

MERGER ANTITRUST LAW

LAWJ/G-1469-05
Georgetown University Law Center
Fall 2023

Tuesdays and Thursdays, 11:10 am – 1:10 pm
Dale Collins

wdc30@georgetown.edu
www.appliedantitrust.com

GRADED WRITTEN ASSIGNMENT

Instructions

Submit by email by 5:00 pm on Monday, November 20

Send to wdc30@georgetown.edu

Subject line: Merger Antitrust Law: Graded Homework Assignment

This is an untimed *graded* homework assignment. The assignment presents a hypothetical fact situation that you are asked to analyze from a particular perspective (e.g., a special assistant to the Assistant Attorney General making a recommendation on the disposition of an investigation, a private practitioner providing advice on the antitrust risks and likely outcome of a proposed transaction, a law clerk preparing an initial analysis of the application of the law to the evidence for a judge). Be sure to write from the assigned perspective *and* answer the question(s) asked.

You must submit the assignment no later than 5:00 pm ET on Monday, November 20, 2023.

Write your answer as a single Word document. When you are ready to submit your assignment, please email it to me as you would any other homework assignment.

This homework assignment is final. Do not expect any clarifications or corrections. If you are convinced that there is an error, inconsistency, or omission in the hypothetical, please give your reasons why you believe there was a mistake, provide what you believe the correct information should be, and 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 sensible correction in the context of the hypothetical as a whole, I will accept the correction and grade your paper accordingly. For this homework assignment (but not for the final exam), you may email me if you wish to point out the problem, but I will either not respond or respond to the class as a whole.

You may consult any written source, including the reading materials, class notes, cases, outlines (commercial or otherwise), books, treatises, the Internet, Westlaw, and Lexis-Nexis. You may use Ctrl-F or search engines on your computer. Citations to cases or other primary sources are not required or particularly desired, although you may find reference to a case that we covered helpful at times to make your analysis more compelling or to shorten the exposition. Citations to secondary sources will *not* be helpful or appreciated. You may use calculators or spreadsheets and any template you have prepared in advance. *You may not contact any person inside or outside of the class about the assignment (except, as noted above, you may email me about any error or inconsistency).*

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 text from any other source into your take-home answer, regardless of who authored the text.¹

This homework assignment consists of one question. The question presents a hypothetical fact situation that you are asked to analyze from a particular perspective (e.g., a special assistant to the Assistant Attorney General making a recommendation on the disposition of an investigation, a private practitioner providing advice on the antitrust risks and likely outcome of a proposed transaction, a law clerk preparing an initial analysis of the application of the law to the evidence for a judge). Be sure that you write from the assigned perspective *and* answer the question(s) asked.

If asked to write a memorandum in any capacity, you may start the answer with the first sentence of the memorandum. There is no need to include a privilege legend, “To” and “From” lines, or a subject line. Also, you may refer to a table in your answer by the table number in the question. If you are asked to write a memorandum as an attorney in a law firm at a confidential phase of the transaction, it is *not* necessary or desirable to use code names for the transaction or the parties. Use the names of the firms given in the hypothetical. This is an exception to the usual rules of practice.

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.

Also, if the hypothetical gives prices or costs for a group of products as being “around” a given number, you may treat all products within that group as having prices or costs at that number for use in any formula. (This substitutes for the assumption, for example, that all prices have coincidentally converged to the same number, notwithstanding their differentiation.)²

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 is much more important than throwing in the kitchen sink. Penalties will be levied for excessive length, verbosity, lack of organization, or the inclusion of irrelevant boilerplate.

Grading will be on the completeness, coherency, and persuasiveness of your answers to the questions presented and not on whether you reached the same conclusions that I did. Ideally, your answer to each question will persuade me that you have correctly identified the issues, properly analyzed them in the context of the prevailing legal standards and the facts presented, and advised a sensible course of action. I have no doubt that some of you will persuade me to go

¹ To be clear, this restriction does not prohibit you from writing new language or copying and pasting new text into your boilerplate document and then copying that text from your boilerplate into your answer. Indeed, I encourage you to take the time during the graded homework assignment to “beef up” your boilerplate. You just cannot copy and paste any text into your answer except from your boilerplate document.

² Think of the number as the average with small variations around the arithmetical mean. When this is the case, the formulas work reasonably well in practice using the average.

one way on a question, while others will equally persuade me to go a different direction on the same question.

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 problem and have wholly ignored reality whenever it was convenient. It will be in your best interest to unlearn the “facts” in the hypothetical as soon as possible after you finish the assignment.

Since this is effectively an exam problem, I will not hold out hope that you find it enjoyable, but I do hope that you find it intellectually stimulating. I have sought to make the question challenging, but you should be well-prepared to tackle it.

HONOR STATEMENT

BY SUBMITTING THIS GRADED ASSIGNMENT, I AFFIRM ON MY HONOR THAT I AM AWARE OF THE STUDENT DISCIPLINARY CODE, AND (I) HAVE NOT GIVEN NOR RECEIVED ANY UNAUTHORIZED AID TO/FROM ANY PERSON OR PERSONS, AND (II) HAVE NOT USED ANY UNAUTHORIZED MATERIALS IN COMPLETING MY ANSWERS TO THIS GRADED HOMEWORK PROBLEM.

Jarred Baby Food Merger

You are an associate at Able & Baker LLP. You and partner Martha Costello have just met with Dorothy Scott, the CEO of Puree Promise Corporation, and some of her senior executives. They have been having discussions and doing due diligence with Little Jar Delights, Inc., to explore an acquisition of Little Jar for \$140 million in cash. Puree Promise and Little Jar are the two smaller of the three companies that manufacture and sell jarred baby food nationwide, with revenue market shares of 20% and 15%, respectively. Cradle Cuisine is the largest manufacturer, with a revenue market share of 65%. Puree Promise’s purpose in pursuing the merger is to enable the combined company to increase its profitability and to compete better with Cradle Cuisine in a product that is steadily declining as consumers increasingly switch to pouches and homemade baby food.

Scott and her executives do not know much about antitrust law, but they are concerned that the deal may face antitrust problems at the Federal Trade Commission.³ They have asked Costello to analyze the likelihood that the FTC will conduct an investigation and, if the deal is investigated, whether the FTC is likely to take enforcement action against the transaction. They also have asked whether, assuming the FTC has an antitrust concern, there is anything the firms can do now or during the investigation that would materially increase the likelihood they would be able to close the deal, including agreeing to some form of consent decree. At this point, Scott is

³ Scott correctly knows that mergers and acquisitions involving food products are reviewed by the FTC.

interested only in the likely outcome of the FTC investigation and not in whether the companies could prevail in litigation.

Costello has asked you to draft a memorandum she can send Scott with this preliminary analysis. Here are the facts as you know them today from your research on publicly available information, responses to the preliminary information request you sent to Costello before the meeting, and what Costello and her team told you at the meeting.

Background

Jarred baby foods are purees packaged in single-serving glass jars and designed to cater to infants' nutritional and developmental needs and their transition to solid foods. Jarred baby food is widely recognized by the industry and the public as a distinct category of baby food and has distinct jarred baby food slotting on supermarket shelves.⁴ These purees typically have a smooth consistency, making them easy for babies to consume and digest. They are made by blending various ingredients, including fruits, vegetables, meats, and sometimes grains or legumes. Many parents appreciate the convenience of jarred purees, as they are pre-cooked and can be served directly from the jar or heated slightly. Short-run demand for jarred baby food at the consumer level is inelastic, with estimates ranging from -0.6 to -0.8. Over the years, baby food manufacturers have expanded their range, offering everything from simple, single-ingredient options to more complex flavor combinations, as well as choices between conventional and organic ingredients.

Jarred baby food is produced in specialized, large-scale facilities. The process begins with sourcing high-quality ingredients, which are cleaned, peeled, and inspected to remove defects. They then are processed (typically by steaming) to retain the maximum nutrient levels while enabling infants to digest them easily. Following this step, the ingredients are pureed—either individually or in combinations—according to recipes created by the manufacturer. Once the desired consistency is achieved, the puree is transferred through high-volume production lines to glass jars, which are vacuum-sealed with a metal lid to ensure freshness and prevent contamination. The filled sealed jars are sterilized through a process known as retort sterilization, where the jars are heated to high temperatures under pressure, after which they are labeled and packed in cases for distribution. The entire operation inside the facility adheres to stringent health and safety standards, given the sensitive nature of the product's intended consumers. While the equipment used to manufacture jarred baby food is specialized, the equipment may be used across all types of baby food purees. As a result, given the recipe, any jarred baby food plant can produce any type of baby food puree with little or no switching costs.

The production of jarred baby food, like other commercial baby foods, is regulated by the Food and Drug Administration (FDA) to ensure compliance with federal safety, quality, and labeling standards. The FDA regularly inspects baby food manufacturing facilities to ensure they comply with federal regulations. Cradle Cuisine, Puree Promise, and Little Jar Delights have created the Jarred Baby Food Trade Association. Executives of the three companies meet several times a

⁴ Supermarket "slots" refer to the shelf space allocated to products in a retail store.

year to discuss matters of industry concern and to jointly lobby the FDA on its regulation of jarred baby food.

In 2022, about 3.7 million infants in the United States consumed 59 million cases of jarred baby food, representing domestic sales of \$2.2 billion. There are only three manufacturers and distributors of jarred baby food in the United States: Cradle Cuisine, Puree Promise, and Little Jar Delights. The three manufacturers produce products differentiated by price, brand reputation, and consumer perceptions of quality. There are no imports of jarred baby food into the United States.

Cradle Cuisine, by far the largest domestic manufacturer, has enjoyed a dominant position in jarred baby food sales for almost 60 years. In the last ten years, its share of jarred baby food sales has increased from 55% to 65%, a trend that is continuing. Cradle Cuisine produces jarred baby food in the United States at its Fremont, Michigan plant. The Fremont plant was modernized in 2018 and is now a state-of-the-art facility, although no additional capacity was added. Puree Promise market intelligence estimates that the Fremont plant operates at 80% of its production capacity, has marginal costs of \$17 per case, and fixed costs of \$135 million annually. Puree Promise also estimates that Cradle Cuisine produced and sold 35.75 million cases of jarred baby food with a price per case of around \$40, and earned \$687.25 million in profits in 2022.

Puree Promise is the second largest producer of jarred baby food in the United States, with a share of 20%. It has been losing share over the last ten years, dropping from 25% to its current 20%. Puree Promise produces jarred baby food for sale in the United States at its Pittsburgh, Pennsylvania plant. The Pittsburgh plant was last updated in 2016, again with no additional capacity added. Puree Promise believes that its Pittsburgh plant is as efficient as the Cradle Cuisine plant, with marginal costs of \$17 per case and fixed costs of \$100 million annually. The Pittsburgh plant operates at 40% of its production capacity. In 2022, Puree Promise produced and sold 12.94 million cases of jarred baby food with a price per case of around \$34, and earned profits of \$120 million.

Little Jar Delights, the third largest producer of jarred baby food in the United States, also has been losing share over the last ten years, dropping from 20% to its current 15%. It produces jarred baby food for sale in the United States at its Albany, New York plant. The Albany plant was last updated in 1960 and is not technologically current. It is a high-cost plant, with marginal costs of \$19.20 per case and fixed costs of \$125 million annually. Puree Promise has inspected the plant and agrees with Little Jar's assessment that it would be prohibitively expensive to make further improvements in the plant. The Albany plant operates at 30% of its production capacity. It produced and sold 10.31 million cases of jarred baby food with a price per case of around \$32, and earned profits of \$7 million in 2022. Puree Promise estimates—and its due diligence on Little Jar confirms—that Little Jar has eliminated all of the possible costs out of its operation and will be unable to meet its financial obligations in about two years. It also has almost no cash reserves and little prospect of obtaining significant loans. The company has little debt, no high-cost leases or contracts it could renegotiate, and no significant assets it could sell and remain in business, so a Chapter 11 bankruptcy restructuring would not help. No one other than Puree Promise has approached Little Jar expressing interest in acquiring it. Given the company's condition and declining market, Little Jar is doubtful anyone other than another jarred baby food

producer would be interested in acquiring it. However, Little Jar has not engaged an investment banking firm to pursue a possible sale.

Tables 1 and 2 summarize some statistics for the three jarred baby food manufacturers:

Table 1

Jarred Baby Food

	Revenues (millions)	Revenue Share	Cases (millions)	Case Share	Price per case	%Margin	\$Margin
Cradle Cuisine	\$1,430	65.00%	35.75	60.6%	\$40.00	57.5%	\$23.00
Puree Promise	\$440	20.00%	12.94	21.9%	\$34.00	50.0%	\$17.00
Little Jar Delights	\$330	15.00%	10.31	17.5%	\$32.00	40.0%	\$12.80
	\$2,200	100.00%	59.00	100.0%			

Table 2

Jarred Baby Food

	Profits before		
	Fixed costs (millions)	Fixed costs (millions)	Profits (millions)
Cradle Cuisine	\$822.25	\$135	\$687.25
Puree Promise	\$220.00	\$100	\$120.00
Little Jar Delights	\$132.00	\$125	\$7.00

Each of the three jarred baby food manufacturers ships their products nationwide from their respective production facility, advertises nationally in trade journals, and sells nationally at a uniform price. All sales are direct from the manufacturer to the retailer. Jarred baby food is a staple in supermarkets—all supermarkets, from large supermarket chain stores to thousands of small independent stores, carry jarred baby food—and 70% of cases of jarred baby food is sold in supermarkets. Given the intense competition for shelf space among the thousands of products supermarkets carry, the industry practice is to stock only two brands of jarred baby food. Cradle Cuisine is sold in nearly 100% of supermarkets. Puree Promise and Little Jar Delights compete for the remaining slot, earning supermarket case (unit) market shares of 57% and 43%, respectively, in that second slot. Jarred baby food is also sold in various other stores, including big box retailers, club stores, and online retailers. These other stores do not have the same shelf space limitations as supermarkets and may stock one, two, or all three brands of jarred baby food. All retail stores recognize jarred baby food as a distinct category of baby food with its own distinct customers. All retail stores sell the jarred baby food they purchase from the manufacturer to parents and other end-users; they do not engage in arbitrage and resell any product to other retailers.

The demand for jarred baby food has experienced a decline resulting from evolving parental preferences, and this decline is widely expected to continue in the foreseeable future. No firms have entered the manufacture and sale of jarred baby food for decades. Entry by new firms in the future is improbable because of declining demand, high existing excess production capacity, and

the high cost of building a new minimum-efficient scale manufacturing plant. Declining demand, excess production capacity, and construction costs also make expansion by incumbent producers untenable.

The two most significant contributors to the decline in demand for jarred baby food are pouch-packed baby foods and baby-led weaning.⁵

As the name suggests, pouch-packed baby foods are purees packaged in a flexible, squeezable pouch. These innovative containers are equipped with a user-friendly twist or flip cap, making it easy for babies and toddlers to self-feed directly from the pouch. Pouch-packed baby foods were introduced commercially in the United States in 2008 and now account for a quarter of U.S. baby food sales. Pouch-packed baby foods offer various flavor combinations similar to jarred baby food, although the primary ingredient in most pouches is a sweet food like apples or pears. Designed for portability and convenience, pouch-packed baby foods eliminate the need for additional utensils like spoons or bowls. Beyond their functionality, the design of these pouches is often vibrant and visually appealing, often featuring clear windows that showcase the food's natural color and texture. However, the features that make pouches so convenient have some experts and parents concerned. They caution against relying on pouch-packed baby foods too much, saying that pouches can be a gateway to bad long-term snacking habits and routine overeating. Moreover, with particularly excessive use, pouches may fail to challenge children at a crucial stage of feeding and oral development when they are learning to chew and swallow soft foods and when they need varied and multi-sensory experiences to help develop a palate for a wide range of foods later in life. Finally, some baby food pouches, which are single-use and then thrown away, may not be made with recyclable plastics and, even if they are, may not be recycled, leading to a potential adverse environmental impact.

Multiple companies have begun producing and selling pouch-packed baby foods since 2008, although none of the three jarred baby food manufacturers have introduced a pouch-packed baby food line. In 2022, sales of pouch-packed baby food (at the manufacturer level) amounted to \$1.8 billion. Table 3 summarizes some statistics for the pouch-packed baby food manufacturers:

Table 3

Pouch-Packed Baby Food

	Revenues (millions)	Share
PouchPeek Organics	\$540.00	30%
LittleSqueeze Pouches	\$270.00	15%
PurePouch Infusions	\$270.00	15%
PouchPals Infants	\$234.00	13%
SqueezeSaplings	\$198.00	11%
PurelyPouch Naturals	\$144.00	8%
Others (6)	\$144.00	8%
	\$1,800.0	100%

⁵ **Note to students:** To keep the hypothetical from becoming too complex, we will consider only pouch-packed baby foods and baby-led weaning as substitutes to jarred baby food.

The production of pouch-packed requires unique, large-scale production facilities. Although the pureeing process is similar to that of jarred baby food, the production lines used to move, fill, and seal the flexible pouches differ significantly from those used for rigid glass jars. Also, since pouch-packed baby food is packaged in plastic, it cannot stand the high temperature and pressure of retort sterilization used for jarred baby food. Instead, pouch-packed baby food uses aseptic processing, which involves sterilizing the food and the inside of the pouch separately before filling the pouch in a sterile environment. Finally, specialized equipment is necessary to label the pouches and pack them into cases for shipping and distribution.

Baby-led weaning (BLW) is a progressive approach to introducing solids to infants, emphasizing the child's role in controlling their intake and exploring a variety of textures and flavors. Rather than starting with traditional purees spoon-fed to the baby, BLW encourages parents to offer soft, graspable pieces of whole foods that the infant can handle and eat independently. Foods such as steamed vegetables, ripe fruits, and well-cooked proteins are often initial favorites. Advocates of BLW believe it helps cultivate healthier eating habits, reduces the likelihood of pickiness, and can make the transition to family meals smoother. At the same time, jarred baby food has some characteristics that many parents prefer. Jarred baby foods are precooked and ready to serve, offering more convenience than homemade baby food, which requires preparation and cooking time. Jarred baby foods are shelf-stable and have a longer shelf life than homemade baby food that needs refrigeration and must typically be consumed within a few days. Jarred baby food comes with detailed nutritional labeling, making it easier for parents to track the intake of calories, vitamins, and minerals, while nutritional information is much more difficult for parents to assess for homemade baby food. The FDA does not regulate the home preparation of baby food, although it provides guidelines and recommendations for parents and caregivers on safe home preparation and storage techniques to ensure that homemade baby food is nutritious and free from potential hazards.

Notwithstanding the declining demand for jarred baby food, some parents and caregivers are firmly wedded to jarred baby food. Table 4 shows the single-SSNIP diversion ratios at the manufacturer level from each of the three brands of jarred baby food:

Table 4
Diversion ratios (for single-product SSNIPs)

From:	To :				
	Cradle Cuisine	Puree Promise	Little Jar Delights	Pouch-packed	BLW
Cradle Cuisine	x	34%	26%	30%	10%
Puree Promise	10%	x	70%	15%	5%
Little Jar Delights	10%	70%	x	15%	5%

Neither Puree Promise nor Little Jar Delights have been able, despite their efforts, to gain share either against one another or Cradle Cuisine. Cradle Cuisine, on the other hand, has not aggressively pursued share, presumably because if it priced aggressively, it would lose too much profit on the sales it can already make at higher prices. Instead, despite the incursion of pouch-packed baby food and baby-led weaning, Cradle Cuisine has generally been the first of the jarred baby food manufacturers to increase price. Cradle Cuisine has increased prices every year for the

last five years at rates above the inflation rate. Puree Promise markets itself more as a premium brand, and although it follows Cradle Cuisine price increases in percentage and timing, it still maintains a case price significantly below Cradle Cuisine and much closer to Little Jar Delights. Little Jar also follows Cradle Cuisine's price increases in timing, although its practice in recent years has been to keep its price \$2 per case below Puree Promise.

When asked at the meeting, Scott said Puree Promise was interested in acquiring Little Jar for two reasons.

First, the acquisition will give the merged company a much greater free cash flow. Puree Promise and Little Jar Delights can consolidate their production in Puree Promise's Pittsburgh plant and shut down Little Jar's Albany plant. Puree Promise has more than enough excess capacity in its Pittsburgh plant to produce all of Little Jar's current production. Puree Promise can produce Little Jar's entire portfolio of jarred baby food products using Little Jar's recipes. By consolidating production in the Pittsburgh Plant, the merged company can save the \$125 million annually that Little Jar spends on fixed costs to operate its Albany plant. Moreover, Puree Promise's Pittsburgh plant is more cost-efficient than Little Jar's Albany plant. Puree Promise has not yet decided whether to consolidate the two brands into a single brand postmerger and is still studying the question.

Second, Scott plans to allocate a portion of the increased free cash flow to competing more aggressively with Cradle Cuisine and increase Puree Promise's market share. After the merger, Puree Promise would have a market share of only 35% against Cradle Cuisine's 65%. Moreover, Puree Promise's Pittsburgh plant would still have 9.1 million cases annually in excess capacity, so the company has considerable headroom to grow its market share without needing to expand its plant. Scott and her team are exploring various strategies, including ramping up advertising to enhance brand visibility, investing in research and development for new recipes catering to contemporary family preferences, implementing direct-to-consumer price promotions, and establishing a customer loyalty program. While they are still formulating the company's postmerger strategic plan, they are actively exploring these options.

When asked in the meeting what the likely response from the marketplace would be to the announcement of the deal, Scott said she hoped it would be positive. Little Jar is a public company, and the market is aware from its annual reports and SEC filings that the company is facing declining demand, struggling for profitability, and operating a plant so old and inefficient that it cannot be updated. The market also knows Little Jar lacks the financial resources or the borrowing ability to build a new plant. Puree Promise has the capacity in its plant to absorb Little Jar's production completely while leaving room for significant expansion. However, Scott is concerned that many supermarket customers (perhaps including some of the large chains) may not be that interested in the combined company competing more aggressively against Cradle Cuisine—indeed, they may even be skeptical that there will be an increase in competition postmerger. Instead, these supermarkets may object to the transaction because they fear the loss of competition between Puree Promise and Little Jar—which they “play off” each other—to win the second slot on the supermarket shelves for jarred baby food. However, since perceptions of quality also differ between Puree Promise and Little Jar, a supermarket will not necessarily choose the lowest priced of the two products for the second slot on the shelf.