your intuitions!
5. Start writing

Another suggestion:

DISTINGUISH BETWEEN PRIMARY AND SECONDARY ISSUES!!

Be sure you address all the major issues. If you do not think you are going to have time to do everything, spot the secondary issues in your answer and leave the detailed analysis until later. Since you will be typing the exam in Word, it is easy to insert additional material if you have the time after you finish the important topics.

1. Ask the setup questions

1. Who are you/what role are you being asked to play?
2. What is the transaction?
3. Where are you in the process?
4. What is the form of the work product?
5. What questions are you being asked to address?
6. What statutes(s) apply?
7. What are the worlds premerger, postmerger, and without the merger?

1. Ask the setup questions

1. Who are you/what role are you being asked to play?
   - From the hypothetical:

> **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 transaction and Clare's is paying a 40% premium for the Benny's stock. Melissa Brown, your section chief, has asked you to prepare a recommendation as to whether the FTC should seek a preliminary injunction blocking the transaction from a federal district court pending a resolution of 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 defenses the merging parties have said that they will advance. 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 FTC's petition to enter the preliminary injunction.

1. Ask the setup questions

2. What is the transaction?
   - From the hypothetical:

> 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 the Benny's stock.** Melissa Brown, your section chief, has asked you to prepare a recommendation as to whether the FTC should seek a preliminary injunction blocking the transaction from a federal district court pending a resolution of 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 defenses the merging parties have said that they will advance. 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 FTC's petition to enter the preliminary injunction.

1. Ask the setup questions

3. Where are you in the process?
   - From the hypothetical:

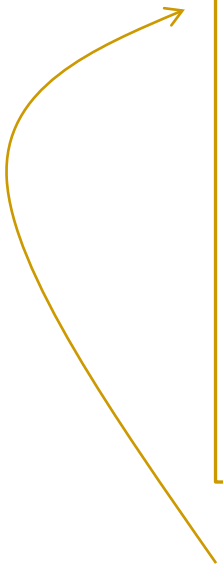
> You are an attorney at the FTC and **your group is reviewing Clare's pending acquisition of Bennie's**, two manufacturers of ice cream. The acquisition is for all cash and Clare's is paying a 40% premium for the Benny's stock. Melissa Brown, your section chief, has asked you to prepare a recommendation as to whether the FTC should seek a preliminary injunction blocking the transaction from a federal district court pending a resolution of 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 defenses the merging parties have said that they will advance. 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 FTC's petition to enter the preliminary injunction.

   - It can make a difference!
     - If you are in a preliminary risk analysis or at the beginning of an investigation, you may be asked what additional facts need to be investigated
     - If you are at the end of an investigation, fact gathering is over—do not suggest new areas to investigate unless absolutely necessary

1. Ask the setup questions

4. What is the form of the work product?
   - From the hypothetical:

> 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 transaction and Clare's is paying a 40% premium for the Benny's stock. **Melissa Brown, your section chief, has asked you to prepare a recommendation** as to whether the FTC should seek a preliminary injunction blocking the transaction from a federal district court pending a resolution of 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 defenses the merging parties have said that they will advance. 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 FTC's petition to enter the preliminary injunction.



You are being asked to write a **reasoned memorandum of law** with a recommendation

Both the graded homework assignment and the final exam will call for a reasoned memorandum of law

1. Ask the setup questions

5. What questions are you being asked to address?
   - From the hypothetical:

> 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 transaction and Clare's is paying a 40% premium for the Benny's stock. Melissa Brown, your section chief, has asked you to prepare a recommendation as to **whether the FTC should seek a preliminary injunction blocking the transaction** from a federal district court pending a resolution of 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 defenses the merging parties** have said that they will advance. 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 FTC's petition to enter the preliminary injunction.
>
> 1 2 3 4 5

   - Five questions are presented

BE SURE THAT YOU ADDRESS EACH QUESTION!!

1. Ask the setup questions

6. What law(s) apply?
   - From the hypothetical:

> 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 transaction and Clare's is paying a 40% premium for the Benny's stock. Melissa Brown, your section chief, has asked you to prepare a recommendation as to whether the FTC should seek a **preliminary injunction blocking the transaction from a federal district court pending a resolution of 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 defenses the merging parties have said that they will advance. 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 FTC's petition to enter the preliminary injunction.

1

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   - *For 1*: FTC Act 13(b) for the standards for entering a preliminary injunction
   - *For 2*: Clayton Act § 7 for the elements of the substantive violation

1. Ask the setup questions

7. What are the worlds premerger, postmerger, and without the merger?
   - *Remember*: Merger antitrust law compares the consumer welfare implications of the world with the merger to the world without the merger

Be sure you understand any differences between the three scenarios and consider their consumer welfare implications!

   - The typical case:
     - *Without the merger*: Conditions resemble those in the premerger state
     - *With the merger*: Conditions resemble the premerger state, except the acquired firm no longer exists independently and the acquiring firm absorbs the acquired firm's market share

But watch out for changing conditions!

1. Ask the setup questions

6. What are the worlds premerger, postmerger, and without the merger?
   - Some variations to the world without the merger
     - *Firm exit*: The target firm might fail and exit the market
     - *Market entry/exit*: One or more third-party firms could enter or exit the market
     - *Market dynamics shift*: Changes in consumer preferences or technological advancements could alter the competitive landscape, impacting market shares independently of the merger
     - *Regulatory intervention*: New regulations or policy changes could affect the target firm's viability or behavior in the market
   - Some variations to the world with the merger
     - *Merger "fix"*: The merger may be restructured to address antitrust concerns
     - *Market entry/exit*: One or more third-party firms could enter or exit the market
     - *Operational synergies*: The merged firm might achieve cost savings or efficiencies potentially reducing prices or improving quality compared to premerger conditions
     - *Innovation and product improvement*: The merger enables the merged firm to innovate to create new or better products faster
     - *Business practice changes*: The merged firm may alter its way of doing business from premerger practices (e.g., Clare's consolidates with Benny's brand)

These are just examples—be alert for any other variations

2. Quick read to spot the issues

- The problem will have multiple issues
- Some issues may be substantively more important than others
- DO NOT get hung up spending too much time on the small issues at the cost of not adequately addressing the major issues

So what do I need to spot?

Typical structure of a formal merger analysis

- Part 1: The prima facie case (of gross anticompetitive effect)
  1. Relevant product market
     - *Brown Shoe* "outer boundaries" and "practical indicia" for the product market
     - Merger Guidelines hypothetical monopolist test
       - *Homogeneous products*: Critical loss implementations
       - *Differentiated products*: One-product/uniform SSNIP recapture implementations
  2. Relevant geographic market
     - "Commercial realities" test
     - Merger Guidelines hypothetical monopolist test
  3. *PNB* presumption
     - Market participants and market shares
     - Applicability of the *PNB* presumption
       - Judicial precedent support
       - Merger Guidelines support

     Some courts are also citing *PNB* itself when the challenged merger's market share and concentration statistics are larger than those in *PNB*.
  4. Explicit theories of anticompetitive effect
     - Unilateral effects
     - Coordinated effects
     - Elimination of a maverick
     - [Elimination of actual or perceived potential competition or of a nascent competitor]
     - [Foreclosure/raising rivals' costs for vertical transactions]

Typical structure of a formal merger analysis

- Part 2: Defendants' rebuttal
  - Direct challenges to prima facie case (no upward pressing pressure)
  - Traditional defenses (offsetting downward pricing pressure)
    - Entry/expansion/repositioning
    - Efficiencies
    - Countervailing buyer power ("power buyers")
    - Failing company/division
    - Ad hoc defenses (e.g., Clare's will continue to be disruptive)

To show sufficient offsetting procompetitive pressure to create a genuine issue of fact on the merger's net competitive effect

- Also, in this problem you will need to address the standards for the entry of a Section 13(b) preliminary injunction
  - Likelihood of success on the merits
  - Weighing the equities/public interest

Do not forget this!

Typical structure of a formal merger analysis

- When writing, resolve each genuinely disputed issue as it arises
  - Resolve direct challenges to the prima facie in Part 1
  - Resolve challenges raised by traditional defenses in Part 2
  - Unless another placement works better for a particular issue!

Do not follow Baker-Hughes *in organizing your writing, but keep the allocations of the burden in mind when resolving disputed issues as they arise*

Typical structure of a formal merger analysis

- Typical organization
  1. "You have asked me . . . . "
  2. Summary of analysis/conclusions
  3. Governing law
     a. Substantive
     b. Procedural
  4. Prima facie case
     a. Product market definition
     b. Geographic market definition
     c. Market participants, market shares, and *PNB* presumption
     d. Explicit theories of anticompetitive harm
        i. Coordinated effects
        ii. Unilateral effects
        iii. Elimination of a maverick

Do *Baker-Hughes* element by element:
- Step 1
- Step 2
- Step 3 (almost never necessary)

Typical structure of a formal merger analysis

- Typical organization
  5. Additional defenses
     a. Entry/expansion/repositioning
     b. Power buyers
     c. Efficiencies
     d. Failing firm
     e. Ad hoc defenses (e.g., Clare's will continue to be disruptive postmerger)
  6. Section 7 conclusion
  7. Relief
  8. Overall conclusion

Do *Baker-Hughes* element by element:
Step 2
Step 3 (almost never necessary)

No modern case has accepted one of these defenses to negate a violation

3. Annotate/Outline

- Some facts to note:
  - Clare's is acquiring Benny's
  - There are two types of ice cream: premium and regular
  - Although prices within each segment have converged, they have varied in the past → *differentiated products* → think one-product SSNIP tests/unilateral effects
  - The merger is horizontal in premium ice cream; no overlap in regular ice cream
  - Premium ice cream is dominated by two firms: Al's and Benny's (premerger: 85%)
  - Two dimensions of competition: Price and innovation
  - Al's has been a price leader in premium ice cream
    - Clare's has been a maverick in prices and innovation
    - All other premium ice cream producers have been followers
  - Postmerger, Clare's will consolidate its premium brand into Benny's → eliminates differentiation
  - AND become tied with Al's as the No. 1 premium ice cream manufacturer (45% share each)
  - High cross-elasticity of demand within each of premium and regular
  - Significant product and price differentiation between premium and regular
  - Significant technological supply-side substitutability between premium and regular
    - BUT no (recent) entry into premium by regular ice cream producers → indicates high reputational barriers
    - AND little growth in market shares by small premium companies (including Dino's) → same
  - Uniform nationwide shipments and pricing → suggests a national geographic relevant market
    - Insignificant amount of store brands (which may be local) → further indicates national market
  - All cost savings are in fixed costs → No cognizable efficiencies

3. Annotate/Outline

- Note some numbers and important 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 $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 th future.

$MC_P = \$2.80$
$MC_R = \$2.40$

While prices can and have varied among brands with in both premium and regular ice cream, actual prices charged by manufacturers during the investigation have converged—with no sign collusion—throughout the country to $4.00 per gallon for premium ice cream and $3.00 per gallon for regular ice cream. The following chart give sales for ice cream manufacturers:

$P_P = \$4.00$
$P_R = \$3.00$

$\$ M_P = \$1.20$
$\$ M_R = \$0.60$
$\% M_P = \frac{1.20}{4.00} = 30\%$
$\% M_R = \frac{0.60}{3.00} = 20\%$

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3. Annotate/Outline

- Note some numbers and important facts:

There are high cross-elasticities of demand between brands within each of the two ice cream segments and low cross-elasticities between individual products in different segments. So, for example, if a 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 a significant amount of volume to its premium brand rivals and little, if any volume to regular ice cream. The same 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% 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 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 meeting the staff, Clare's made the following arguments in defense of the transaction:

4. Write

- Be organized

Exam instructions:

Present your analysis in a well-organized, linear, and concise manner. Think about your answers 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. Penalties will be levied for excessive length, verbosity, or lack of organization.

4. Write

- Prepare in advance

Exam instructions:

As we discussed in class, you may cut and paste short passages from materials you have collected in a single document to introduce a concept, a rule of law, a legal principle, or an economic proposition or formula ("boilerplate"). 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 before starting your exam) into your take-home exam responses, regardless of who authored the text.

4. Write

- Do NOT add new facts unless absolutely necessary
  - Stating facts not in evidence will be detrimental to your grade even if they do not change the result
  - Use only the “facts” in the hypothetical
- Exception:
  - If you are convinced that there is a **critical error, inconsistency, or omission** in the exam—
    - Clearly identify the problem
    - Explain why you believe there was a mistake
    - Provide what you believe the correct information should be
    - Write your answer accordingly
  - If you have good reasons for believing there was a mistake in the problem (even if I disagree) and provide a correction that is sensible in the context of the hypothetical as a whole, I will accept the correction and grade your paper accordingly

4. Write: Introduction

- Opening paragraph to a memorandum: "You have asked me . . . ."

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 said that they will advance. You have also asked me to address how the court is likely balance the balance the equities and what the court is likely to decide on the petition to enter the FTC's preliminary injunction.

You should be able to copy most of this from the exam pdf[1]

[1] For copying text from a PDF file using Adobe Acrobat Reader, see Copy text and images from PDFs. If you have not done this is the past, you should practice before the exam.

4. Write: Introduction

- Short conclusion
  - ANSWER EACH QUESTION ASKED
  - Be succinct
  - You can write the short conclusion last—but if you did a good outline, you can do a first draft now of the introduction
  - Helpful to you and to me
    - Ensures that you answer all the questions asked
    - Gives me a roadmap as to where your analysis is going

4. Write: Introduction

- Short conclusion—Instructor's answer

1 **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 both anticompetitive unilateral and coordinated effects. Consumers are likely to be harmed by both an increase in prices and a reduction in the rate of product innovation as a result of the merger. The various defenses advanced by the parties are either speculative (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 is likely to 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 find that the entry of a preliminary injunction is in the public interest.

4. Write: Introduction

- Short conclusion—Instructor's answer

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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 both anticompetitive unilateral and coordinated effects. Consumers are likely to be harmed by both an increase in prices and a reduction in the rate of product innovation as a result of the merger. The various defenses advanced by the parties are either speculative (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 is likely to 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 find that the entry of a preliminary injunction is in the public interest.

4. Write: Introduction

- Short conclusion—Instructor's answer

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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 both anticompetitive unilateral and coordinated effects. Consumers are likely to be harmed by both an increase in prices and a reduction in the rate of product innovation as a result of the merger in both markets.** The various defenses advanced by the parties are either speculative (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 is likely to 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 find that the entry of a preliminary injunction is in the public interest.

4. Write: Introduction

- Short conclusion—Instructor's answer

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 both anticompetitive unilateral and coordinated effects. Consumers are likely to be harmed by both an increase in prices and a reduction in the rate of product innovation as a result of the merger. **The various defenses advanced by the parties are either speculative (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 is likely to 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 find that the entry of a preliminary injunction is in the public interest.

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4. Write: Introduction

- Short conclusion—Instructor's answer

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 both anticompetitive unilateral and coordinated effects. Consumers are likely to be harmed by both an increase in prices and a reduction in the rate of product innovation as a result of the merger. The various defenses advanced by the parties are either speculative (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 is likely to 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 find that the entry of a preliminary injunction is in the public interest.

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4. Write: Introduction

- Short conclusion—Instructor's answer

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 both anticompetitive unilateral and coordinated effects. Consumers are likely to be harmed by both an increase in prices and a reduction in the rate of product innovation as a result of the merger. The various defenses advanced by the parties are either speculative (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 is likely to 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 find that the entry of a preliminary injunction is in the public interest.

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4. Write: Introduction

- Short conclusion—Instructor's answer

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 both anticompetitive unilateral and coordinated effects. Consumers are likely to be harmed by both an increase in prices and a reduction in the rate of product innovation as a result of the merger. The various defenses advanced by the parties are either speculative (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 is likely to 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 find that the entry of a preliminary injunction is in the public interest.**

7

4. Write: Introduction

- Applicable law
  - Clayton Act § 7
  - FTC Act § 13(b)
  - *Baker Hughes* three-step burden-shifting approach

4. Write: Introduction

- Applicable law
  - Clayton Act § 7
    - Instructor's answer (prepared in advance):

> 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 exam instructions state that you may assume that the requisite interstate nexus exists to apply Section 7
      - You do not have to address the interstate commerce requirement explicitly

4. Write: Introduction

- Applicable law
  - FTC Act § 13(b)
    - Instructor's answer (prepared in advance):

> 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). The Commission meets this standard if it "has raised questions going to the merits so 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.

4. Write: Introduction

- Applicable law
  - *Baker Hughes* three-step burden-shifting approach
    - Instructor's answer (form prepared in advance):

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 burden of proof in market definition and in market shares and market concentration within the relevant market sufficient to trigger the *PNB* presumption (explained below).
2. Once the plaintiff has made a prima facie showing, the burden of production then shifts to defendant to adduce evidence sufficient to put the *PNB* presumption in issue.
3. If the defendant discharges its burden, the burden of persuasion returns to 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 the 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 showing must be to discharge its burden of production for putting the plaintiff's prima facie case in issue. *Id*. at 983.

4. Write: Introduction

- The roadmap
  - Instructor's answer (form prepared in advance):

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

4. Write: The prima facie case

- The relevant product market
  1. Premium ice cream only
     - *Brown Shoe* "outer boundaries" and "practical indicia" (test and application)
     - Hypothetical monopolist test (test and application through one-product SSNIP recapture test)
  2. All ice cream
     - *Brown Shoe* "outer boundaries" and "practical indicia"
     - Hypothetical monopolist test (test and application through percentage critical loss)

Do not get lost in the details. Think about what your intuitions tell you are the correct relevant markets. When you work out the details (especially the HMT), if you are getting an answer different from your intuitions, double check your work!

- Note:
  - It was unnecessary to analyze a regular ice cream market as part of the prima facie case,
    - There is no overlap in regular ice cream—and we have only looked at theories of harm in horizontal mergers
    - Incidentally, there is no nonhorizontal theory of harm that applies to a regular ice cream market either
  - BUT it would be good strategy if you can make out a prima facie case in all ice cream

4. Write: The prima facie case

- The relevant product market
  - Premium ice cream only—*Brown Shoe*
    - "Outer boundaries" test
      - Very high cross-elasticities/diversion ratios/recapture ratios within the candidate market
      - Little diversion to outside the candidate market for one-product price increases
    - Practical indicia
      - 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)
      - Probably most importantly, premium ice cream has—
        - a significantly higher price ($4.00 v. $3.00 per gallon at wholesale), *and*
        - a 50% higher percentage margin (30% = 1.20/4.00 v. 20% = $0.60/$3.00)

4. Write: The prima facie case

- The relevant product market
  - Premium ice cream only—Hypothetical monopolist test
    - Homogenous vs. differentiated product markets—How can you tell?
      - Homogenous product markets can support only one price for all products in the market
        - If one firm raises its price, it loses all its customers to other firms in the market
        - Equivalently, a firm in a homogeneous market has *no* inframarginal customers
          - All customers are necessarily marginal customers
        - *Rule*: A necessary condition for products to be in a homogeneous market is that all products have the same price (as in the premium ice cream hypothetical premerger)
        - BUT equal prices is *not* a sufficient condition—the prices observed in the market may be coincidental and firms may still have inframarginal customers
        - Apply a critical loss test to homogeneous product markets
      - Products in differentiated product market have inframarginal customers
        - *Rule*: If it is possible to raise the price of one product and that product retain some customers, then the market is a differentiated product markets
        - *Implication*: If products in the candidate market have had different prices in the past even through they have equal prices immediately before the merger, the market is a differentiated products market
        - *Implication*: A profit-maximizing monopolist must take into account profits on recaptured products when performing the hypothetical monopolist test
        - *Implication*: Use a one-product SSNIP recapture test in applying the HMT

4. Write: The prima facie case

- The relevant product market
  - Premium ice cream only—Hypothetical monopolist test
    - *Example*: Suppose each type of product with an identical price in the picture is produced and sold by a different firm. Is a candidate market of all these products a homogeneous product market or a differentiated products market?

- Equality of price is a necessary but not sufficient condition for the market to be homogeneous
- You can imagine that each of these products has inframarginal customers, suggesting that the market is differentiated
- AND if the products exhibited different prices in the past, the market conclusively would be differentiated

4. Write: The prima facie case

- The relevant product market
  - Premium ice cream only—Hypothetical monopolist test
    - This is a differentiated candidate market, so use a recapture test rather than a critical loss test
    - How do you know?

> ***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.[2]

> [2] 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.

> 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 same is true for regular ice cream brands.

4. Write: The prima facie case

- The relevant product market
  - Premium ice cream only—Hypothetical monopolist test
    - This is a differentiated candidate market, so use a recapture test rather than a critical loss test
  1. One-product SSNIP recapture test for *symmetric products*:

$$R^{i}_{Critical} = \frac{\delta}{m} = \frac{5\%}{30\%} = 16.67\%.$$

Make sure you understand the inequalities! Actual recapture *greater* than critical recapture means that the hypothetical monopolist is recapturing enough customers to make the SSNIP profitable

Here, $R_{Clare's}$ and $R_{Benny's}$ are 100% (need at least one of the products subject to the SSNIP to be a product of a merging firm), so the one-product SSNIP recapture test is satisfied, and premium ice cream satisfies the HMT

2. You could also have used the general formula for the critical recapture ratio:

$$R^{1}_{Critical} = \frac{\$SSNIP_1}{\$m_{RAve}} = \frac{0.20}{1.20} = 16.67\%,$$

where $\$m_{RAve}$ is the diversion share-weighted average of the dollar margins of the recapturing firms

- Diversion share-weighted averages were part of the optional material in this course
- BUT note that in this hypothetical all premium ice cream manufacturers have the same dollar margin of $1.20, so $\$m_{RAve}$ is $1.20

4. Write: The prima facie case

- The relevant product market
  - Premium ice cream only—Hypothetical monopolist test
    3. Or brute force accounting: Apply SSNIP to Clare's (or Benny's)

NB: This calculates the incremental profit loss for Clare's from the SSNIP

Gain on inframarginal sales			
	Premium		
$SSNIP =	$0.20		
$\%\Delta q$ =	20.00%	From hypothetical	
q =	43.80	from hypothetical (table)	G
Δq =	8.76		
$q_2 = q - \Delta q$ =	35.04		
Gain =	7.01		
Loss on marginal sales			
$\$m$ =	1.20		
Δq =	8.76		L
Loss =	10.51		
NET Clare's =	-3.50		

NB: This calculates the incremental profit gain from the recapture by other premium ice cream manufacturers

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

4. Write: The prima facie case

- The relevant product market
  - Premium ice cream only—Hypothetical monopolist test
    - If you had used a critical loss test, the candidate market would have FAILED
    - Percentage critical loss to test the profitability of a uniform SSNIP:

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

    - But the actual loss is 16%. Therefore, the test fails.

Again, make sure you get the inequalities right! Actual loss greater than critical loss means that the hypothetical monopolist loses too many customers to make the SSNIP profitable

Only needs to pass one HMT test. If the candidate market passes one test but fails other tests, it is still passes the HMT under the Merger Guidelines

If a candidate market is supported by the Brown Shoe *factors but fails the HMT:*

1. *Check your math*
2. *See if there are other implementations (e.g., one-product SSNIP test)*

4. Write: The prima facie case

- The relevant product market
  - Premium ice cream only—Hypothetical monopolist test
    - Applying the uniform SSNIP test
    - *Test*: If all the uniform recapture ratios are equal to or greater than the critical recapture ratio for all products and strictly greater than the critical recapture ratio for at least one product, then the hypothetical monopolist could profitably increase the prices by a uniform SSNIP
    - Determine the critical uniform recapture ratio $R^{U}_{Critical}$:

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

    - Determine the actual uniform recapture ratios R^{U}_{i} for each product *i* in the candidate market (these are different from the one-product SSNIP recapture ratios!)
      - The problem states: "if the prices of all premium ice cream products were increased uniformly by a SSNIP, 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*."
      - This tells you that $R^{U}_{i} = 0$ for all the products in the premium ice cream candidate market
    - The test FAILS

The key to remember is that retained inframarginal sales are NOT recaptured sales. Recaptured sales are lost marginal sales *that divert to another product in the candidate market.*

4. Write: The prima facie case

- The relevant product market
  - All ice cream—*Brown Shoe*
    - "Outer boundaries" test
      - The cross-elasticity between the two *categories* of ice cream products is relatively high
        - All premium ice cream with a uniform SSNIP diverts almost 100% diversion to regular ice cream
        - All regular ice cream with a uniform SSNIP diverts almost 100% diversion to premium ice cream
    - Practical indicia
      - Industry and the public recognition of ice cream as distinct from other types of foods
      - Ice cream has peculiar characteristics and uses
      - Ice cream is produced using unique production facilities
      - Ice cream has distinct prices

4. Write: The prima facie case

- The relevant product market
  - All ice cream—Hypothetical monopolist test
    - Easy answer:
      - *Rule*: With selective SSNIPs and the elimination of the smallest market principle, if a candidate market satisfies the HMT, then any superset of that candidate market satisfies the HMT
      - *Application*: Since we have already shown that premium ice cream satisfies the HMT, then all ice cream satisfies the HMT
      - You do not need to say anything more than this
    - Could also use a critical loss for a uniform SSNIP:

$$\%CL_{\text{premium}} = \frac{5\%}{5\% + 30\%} = 14.3\%$$

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

Actual loss for premium ice cream and regular ice cream is 3% and 5%, respectively.

    - That is, with a 5% SSNIP—
      - The hypothetical monopolist would make money on premium ice cream, *and*
      - The hypothetical monopolist would make money on regular ice cream
    - Therefore, the hypothetical monopolist could profitably raise prices by a 5% SSNIP, and so all ice cream is a relevant product market

4. Write: The prima facie case

- Suggestions on applying the hypothetical monopolist test
  - Be sure you know the "brute force" accounting principles
  - Every problem can be tested through brute force accounting

If you are not sure of the formula to use, use brute force accounting

  - Do NOT spin your wheels on the HMT

If you are having problems, make sure that your Brown Shoe *analysis makes common sense in the context of the hypothetical, assume that this is the relevant market, and leave a hole in the answer to fill in after you finish the rest of the memorandum*

It is better to have a hole in the HMT than to leave other major issues inadequately addressed (much less unaddressed)

4. Write: The prima facie case

- More thoughts on applying the hypothetical monopolist test
  - Don't forget that you can apply the one-product SSNIP recapture test to product groups
    - Say you have two homogeneous product groups that are differentiated from each other groups (blue cars and red cars)
    - Suppose further that you have uniform SSNIP diversion ratios for each group to the other group
    - You can test each group using critical loss and test the combined group using a one-product "group" SSNIP recapture test (i.e., treat each group as if it were an individual product. Since all the prices and margins are the same for all products within the group, it does not matter what the diversion ratios are to individual products)
  - Special case:
    - Suppose one homogeneous product group satisfies the HMT
    - Suppose a second homogeneous product group is also symmetrical but differentiated from the first group, and that the second product group fails the HMT
    - *Proposition*: When the two groups are combined, they satisfy the HMT regardless of the diversion ratios from one group to the other
      - Just increase the price of blue cars and hold the price of red cars constant—the hypothetical monopolist makes a positive profit on blue cars and the financials on red cars are unchanged except perhaps some any recapture (which is unnecessary)
      - REMEMBER: At least one product of a merging firm should be subject the SSNIP in a one-product SSNIP recapture test (not required under the 2023 Merger Guidelines, but advisable)

4. Write: The prima facie case

- The relevant geographic market
  - The United States
    - No dispute
      - Merging parties submit that the relevant geographic market is the United States
      - The staff agrees (fn. 3 of the hypothetical)

If the hypothetical is clear that the parties agrees on the dimensions of the product or geographic market, it is enough that you simply state the agreement in the answer.

    - However, if you wanted (or had) to go further and do the analysis—
      - The "area of effective competition" test (test and application)
        - Nationwide sales by majors
        - Uniform nationwide pricing by majors
        - Insignificant amount of store brands (which may be local)
      - Hypothetical monopolist test—performed above
        - Remember, the HMT always needs a relevant product market and a relevant geographic market

4. Write: The prima facie case

- Market shares, concentration, and the *PNB* presumption
  - *PNB* presumption (boilerplate for judicial presumption and Merger Guidelines)
  - Use revenues for market shares
    - If you are going to be testing for an all ice cream market, products are differentiated in prices
  - No nonsellers in premium ice cream
    - Although technologically easy and inexpensive to switch, significant reputational barriers
      - Despite Clare's and Dino's aggressive efforts to grow in premium ice cream, neither was able to obtain more than a 5% market within three years of entry
      - Significant price differential ($4.00 v. $3.00) and especially the margin differential (30% v. 20%) between premium ice cream and regular ice cream not competed away by supply-died switching
      - Clare's is purchasing Benny's because it did not believe it could grow its market share significantly in the coming years on its own → high reputational barriers

4. Write: The prima facie case

- Market shares, concentration, and the *PNB* presumption
  - Applying the *PNB* presumption:

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

45%, Δ = 400, postmerger HHI = 4080
Strong HHI and judicial precedent case (including surpassing thresholds in *PNB*)

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

34.2%, Δ = 399, postmerger HHI = 2329
Relatively weak HHI and judicial precedent case (surpasses 30% *PNB* threshold and maybe 4CFR)
Strengthened by supporting theories of anticompetitive harm (below)

Make sure you know how to do an HHI analysis!
You need to do these calculations on the exam.

4. Write: The prima facie case

- The *PNB* presumption in the all ice cream market
  - Instructor's answer (form prepared in advance):
    - Second, look at the *PNB* facts (only if they support the candidate market as a relevant market):

> **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*.** 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).

4. Write: The prima facie case

- The *PNB* presumption in the all ice cream market
  - Instructor's answer (form prepared in advance):
    - Third, look at the Merger Guidelines thresholds:

> 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*. **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).

4. Write: The prima facie case

- The *PNB* presumption in the all ice cream market
  - Instructor's answer (form prepared in advance):
    - Fourth, look at the judicial precedent:

> 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*. 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).**

4. Write: The prima facie case

- Additional evidence supporting the prima facie case
  - Coordinated effects
    - State the test (prepared in advance)
      - Premerger, the market is susceptible to tacit coordination
      - The merger will increase the likelihood or effectiveness of tacit coordination
    - *Premium ice cream market*: Apply the test—on price
      - Premium ice cream market susceptible to tacit coordination
        1. 2 dominant firms (Al's and Benny's) with 85% of the market
        2. History of successful tacit coordination (price leadership by Benny's)
           1. Successful before Clare's entry
           2. Successful, but less so, after Clare's entry
      - Merger will increase the probability, stability, and effectiveness of tacit coordination
        - Creates a duopoly with two equal-sized firms (and a competitive fringe)
        - Eliminates Clare's as a disruptive force
    - All-ice cream market—probably not
      - All ice cream market perhaps susceptible to tacit coordination in regular ice cream
        - 3 major firms in regular ice cream
        - Significantly differentiated between premium and regular ice cream—little reason to coordinate
      - But merger is unlikely to increase the probability, stability, or effectiveness of tacit coordination
        - Benny's is a pure play premium ice cream firm—acquisition does little to change the incentives to coordinate in all ice cream products

Remember: We are analyzing the prima facie case. Whether Clare's will continue to be disruptive postmerger is in Step 2.

4. Write: The prima facie case

- Additional evidence supporting the prima facie case
  - Maverick—applies (Clare's is a maverick in pricing and innovation)
    - State the test (prepared in advance)
      - Premerger, the market is susceptible to tacit coordination
      - One of the merging parties is a disruptive force that impedes coordination (the "maverick")
      - The acquisition of the maverick will remove the disruptive force and increase the probability or effectiveness of tacit coordination
    - Apply the test to Clare's
      - Small firm premerger
      - Disrupted the ability of Al's and Benny's to raise prices premerger
      - Innovative—forced Al's and Benny's to follow
      - Large firm with single brand postmerger (45% share; tied for No. 1 with Al's)—reduces maverick incentives on both price and innovation
      - Bottom line:
        - Will enable more accommodating conduct on higher premium prices
        - Will enable more accommodating conduct on lower rates of premium innovation
    - Note
      - Works in both the premium ice cream market and the all ice cream market

4. Write: The prima facie case

- Additional evidence supporting the prima facie case
  - Unilateral effects on price—does not apply in premium ice cream
    - Test (prepared in advance)
      1. The products of the merging firm must be differentiated and have different dollar margins (premerger, postmerger, or both)
      2. The products of the merging parties must be close substitutes for one another
         - That is, they have high cross-elasticities of demand or diversion ratios with one another
      3. The products of (most) other firms must be much more distant substitutes
         - That is, they have low cross-elasticities of demand or low diversion ratios with the products of the merging firms
      4. Repositioning into the products of the merging firms must be difficult
         - That is, other incumbent firms and new entrants in the market cannot easily change their product's attributes or introduce a new product that would be a close substitute to the products of the merged firm
    - Apply the test
      - Premerger, Clare's and Benny's premium ice cream products were coincidentally sold at the same price and have the same dollar margin
      - Postmerger,
        - Clare's will consolidate the premium brands, so there will only brand, so there will be no differentiated premium products on which to increase the price of one product and divert sales to a second product to recapture profits
        - Little diversion from premium products to regular products (and vice versa), so the merged firm has no opportunity for unilateral effects by raising the price in one category and recapturing diverted sales in the other category

4. Write: The prima facie case

- Additional evidence supporting the prima facie case
  - Unilateral effects on innovation
    - Apply the test
      - Premerger, the Clare's was uniquely innovative in premium ice cream
        - Largely in an effort to increase market share
      - Postmerger,
        - Combined firm will have a large market share in premium ice cream
          - 45%--Tied for #1 with Al's
        - Given the large share, Clare's no longer has the same incentives to innovate
        - So the rate of innovation in premium ice cream would decrease even if all other firms continued to maintain their premerger innovation rates
    - Note
      - Works in both the premium ice cream market and the all ice cream market
      - Although this theory is sound, the reduction in innovation works better as a coordinated effect theory

4. Write: Defendants' rebuttal arguments

- First, make sure you know what defenses need to be addressed:
  1. *Broad markets/ low HHIs*: The only relevant market is all ice cream, and in this market the merger is too small to create a competitive problem
  2. *Entry/expansion*: 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. *Expansion defense*: Dino's, which entered four years ago and today has 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. *Continued maverickness*: 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 given its larger sales base
  5. *Efficiencies*: 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

This is taken verbatim from the hypothetical. But you cannot always expect that the hypothetical will be so clear in mapping the defense arguments to the legal defenses.

Also, you may find it helpful to name the defenses

4. Write: Defendants' rebuttal arguments

1. *Broad market*: The only relevant market is all ice cream, and in this market the merger is too small to create a competitive problem
   a. *Key 1*: Analysis shows that premium ice cream is also a market (see above) in which the merger is anticompetitive
      - Sufficient that the merger be found likely to be anticompetitive in only one relevant market to be enjoined
   b. Could argue that all ice cream violates the "smallest market" principle
      - Still cited by some courts but rejected as a strict requirement in the 2010 Merger Guidelines and an increasing number of courts—unlikely to be a winning argument
   c. *Key 2*: The transaction is anticompetitive in an all ice cream market
      i. Shares alone (weakly) predicate the *PNB* presumption
      ii. Merger eliminates Clare's as a maverick and creates an anticompetitive unilateral effect in pricing and innovation
   d. Note on recapture unilateral effects in an all ice cream market
      i. There is no anticompetitive recapture unilateral effect in pricing because—
         a. the premerger margins of Clare's and Benny's products are the same, *and*
         b. Clare's is consolidating the merged firm's premium ice cream products into one brand → no opportunity for diversion through recapture postmerger
      ii. Of course, you could argue that although Clare's says that it will consolidate the brands postmerger, it is under no obligation to do so and if it maintains two brands postmerger there would likely be an anticompetitive unilateral effect in pricing

4. Write: Defendants' rebuttal arguments

2. *Rapid entrants*: Even if premium ice cream is the relevant market, the HHIs are not that high and should be further downgraded given the supply-side substitutability between regular and premium ice cream
   a. *Reject HHI premise*: HHIs high enough in actual sales to predicate the *PNB* presumption under judicial precedent and the Merger Guidelines
   b. *State test* for rapid entrants "defense"
      i. There exist firms that are likely to rapidly into production or sale of a product in the relevant market, without incurring significant sunk costs of entry and exit, *and*
      ii. This entry or expansion (collectively) would be sufficient to prevent any anticompetitive effect from the merger from occurring

   NB: Rapid entrants are treated under the Merger Guidelines as market participants and assigned market shares. Here, I have refashioned it as an entry/expansion defense. You can be a bit flexible in the technical treatment of rapid entrants (as long as it makes economic sense)

4. Write: Defendants' rebuttal arguments

2. *Rapid entrants (con't)*:
   c. *Apply test*: Reputational barriers are too high for meaningful rapid expansion—
      i. Despite Clare's and Dino's aggressive efforts to grow in premium ice cream, neither was able to obtain more than a 5% market within three years of entry
      ii. Clare's is purchasing Benny's because it did not believe it could grow its market share significantly in the coming years on its own
      iii. Significant price differential ($4.00 v. $3.00) and especially the margin differential (30% v. 20%) between premium ice cream and regular ice cream did not induce regular ice cream producers other than Clare's to materially shift or expand production into premium ice cream
   d. *Bottom line*:
      i. High reputational barriers prevent timely and sufficient entry to constrain pricing
      ii. No argument that entry (rapid or otherwise) would protect the market from an anticompetitive decrease in the innovation of new premium ice cream products

4. Write: Defendants' rebuttal arguments

2. *Rapid entrants (con't)*:
   - Alternative analysis using the Guidelines market participants approach
     - *State test*:
       - Rapid entry would have to occur at a sufficient level to negate the application of the *PNB* presumption (and rebut any explicit theories of anticompetitive effect)
     - *Apply test*:
       - During the investigation, the merging parties did not advance any evidence of the timing and magnitude of rapid entry, much least evidence sufficient to show that the magnitude would be sufficient to make the *PNB* presumption inapplicable
       - Moreover, it is unlikely that such evidence exists
         - Rerun arguments that reputational barriers are too high for meaningful rapid expansion
     - *Bottom line*:
       i. High reputational barriers prevent meaningful rapid entry or expansion sufficient to defeat the application of the *PNB* presumption
       ii. No argument that rapid entry would defeat explicit theories of anticompetitive pricing effects
       iii. No argument that entry (rapid or otherwise) would protect the market from an anticompetitive decrease in the innovation of new premium ice cream products

Either approach would be sufficient on an exam question

4. Write: Defendants' rebuttal arguments

3. *Expansion*: Dino's, which entered four years ago and today has 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
   a. State test (expansion defense—prepared in advance)
      i. Timely
      ii. Likely
      iii. Sufficient
   b. Apply the test—not timely or sufficient
      i. Dino's only reached a 5% market share after four years
      ii. Even if Dino's grows at its historical rate—about 50% per year—in another two years, Dino's would only have a market share of a little over 11%
      iii. Should only look at *incremental* growth resulting from the merger—parties presented no evidence of future incremental growth in response to the merger
      iv. Even if Dino's is successful in eventually creating enough downward pricing pressure to offset the merger's anticompetitive effect, until this time the merger would be anticompetitive and violate Section 7
      v. Even enough downward pricing pressure would not offset the anticompetitive effect of reduced innovation

4. Write: Defendants' rebuttal arguments

4. *Continued maverickness*: 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
   a. 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, Clare's will have achieved its goal of becoming a larger firm.
   b. Moreover, Al's and the combined firm will account for 90% of all premium ice cream sales → strong incentive to follow the leader (coordinated effects)
      - Under these conditions, it will be in the combined firm's profit-maximizing interest to follow Al's lead in increasing prices—or even to lead price increases itself—since the opportunity costs of *not* doing so will be so high
   c. Given this profit incentive, Clare's claim that it will continue to price and innovate aggressively after the merger, just as it did before the merger, should not be credited

4. Write: Defendants' rebuttal arguments

5. *Efficiencies*: The merger will produce substantial efficiencies that will offset any possible anticompetitive effect of the transaction
   a. Test (prepared in advance)
      i. Merger specific
      ii. Verifiable
      iii. Sufficient to overcome otherwise anticompetitive effects of the merger
      iv. Not resulting from an anticompetitive effect of the merger
   b. All claimed efficiencies are fixed cost efficiencies and are not cognizable in an efficiency defense
      i. Eliminating duplicative administrative and sales overhead
      ii. Streamlining the combined sales force
      iii. Taking advantage of some excess capacity to consolidate production
      iv. Reducing the number of the merged firm's operating plants
   c. No claim of other cognizable efficiencies

Fixed cost savings are likely to be present in most hypotheticals. Be sure that your boilerplate explains that fixed cost savings are not cognizable in an efficiencies defense because they do not offset the merged firm's anticompetitive pricing incentives and are not passed on to consumers.

4. Write: Conclusion on likelihood of success

- Instructor's answer

> **3. Conclusion on 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 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 defeat the expansion, pricing and innovation efficiencies, cost efficiencies, and price reduction defenses of the merging parties. This proves a likelihood of success on the merits of proving a Section 7 violation in both markets.

- No need to be elaborate here—details in the conclusion in the introduction
  - State the dimensions of the relevant product and geographic market
  - State the nature of the anticompetitive effect
  - State what defenses were rejected
  - Conclude on the likelihood of success on the merits

You can use some boilerplate here—but be sure to customize it to the problem!

4. Write: Weighing the equities

- Role of equities in applying Section 13(b) (prepared in advance)
- The equities
  - The public equities (prepared in advance)
    - Public interest in the enforcement of the antitrust laws
    - Public interest in ensuring full relief if merger is found to violate Section 7
    - Public interest in ensuring that an anticompetitive merger is not allowed to exist and create anticompetitive harm, even if temporarily
  - The private equities (largely prepared in advance)
    - Deal will crater
    - Loss of premium to Benny's shareholders
- Weighing the equities (prepared in advance)
  - Weigh in favor of the FTC if a likelihood of success of the merits is shown

5. Write: Conclusion

- Instructor's answer

> **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.

  - Again, no need to be elaborate if the conclusion paragraph in the introduction answers the specific questions asked

Final thoughts

- Graded homework problem
  - Posted Sunday, October 12 (in the evening); due on Monday, October 27 by 11:59 pm
  - Counts as one-third of the course grade/two-thirds for final exam
    - Before any adjustments (see course introductory memorandum)
  - No time limit
- Don’t hesitate to reach out to me with questions on concepts and general principles through the end of the semester
  - But I will not be able to answer questions specific to the graded homework assignment once it is posted

Use the graded homework assignment to nail down the rubric, the boilerplate, your exam strategy, any Excel spreadsheet templates, and your “copying and pasting” technique. These will pay large dividends during the timed exam.