GEORGETOWN UNIVERSITY LAW CENTER
EXAMINATION IN MERGER ANTITRUST LAW
TAKE HOME EXAM
(5 HOURS)

Professor Dale Collins

Date Exam Opens: Tuesday, December 6, 2022, at 8:30 am. ET
Date Exam Closes: Thursday, December 15, 2022, by 6:30 pm. ET

INSTRUCTIONS:

1. This is a TAKE HOME mode exam.
2. This five (5) hour exam will be available beginning at 8:30 am ET on Tuesday, December 6, 2022, and must be submitted five (5) hours after it is downloaded but no later than 6:30 pm ET on Thursday, December 15, 2022. The exam must be downloaded and submitted via www.exam4.com. Do **not** use the Exam4 software to type and submit your answers. **Write your answers to both questions as a *single* Word document**. When you are ready to submit your exam, you will upload the document via the www.exam4.com website where you downloaded the exam. Once an examination is submitted for grading, no amendments or supplements will be permitted or accepted.
3. This exam is final. No clarifications or corrections will be provided. If you are convinced that there is an error, inconsistency, or omission in the exam, please identify the problem, 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.
4. Exams at the Law Center are graded on an anonymous basis. The Student Disciplinary Code provides that the "unauthorized breach of anonymity in connection with a blind-graded examination" is a disciplinary violation. Therefore, be sure that you do not reveal your identity as the author of an examination in your answers themselves, in any communications with the professor, or otherwise discuss the substance of the exam with your professor(s) or with any other student from the time the exam is first administered until after grades are published.
5. 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 as well as any spreadsheet templates you have prepared in advance.
6. 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

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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.

7. Students who elect to print out take-home exam questions must destroy all exam documents after they have submitted their exam responses.
8. This exam consists of two questions. Each 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.
9. Each question will be weighted equally for grading purposes. Grading will be on the completeness, coherency, and persuasiveness of your answers to the questions presented and not on whether you reach the same conclusion as 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 one way on a question, while others of you will equally persuade me to go a different direction on the same question.
10. 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, lack of organization, or the inclusion of irrelevant boilerplate.
11. 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.
12. 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. This is an exception to the usual rules of practice.
13. You should assume that federal subject matter jurisdiction exists and that it is unnecessary to address any jurisdictional questions in your answers. Also, in the areas of interest all demand curves are linear and all marginal costs are constant.
14. It should go without saying that, outside of this examination, you should not believe everything (or anything) in the statement of any hypothetical fact situation. I have taken considerable liberties in fashioning the problems and have totally ignored reality whenever it was convenient. It will be in your best interest to unlearn the "facts" in the questions as soon as possible after you finish the examination.
15. The hypothetical facts should be complete in the sense that they present what is known at the time the analysis is requested. As in life, some information you would like to have may simply not be available. Analyze the facts as they are presented in the question.
16. Since this is an examination, 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 questions challenging, but you should be well-prepared to tackle them.

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This exam consists of sixteen (16) pages, including these three (3) cover pages. Please be sure your exam is complete.
Please be sure that you use your exam number (not your student ID number or social security number).

HONOR STATEMENT

BY SUBMITTING THIS EXAM THROUGH EXAM4, 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, (II) HAVE NOT USED ANY UNAUTHORIZED MATERIALS IN COMPLETING MY ANSWERS TO THIS TAKE-HOME EXAMINATION, AND (III) HAVE NOT WORKED MORE THAN FIVE (5) HOURS ON THIS EXAM.

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LABELSTOCK MERGER

You are an associate at Gambini & Galloway LLP. Tempere Manufacturing Corporation, a firm client, is considering making an offer to acquire Black River Label Stock, Inc. for $593 million in cash. Tempere and Black River both manufacture and sell pressure sensitive label stock. Mona Lisa Gambini, a partner with whom you work, has been asked by Tempere to provide them with a preliminary antitrust risk assessment of the transaction. Ms. Gambini has told Tempere that the acquisition most likely would be reviewed by the Antitrust Division of the Department of Justice. Tempere is seeking Ms. Gambini's advice on whether the antitrust enforcement agencies are likely to investigate the transaction and, if so, whether the parties can successfully convince the Division to close the investigation either cleanly or with some mutually acceptable consent order. Tempere also would like to know, if it goes forward with the deal, what, if anything, it can or should do now to improve the chances of success of clearing any investigation without enforcement action.

Ms. Gambini has asked you to draft a memorandum for her to send to Black River to answer their questions. Black River has provided some information, and you have researched materials in the public domain. This is what you have learned:

Label stock

Pressure sensitive labels are self-adhesive labels that are peeled off a backing material and applied by pressure to adhere to a bottle, package, or other material. Almost every industry extensively uses these types of labels. They can be applied manually as part of a hand-crafting production process or by using labeling equipment in a high-speed production line.

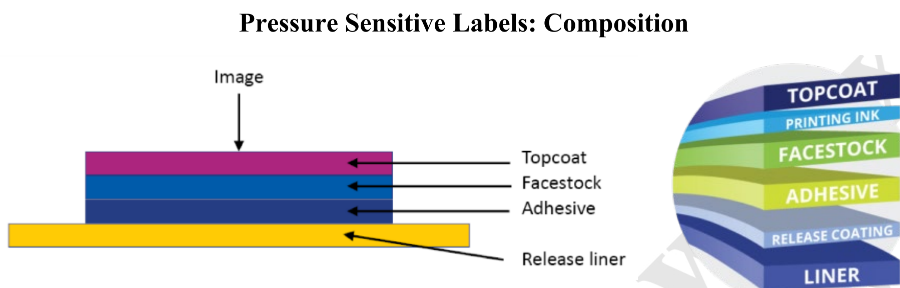
Pressure Sensitive Labels: Examples

Pressure sensitive labels are made from label stock. Label stock is a multilayer laminate consisting of a face material or "facestock" (the surface of the label on which the text will be printed), an adhesive, a silicon coating (which allows an easy release of the face material from the base material), and the base material or "release liner" (which protects the adhesive).[1]

[1] The facestock in pressure sensitive label stock may be either paper or plastic film. In our hypothetical world, we will assume that there is only one homogeneous type of label stock and it can be used for all purposes. Also, we are going to ignore all demand and supply side disruptions caused by COVID over the last several years and assume that it was business as usual.

Converters make pressure sensitive labels by purchasing label stock in bulk (usually in large rolls) from specialized manufacturers, cutting the rolls to desired sizes and shapes, and adding printed text and images as specified by their customers. After printing, converters can also add a "topcoat" to protect the text and images. There are about 2000 pressure sensitive label converters in the United States. Bulk label stock rolls cost $1400 per ton to produce and currently sell to converters throughout the country at a wholesale price of $2,000 per ton.[2]

Pressure Sensitive Labels: Composition



Specialized manufacturers use high-volume production equipment to produce label stock in bulk rolls. There are seven U.S. label stock manufacturers. There are no imports or exports of label stock into or from the United States, nor would any companies begin importing to the United States if U.S. prices increased by 5%.

Bulk Label Stock Manufacturing

	Tons (000s)	
Company	Capacity	Production
Avalee	510	500
Black River	320	200
Tampere	100	100
Madison	60	55
Milwaukee	60	55
Algoma	60	55
Cumberland	32	30
	1142	995

Avalee, headquartered in Chicago, Illinois, is the largest manufacturer and seller of bulk label stock rolls in the United States. Avalee's plant is operating at its rated capacity of 500,000 tons per year. Avalee has no space to increase the capacity of its existing plant. To meet additional demand, Avalee purchases 55,000 tons per year from Tempere under a long-term supply agreement. That agreement expires on December 31, 2023. Avalee is considering building a new plant at a different site but has not finalized its plans, purchased a site, or engaged contractors to design and build the facility. If and when Avalee decides to build a plant, it will take at least two to three years to find a site, obtain the required environmental approvals, construct the facility, and begin commercial production.[3]

[2] Manufacturers sell a variety of different sizes of rolls, many of which are under one ton and are priced proportionally.

[3] Two to three years is the fastest a minimum efficient scale label stock plant can be constructed. Expansions of existing plants typically take around two years.

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Black River, the target company, is headquartered in Dayton, Ohio, and is the second largest manufacturer and seller of bulk label stock in the United States. In 2018, Black River management decided to significantly expand and modernize its bulk label stock plant, increasing its capacity from 220,000 annual tons to 320,000 tons per year. Black River completed the expansion in late 2021. Expenses associated with the expansion are causing the company to run a significant negative cash flow into the foreseeable future. In early 2022, the management was replaced and the new management decided to put Black River up for sale in September 2022.

Tampere, the acquiring company and the firm's client, is a Finnish company headquartered in Helsinki. It is the third largest bulk label stock manufacturer in the United States. Tampere entered the United States in 2015 by exporting label stock from its production plants in Finland. Having gained product acceptance and sales experience in the United States, in late 2017 Tampere completed a large production plant in the United States with the capacity to produce 100,000 tons of label stock annually. At the time it built the plant, Tampere was selling only 20,000 tons annually in the United States.

Until recently, Avalee was the price leader in the United States. The other companies selling in the United States (including Tampere) matched Avalee's pricing. This ended in early 2022 when Black River began discounting label stock to gain more sales and more fully utilize its expanded plant capacity. Since label stock is a homogeneous product, the other companies matched Black River's wholesale price to protect their market share, stabilizing the market wholesale price at $2000 per ton.

The demand for label stock is relatively inelastic, with an aggregate own-elasticity of −0.1. The demand for label stock is ultimately driven by the demand for pressure sensitive labels, which typically account for a small portion of the cost of goods sold. There are no reasonable substitutes since non-adhesive labels are often not technically suited for the labeled product. Even if they are technically suitable, using non-adhesive labels requires the manufacturer of the labeled goods to change its production process and increases the manufacturer's total production costs.

Tempere's history and business plans

In the early 2010s, Tempere saw the United States as a prime market to enter. Not only was the United States one of the world's largest markets for bulk label stock, but it was also dominated by two firms—Avalee and Black River, which collectively had a share of over 80%—and exhibited high wholesale prices. Avalee had successfully increased prices at rates higher than the company's cost increases for years, which Black River and the smaller firms followed.

Tempere entered the U.S. market in 2015 through exports from Finland. It priced its label stock aggressively to gain market acceptance and market share. However, Tempere's aggressive pricing was largely irrelevant to U.S. market prices because Tempere had little ability to sell significant volume in the United States. After Tempere's entry into the United States, Avalee continued to lead whole price increases for the industry.

Tempere grew relatively slowly and, by late 2017, was selling only 20,000 tons of label stock annually in the United States. Nonetheless, Tempere was confident it could grow in the United States. In late 2018, Tempere opened a 100,000-ton per year production facility in the United States. To help offset the costs of building the plant and increase its capacity utilization, Tampere entered into a five-year agreement to supply Avalee 55,000 tons per year beginning in January

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2019 at a discount of 20% off Tampere's wholesale price. (As noted above, this contract is up for renewal at the end of 2023.) With 20,000 tons in existing annual sales and 55,000 tons committed to Avalee, Tempere had excess capacity of only 25,000 tons at the time the plant opened. As a result, Tempere cut back on its aggressive pricing, began to follow Avalee's price lead, and relied on good customer service and market growth to further load its plant and reduce excess capacity.

Currently, Tempere's sales to converters have grown to 45,000 tons annually. With its supply commitment to Avalee of 55,000 tons, Tempere is operating at full capacity and needs additional capacity if it is to continue to grow. Tempere has aggressive plans to grow its U.S. sales by 25% for five years once it has the capacity to cover the increased sales.

To meet its projected future production needs, Tempere developed the following strategy. Avalee would expand its U.S. plant to double its capacity from 100,000 tons to 200,000 tons annually by the end of 2024. Once the expansion is online, Tempere will again have significant excess capacity. As it did with its original plant, Tempere ideally would like to reduce the excess capacity by entering into a new supply agreement with Avalee for 55,000 tons annually from 2025 to 2029. Since Avalee would balk at not having a supply agreement for 2024, Tempere would delay its growth plans until 2025 and renew the existing supply agreement for five years starting at the beginning of January 2024. Whether Tempere would be willing to continue to supply Avalee after 2028 would depend on how well Tempere was doing at the time. The following table summarizes Tempere's business plans without the Black River acquisition. Tempere has not yet started discussions with Avalee on a renewed supply agreement but planned to do so early next year.

Tempere Projected Annual Sales with (Delayed) 25% Growth Rate without the Black River Acquisition

Year	Sales (000 tons) Tempere	Avalee	Black River	Capacity (000 tons) Total	Excess	Avalee Supply Contract
2022	45	55		100	0	Current
2023	45	55		100	0	Current
2024	45	55		100	0	Renewed
2025	56	55		200	89	Renewed
2026	70	55		200	75	Renewed
2027	88	55		200	57	Renewed
2028	110	55		200	35	Renewed
2029	137			200	63	???

Early this year, Tempere's board of directors approved this strategy and committed the necessary funding for the expansion. By the beginning of this past summer, the company engaged a construction firm to prepare the engineering plans and the plant site for construction to begin in early 2023. Surprisingly, Tempere's plans to expand its plant have yet to leak into the industry.

Tempere's plans, however, were put on hold when Black River became available for purchase at the end of the summer. At its current offer price, Tempere estimates it would obtain Black River's existing 120-ton excess capacity at 70% of the cost per ton of expanding Tempere's U.S. facility. Tempere finds the financials for buying Black River over expanding Tempere U.S. plant

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compelling. While Tempere and Black River are still in negotiations, Tempere understands that there are only two other bidders for Black River—a U.S. private equity company and a Swedish paper company with no label stock operations in the U.S.—but that Tempere's offer price materially exceeds the bids by the two other companies.

While Black River's plant has the capacity to absorb Tempere's current production, Tempere plans to operate both plants and load them with additional sales earned through aggressive pricing. Given all the excess capacity it would have, Tempere would like to continue the Avalee supply agreement to supply 55,000 tons to Avalee annually (if not increase the supply volume) for another four years at the current 20% of the prevailing wholesale price. Tempere has not discussed this with Avalee. But even if Tempere can negotiate a new four-year contract with Avalee, Tempere will still have significant excess capacity in the years following the Black River acquisition and a need to grow the business.

Tempere Projected Annual Sales with 25% Growth Rate with the Black River Acquisition

Year	Sales (000 tons)			Capacity (000 tons)		Avalee Supply Contract
	Tempere	Avalee	Black River	Total	Excess	
2022	45	55		100	0	Current
2023	56	55	200	420	109	Current
2024	70	55	200	420	95	Renewed
2025	88	55	200	420	77	Renewed
2026	110	55	200	420	55	Renewed
2027	137	55	200	420	28	Renewed
2028	172	0	200	420	48	None
2029	215	0	200	420	5	None

As these tables show, there are two differences between the business plans with and without the Black River acquisition. First, with the Black River acquisition, Tempere would begin its 25% growth plan immediately in 2023 rather than delay it until 2025 as Tempere awaits the completion of its plant expansion. Second, while Tempere would be willing to renew the Avalee supply agreement at current volumes and price terms in both scenarios, the extension would be for four years with the Black River acquisition and five years with the plant expansion.

Market reactions

When asked about the market reaction to the transaction, Tempere executives expect some opposition from converters. Most converters buy from one of the 'Big Three," which collectively account for over 80% of wholesale sales, plus a fringe of small domestic suppliers. They accurately see market competition driven by the three big firms, with the remaining firms as followers. The transaction will reduce the number of major suppliers from three to two, and converters are likely to fear their prices will increase as a result.

Moreover, this fear may be exacerbated by an additional concern that Tempere will close its U.S. plant and consolidate its production into the Black River plant. With 120,000 tons of excess capacity, the Black River plant could readily absorb the Tempere's plant production. Then, with only 20,000 tons of excess capacity remaining, Tempere would have little incentive to price aggressively to increase production and gain market share. Converters remember that in the last few years, as Tempere's market share increased and its excess capacity decreased, Tempere cut

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back on its aggressive pricing and began to follow Avalee's rice increases. The pace and magnitude of price increases in the market rose as a result.

Tempere is unsure of how Avalee reacts to the transaction. Tempere expects that Avalee is likely to have two concerns.

First, Avalee will question what effect the acquisition of Black River will have on Tempere's willingness to renew the existing supply agreement when it expires at the end of 2023. Avalee sells more label stock today than it can produce. If Tempere buys Black River and continues both plants in production, Tempere will have a significant incentive to renew the current supply agreement (or perhaps even increase the supply volume) to help fill the Black River plant. On the other hand, if Black River is sold to a third-party buyer, Avalee may be able to enter into as good or better a supply agreement to replace the Tempere agreement. The new buyer will have a significant incentive to deal with Avalee to reduce the 120,000-ton excess capacity. Tempere expects that, at a minimum, if a third party buys the Black River plant, Avalee will attempt to "play off" Tempere and the new buyer in the bidding for a new five-year supply agreement beginning in 2024 to get even more favorable terms than it has today. But Avalee may think that it is also possible that, if Tempere does not buy Black River, Tempere may seek to reduce its supply commitment or abandon it altogether when the current contract comes up for renewal next year in order to free up production to expand its sales to converters (without the 20% discount).

Second, Avalee also recognizes that if Tempere buys the Black River plant, Tempere will have an incentive to engage in aggressive pricing to build market share and reduce excess capacity. That will reduce the price increases Avalee would like to see in the future. If Tempere does not acquire Black River and continues to supply Avalee with 55,000 tons per year, Tempere will not have excess capacity to reduce and hence will not return to aggressive pricing. Of course, Avalee will recognize that Tempere may decide to expand its plant and aggressively price to fill the new capacity once online, but that additional capacity is at least two or three years away at the earliest.

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PROVIDENCE HOSPITAL/MID MONTANA CLINIC MERGER

You are an associate at Gambini & Galloway, a busy firm these days. You and JoAnne Galloway, a partner with whom you work, have met with Dr. Gregory House, the CEO of Providence Healthcare, a long-time firm client. Providence, an integrated healthcare system in Montana, Idaho, and Wyoming, is negotiating to acquire Mid Montana Clinic, PC (MMC), the largest physician group in Missoula, MT, for $36 million in cash. Dr. House reluctantly asked for the meeting at the insistence of his corporate lawyers, who were concerned that the transaction might raise antitrust concerns since Providence operates Providence St. Joseph's (PSJ), the larger of two hospitals in Missoula. Dr. House said that Providence had acquired physician groups in Billings, Cheyenne, and Boise, where it also has hospitals, without any problems and saw no reason why the acquisition of MMC should be any different.

Ms. Galloway promised Dr. House to provide him with a preliminary antitrust risk assessment of the transaction. The corporate lawyers have warned Ms. Galloway that if she thinks there may be an antitrust problem with the transaction, Dr. House will need a rigorously argued (but not necessarily long) memorandum of law to be convinced.

Ms. Galloway does believe that the transaction presents a serious antitrust concern and has asked you to draft the memorandum she will send to Dr. House. Ms. Galloway wants the memorandum to address the risk that the transaction will be subject to an antitrust review by the Federal Trade Commission or state antitrust authorities,[4] the theories of anticompetitive harm that the transaction is likely to present and any defenses to these theories the merging parties may be able to develop, and the likely outcome of any investigation (including any possibility of a consent settlement).

For background, Providence has provided some information and you have researched materials in the public domain. Ms. Galloway asks that the memorandum identify any information that needs to be developed to refine the analysis further, but you should use your common sense and experience where possible to predict what the answers to those questions are likely to be.

The merging parties

Providence is an integrated healthcare system operating in Montana, Idaho, and Wyoming.[5] In the Missoula area, Providence operates Providence St. Joseph's, a vertically integrated healthcare delivery system operating a 220-bed general acute care hospital, eight primary care clinics, and several specialty clinics. Providence St. Joseph's employs 160 physicians in the region, of which 108 are hospitalists and 52 are nonhospital outpatient physicians.[6] Providence St. Joseph's nonhospital outpatient physicians, all of whom work in Providence St. Joseph's primary and specialty clinics, include 36 adult primary care physicians (PCPs), four pediatricians, eight OB/GYN physicians, and four general surgeons.[7]

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[4] Ms. Galloway knows that the FTC reviews transactions involving medical providers.

[5] An integrated healthcare system is comprised of both hospital services and physician services and may also include insurance companies and research and education components.

[6] A hospitalist is a dedicated inpatient physician who works exclusively in a hospital. Hospitalists do not treat patients on an outpatient basis. Outpatient physicians treat patients initially outside of a hospital in nonhospital clinics or doctor's offices.

[7] A description of each of these specialties is given in the appendix if you need it.

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St. Mary's Hospital, a 160-bed acute care hospital, operates the only other hospital in the Missoula area. St. Mary's employs 88 physicians, primarily hospitalists and other hospital-based specialists. Its nonhospital outpatient physicians include six adult PCPs but no pediatricians, OB/GYN physicians, or general surgeons.

MMC, a for-profit, physician-owned professional corporation under Montana law, is a multispecialty for-profit physician group in Missoula. MMC operates only in the Missoula area, where it has nine clinics and one ambulatory surgery center. MMC has 43 physicians (all with an ownership interest in MMC), including 23 adult PCPs, six pediatricians, eight OB/GYN physicians, and six general surgeons.[8]

For many years, MMC and St. Mary's have had a referral relationship. MMC is the largest source of referrals for St. Mary's, accounting for almost 60% of St. Mary's inpatient admissions. All MMC physicians have staff privileges in their respective specialties at St. Mary's and a few also have staff privileges at St. Joseph's.[9] MMC and St. Mary's also have professional service agreements under which, for example, MMC general surgeons provide trauma coverage, MMC OB/GYNs provide childbirth coverage, and MMC pediatricians provide emergency pediatric coverage at St. Mary's, without which St. Mary's could not operate.

The following table summarizes the nonhospital outpatient physicians in the greater Missoula area:[10]

Nonhospital Outpatient Physicians in the Missoula Area

Provider	Adult PCP	Pediatricians	OB/GYN	General surgery	Total
Providence St. Joseph's	36	4	8	4	52
St. Mary's	6				6
Mid Montana Clinic (MMC)	23	6	8	6	43
University Doctors, P.C.	6	1			8
Center for Family Medicine	3				3
Baker Family Medicine	1				1
Grant Creek Family Clinic	4	1	0		5
Sole practitioners	2		0		2
	81	12	16	10	120

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The contemplated transaction

For several years, both Providence and St. Mary's have indicated an interest (and an increasing willingness to pay) to acquire MMC. After resisting these entreaties, MMC decided earlier this year to put itself up for sale and invited bids from Providence and St. Mary's. Dr. House said that MMC's decision to align itself with a healthcare system containing a hospital was necessary to maintain MMC's long-run financial viability. Dr. House admitted, however, that the due

[8] To be clear, MMC does not operate any hospital and all MMC's physicians are nonhospital outpatient physicians.

[9] Hospital staff privileges authorize a medical practitioner who is not employed by the hospital to admit patients and provide patient care in the hospital for a specific medical practice.

[10] The Total in the table may be larger than the sum of the numbers in the row because of physicians in the group with specialities other than the four noted.

diligence on MMC revealed that MMC revenues increased during each of the prior three years. The due diligence also gave no indication that MMC will not be able to continue to be a profitable business into the foreseeable future as a standalone healthcare provider in Missoula.

Providence's current bid is to buy MMS for $36 million in cash.[11] The acquisition will include all MMC's practice assets, including its clinics and diagnostic imaging equipment. Providence also agrees to continue operating all MMC's facilities and offer employment to all MMC employees, including all MMC physicians.

When questioned by Ms. Galloway, Dr. House said that Providence values nonhospital physician practices (including real estate and other associated assets) in the Missoula area at about $700,000 per physician. This assumes that the physicians in the acquired practice would become Providence employees at closing under a five-year employment agreement. MMC physicians who sign employment agreements would continue to work in their current jobs in their current facilities. However, as Providence employees, they could have hospital staff privileges only at Providence St. Joseph's, and any local referrals they make would have to be to physicians in Providence St. Joseph's hospitals and clinics.

Providence recognizes that not all MMC physicians will wish to become Providence employees. Already two MMC pediatricians have announced that if the deal closes, they will be joining Grant Creek Family Clinic. In addition, one MMC OB/GYN and one MMC general surgeon have announced that they will retire from the practice of medicine once the deal closes. Because the value of the acquisition decreases with each physician that does not join as an employee, Providence has negotiated a purchase price adjustment of $800,000 for every MMC physician who does not become a Providence employee at the closing. Providence will also require conditioning the closing on at least 35 MMC physicians becoming Providence employees. If more than eight MMC physicians do not join as employees, Providence can terminate the purchase agreement. Notably, as with past acquisitions of physician groups, Providence will not seek to impose a noncompetition restriction on a selling MMC physician who does not become an employee.

St. Mary's also bid for MMC. Providence and St. Mary's went through several rounds of bidding, but ultimately St. Mary's could not match the price that Providence was offering to pay.

Transaction rationale and benefits

Although Providence St. Joseph's has the capacity in its physical facilities to serve a larger number of patients, its physicians are operating at capacity. Dr. House stated that for the last three years, Providence St. Joseph's had been trying unsuccessfully to recruit additional pediatricians, OB/GYNs, and general surgeons to expand its hospital and clinics. Recruiting physicians in Missoula is challenging because of the area's geographic location, perceived adverse weather conditions, and the lack of Montana OB/GYN and pediatrics residency programs. If all but the four MMC physicians who have announced other plans join Providence, the MMC acquisition will satisfy Providence St. Joseph's desire for additional physicians. In the event, however, that the acquisition does not include at least two pediatricians, two OB/GYNs, and two general surgeons, Providence will resume its recruitment efforts to make up the shortfall.

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[11] It is up to MMC as to how to distribute the purchase to its individual physician-owners.

When asked whether the transaction offered any benefits in the Missoula area, Dr. House replied that the transaction will benefit patients in at least three distinct ways:

1. Providence St. Joseph obtains rebates from drug manufacturers for drugs used by Medicare and Medicaid patients under the federal "340B program."[12] Under the law, Providence St. Joseph must pass these rebates to its Medicare and Medicaid patients. All MMC's Medicare and Medicaid patients must purchase from commercial pharmacies that do not qualify for the 340B program and consequently pay higher prices for their prescription drugs than patients purchasing from the Providence St. Joseph's pharmacy. After the acquisition, MMC's Medicare and Medicaid patients will be able to purchase their prescription drugs from the Providence St. Joseph pharmacy at the lower price. Providence St. Joseph estimates that this will save MMC patients over $1 million in drug costs.
2. All MMC patients will be able to access the Providence St. Joseph's clinical laboratory services. While Providence St. Joseph's does not charge patients lower fees than the commercial laboratories MMC uses, the turn-around time for testing averages one day less at Providence St. Joseph's because MMC must send its tests to commercial laboratories in Billings, MT, 345 miles away.
3. Providence St. Joseph's can improve patient quality at MMC clinics by (a) embedding behavioral health therapists into MMC's primary care clinics, (b) assisting in enrolling MMC cancer patients in clinical trials outside the Missoula area, and (c) creating an electronic medical record (EMR) system for MMC.

Payers and patients

In 2020, over $809 billion was spent on physician and clinical outpatient services in the United States.[13] Most medical services in the United States are charged on a fee-for-service model. When a patient obtains a medical service, the physician charges a fee for the service. In 2020, however, patients paid out-of-pocket only 7.3% of all fees for physician and nonhospital services, the rest being paid by private and government third-party payers. Commercial insurance companies paid 37.1%, Medicare and Medicaid 34.8%, other government payers 5.3%, and other third-party payers 15.5%.[14] In the United States, 54.3% of Americans obtain their health insurance through employer-sponsored commercial insurance plans.[15]

Medicare, Medicaid, and other government payers set the fee providers can charge for their insureds on a "take it or leave it" basis. There are no negotiations with providers. Providers seeking reimbursement under one of these programs can charge no more for a service than the government-set rate. These rates are the same throughout the country and do not vary because of

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[12] Section 340B of the Public Health Service Act requires pharmaceutical manufacturers to enter into an agreement, called a pharmaceutical pricing agreement (PPA), with the HHS Secretary in exchange for having their drugs covered by Medicaid and Medicare Part B. Under the PPA, the manufacturer agrees to provide front-end discounts on covered outpatient drugs purchased by specified providers, called "covered entities," that serve the nation's most vulnerable patient populations. Providence St. Joseph is a covered entity; MMC is not.

[13] Centers for Medicare & Medicaid Services, National Health Expenditures by Type of Service and Source of Funds, CY 1960-2020.

[14] *Id.*

[15] Katherine Keisler-Starkey & Lisa N. Bunch, U.S. Census Bureau, Health Insurance Coverage in the United States: 2021 3 (Sept. 2022).

differences in the cost of living or competitive conditions in a specific area. Given the large number of patients on Medicare and Medicaid, almost medical providers accept Medicare and Medicaid patients.

By contrast, commercial insurance companies negotiate with individual providers on the fee the provider will charge for a service provided to a covered patient. Most commercial insurance plans begin to pay a share of an insured's medical expenses each year after the patient has paid a set amount in the insurance contract (the "deductible"). After the patient has paid the deductible, when a provider renders a service, the insurance company pays the bulk of the agreed-upon fee, and the patient is responsible for the remainder of the charge (the "copay"). Most of the 7.3% of nonhospital outpatient services paid by patients are the result of insurance deductibles and copays.

Commercial insurance companies seek to pay medical providers the lowest reimbursement rates they can negotiate. They do this by creating a "network" of providers in a general area. Insurance companies then incentivize their insureds to use "in-network" providers by charging substantially lower copays than for out-of-network providers. As a result, the vast bulk of commercially insured patients obtains their medical services from "in-network" providers. In this way, insurance companies can "deliver" their insureds to in-network providers and increase the providers' utilization rates and market share. Insurance companies then obtain the lowest reimbursement rates by effectively requiring reasonably substitutable providers to bid against each other for an exclusive spot in the insurance company's network.

Two providers are "reasonably substitutable" for inclusion in an instance network if the insurance company's ability to sell its insurance plans to employers is not especially sensitive to which provider is included in the network. Employers, in turn, are sensitive to the demands of their employees as to what providers their employees wish to use. The more an employer's employees demand to use a particular provider, the more likely the employer will only purchase insurance plans that include that provider in the network. As a result, local employers are looking for insurance plans that include "in-network" providers with the medical services and specialties their employees demand and within a reasonable driving distance for their employees. Providers then compete to make themselves attractive to insureds to maximize their bargaining leverage with insurance companies when negotiating for inclusion in the network.

Since most insured patients pay only a small portion of the fees an "in-network" provider charges, patients almost always look first for doctors within their insurance company's network with the medical specialty that meets the patient's health needs. Patients then choose among these "in-network" physicians based on referrals by other doctors, the recommendations of family and friends, professional ranking, location, availability of appointments, and other nonprice factors. In general, while patients are willing to travel considerable distances for specialized complex medical procedures, they are not willing to travel more than 20 miles from home for the types of services provided by adult PCPs, pediatricians, OB/GYNs, or general surgeons if reputable quality "in-network" providers are available within that distance.

Within the Missoula area, insurance companies regard Providence St. Joseph's and St. Mary's as reasonably substitutable hospitals, and insurance companies often require that they bid against each other for an exclusive spot in an insurance company's network for iplans covering Western Montana. Because Providence St. Joseph's negotiates as a package with its clinics, an insurance company that includes Providence St. Joseph's in its network will also include its associated

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clinics. Conversely, since St. Mary's depends on MMC doctors for inpatient referrals and for various types of medical specialty coverage within the hospital, an insurance company that includes St. Mary's in its network will also include MMC. For example, Blue Cross Blue Shield of Montana, the largest commercial insurance company in Montana, includes St. Mary's and MMC in its network but does not include Providence St. Joseph's. On the other hand, UnitedHealthcare includes Providence St. Joseph's in its network but does not include either St. Mary's or MMC.

Competition in nonhospital outpatient services in and around Missoula

Missoula is Montana's largest city. The Missoula metropolitan statistical area, which comprises Missoula County, is one of three MSAs in Montana. In 2020, the Missoula MSA had a population of 117,922, making it Montana's second-largest MSA behind Billings and ahead of Bozeman. The two hospitals and all nonhospital outpatient clinics in Missoula Country are in the city of Missoula and within three miles of each other.

Outside of Missoula County, the nearest hospital is the 25-bed Superior Community Hospital, almost 60 miles away in Superior, MT. The nearest hospital with over 100 beds is 119-bed St. James Healthcare in Butte, MT, 118 miles from Missoula. To the north, Kalispell, MT, 188 miles from Missoula, has the 124-bed Logan Health Medical Center. The only meaningful

nonhospital outpatient services are offered around these hospitals.

Possible concerns about the transaction

When asked about possible opposition to the transaction, Dr. House was notably noncommittal, saying that he would have to think more about this. Dr. House did inquire, however, whether opposition to the transaction would increase the likelihood of an investigation or the chances the deal would be challenged.

APPENDIX

Adult PCP services are provided to patients aged 18 and over by physicians who are board-certified in internal medicine, family medicine, and general practice. Adult PCP services typically include routine medical services in an outpatient or office setting, such as physical

exams, basic medical procedures, treatments of common illnesses and injuries, and long-term management of chronic conditions such as diabetes and hypertension.

Pediatric services are primary care services provided by pediatricians to children under the age of 18. Pediatricians receive additional training to treat medical conditions affecting pediatric patients.

OB/GYN services provided by specially trained physicians related to women's reproductive health, pregnancy, and childbirth.

General surgery services are offered by physicians who are board-certified exclusively in general surgery. General surgeons typically perform basic surgical procedures including abdominal surgeries, hernia repair surgeries, gallbladder surgeries, and appendectomies. Specialty surgeons who receive additional training and certification in particular types of procedures beyond the scope of general surgery training do not perform the same set of services as surgeons who are board-certified exclusively in general surgery.

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END OF EXAM

Dale Collins
Merger Antitrust Law
Fall 2022

LABELSTOCK MERGER
Outline[1]

This outline summarizes the analysis of the hypothetical. The issues presented range from easy to spot and analyze to quite complicated. In the time available, no answer could spot, much less analyze, all of the issues. The exams were ranked ordered based on their completeness and analytical persuasiveness. I then applied the law school's curve to assign grades.

0. Questions—Calls for a reasoned memorandum of law on a preliminary antitrust analysis
   a. Are the antitrust enforcement agencies likely to investigate the transaction?
   b. If so, can the parties successfully convince the Division to close the investigation either cleanly or with some mutually acceptable consent order?
   c. What, if anything, can or should Tempere do now to improve the chances of success of clearing any investigation without enforcement action?

1. Inquiry risk
   a. Antitrust Division
      i. *HSR reportable*: Purchase price \$593 million > \$101 million threshold. No exemptions[2]
      ii. The Division will learn of the horizontal overlap from the HSR filings
      iii. The overlap will lead the Division to learn about other competitors, which it could do through an Internet, literature, and newspaper search
      iv. Moreover, there a possible, if not likely, complaints from Avalee and/or larger converters that would inform the Division further about the structure of the industry
      v. The Division's search of publicly available information plus any information it learns from complainants will reveal that this is a 3 → 2 horizontal merger with four (low capacity) fringe firms
      vi. The preliminary investigation will result in the companies producing basic documents (e.g., strategic plans, any internal or external market research reports) and in interviews with customers

[1] There was a typo on Page 7 of the exam. "*Avalee* would expand its U.S. plant to double its capacity . . . ." should read "*Tempere* would expand its U.S. plant to double its capacity . . . ." This should have been obvious from the context. In any event, it does not appear that anyone was tripped up by the typo.

[2] A surprising number of students cited the HSR thresholds for 2020 or 2021 rather than for 2022. I suspect that this resulted from the use of old boilerplate, but there is no excuse for not using the current thresholds. If you did this in a memorandum to a partner or an agency section chief, you would not be treated kindly.

More generally, you must be careful to make sure that your boilerplate fits the problem. I not infrequently find references to ice cream, orange juice, and other irrelevant products in students' answers. My suggestion is that when you are preparing your boilerplate, highlight in **bold** anything that may need to be changed or updated to conform to the issues you are addressing.

vii. The preliminary investigation will reveal that an indepth second request investigation is warranted
viii. CONCLUSION: Tempere should anticipate a preliminary and second request investigation

b. State AGs
  i. Could be an interest by the state AG in which the Tempere plant is located if there is a possibility that plant would close[3]
  ii. If interested in the transaction, the state AG almost surely would join in the Antitrust Division's investigation and not open a separate investigation

2. Substantive risk

a. Relevant product market: Manufacture and sale of pressure sensitive label stock
  i. *Brown Shoe* factors
    1. Homogeneous product → high cross-elasticities of demand between producers
    2. No reasonable substitutes → very inelastic own-demand (-0.1) and low cross-elasticities with other types of labelling products
    3. Industry recognition
    4. Peculiar uses and characteristics (lower cost to use than non-adhesive labels)
    5. Unique production processes and facilities (that take two to three years to build)
    6. Distinct customers (converters)

  ii. Hypothetical monopolist test: use critical elasticity test
  (NB: Demand-based)

    1. Price: $2000 per ton
    2. Cost: $1400 person
    3. Margin: (2000 – 1400)/2000 = 30%
    4. %SSNIP: 5%
    5. Critical elasticity test

$$\left|\varepsilon_{cl}\right| \cong \frac{1}{\delta + m} = \frac{1}{0.05 + 0.30} = 2.86$$

    6. |Actual elasticity|: 0.1 < 2.86 → HMT satisfied for a 5% SSNIP

3 Unfortunately, I failed to identify in the hypothetical the state in which the Tempere plant was located, but that should not have stopped you from identifying that AG's possible interest

b. Relevant geographic market: The United States[4]
    i. Commercial realities
        1. All manufacturers sell nationwide
        2. Uniform price throughout the U.S. of $2000 per ton
        3. No exports or imports
    ii. HMT: Same as for relevant product market

c. Market participants and market shares
    i. All seven current sellers; no nonseller market participants[5]
    ii. Market shares:
        1. Domestic producers at current sales
        2. QUERY: What to do with Tempere's sales to Avalee? Does it matter? A BIT (see below)

d. *PNB* presumption

NOTE: All unit sales by manufacturers is the preferred calculation, but dollar sales by all manufacturers also works and gives essentially the same *PNB* presumption result. Sales to converters distorts Tempere's significance and should not be used.

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[4] At least one student simply asserted that it was "clear" that the relevant geographic market was the United States. I agree with the conclusion, but the assertion is not a reasoned analysis. In writing formal memoranda, you should strike words like "clear" and "obvious" from your vocabulary.

Separately, some students relied solely on the fact that there are no imports or exports into or out of the United States and that no imports would start even if the U.S. price increased by 5%. This is sufficient to show that the relevant geographic market is no larger than the United States, but it is not sufficient to show that the relevant geographic market is the United States. Regional or local geographic markets are consistent with the absnce of imports or exports. To establish that the United States is the relevant geographic market, you also need to cite that bulk label stock manufacturers sell nationwide and that the wholesale price is a uniform $2000/ton.

Lastly, some students added a paragraph at the end of the geographic market analysis to the effect that "[w]hile there may be smaller geographic markets within the nationwide market, the facts stated in the investigation record do not allow us to analyze this." This is not correct. Under the facts as given—all producers identified, all sell nationwide, and all sell at a uniform price of $2000/ton—there is only a national market. The paragraph was part of the boilerplate and illustrates that you need to make sure that the boilerplate you use fits the problem.

[5] Some students identified the market participants as only the Big Three and performed the HHI calculation on just the top three firms. This is incorrect. While in coordinated effects a subgroup of firms can be a collusive group, for the purpose of market definition *all* current sellers must be included in the market (with the exception that any firm that is nearly certain to cease production and exit the market in the near future can be excluded). The "commercial realities" judicial test requires as much. *H&R Block* is a good illustration of the DOJ's recognition of this principle.

I should also note that some students looked at—and performed HHI calculations for—both a "Big Three" market and an all seven-manufacturer market. This was a waste of valuable exam time. Only the seven-firm market was relevant to the analysis.

Bulk Label Stock Manufacturing	Tons (000s)		HHI calculations			
			Capacity		Production	
Company	Capacity	Production	Share	HHI	Share	HHI
Avalee	510	500	44.66%	1994	50.25%	2525
Black River	320	200	28.02%	785	20.10%	404
Tampere	100	100	8.76%	77	10.05%	101
Madison	60	55	5.25%	28	5.53%	31
Milwaukee	60	55	5.25%	28	5.53%	31
Algoma	60	55	5.25%	28	5.53%	31
Cumberland	32	30	2.80%	8	3.02%	9
	1142	995	100.00%	2947	100.00%	3131
Combined			36.78%		30.15%	
Pre HHI				2947		3131
Delta				491		404
Post HHI				3438		3535

2FCR	Capacity	Production
Premerger	72.68%	70.35%
Postmerger	81.44%	80.40%
Difference	8.76%	10.05%

i. Merger Guidelines: Triggers presumption under the Guidelines, but not that deep into the "red zone" (i.e., not a strong presumption):
    1. Post > 2500; Δ > 200
    2. Guidelines: "will be presumed to be likely to enhance market power"

ii. *PNB* itself: Good support (but needs to be argued and not just asserted)
    1. Combined firm's share right at or slightly above *PNB's* threshold of 30%
    2. Combined postmerger 2FCR:
       Capacity: ≈ 81%; increase: 8.76% points
       Revenues: ≈ 80%; increase: 10/05% points
       Low compared to *PNB* point change, but much higher starting concentrations → should be enough to support presumption

iii. Judicial support: Reasonably strong[6]
    1. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001) (merger of second and third largest firms with a delta of 510 and a postmerger HHI of 5285 created a presumption of anticompetitive effects by a "wide margin")
    2. *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 72 (D.D.C. 2011) (merger of second and third largest firms triggering

[6] I continue to be surprised by the number of students who failed to provide support from the modern merger antitrust case law for the applicability of the *PNB* presumption. As I stressed a number of times in class, modern case law support —that is, case citations with supporting parentheticals—is more important in court than *PNB* itself or the Merger Guidelines (which to a court are only advisory).

presumption with a combined share of 28%, a delta of 400, and postmerger HHI of 4691)
3. *United States v. UPM-Kymmene Oyj*, No. 03 C 2528, 2003 WL 21781902 (N.D. Ill. July 25, 2003) (triggering presumption with a combined share of 20%, a delta of 190, and a postmerger HHI of 2990)
4. *See In re Evanston Northwestern Healthcare Corp.*, 144 F.T.C. 1, 380 (2007) (Commission opinion) (triggering presumption with a combined share of 35%, a delta of 384, and a postmerger HHI of 2739)

iv. CONCLUSION: Reasonably strong PNB presumption given PNB and judicial support

3. Unilateral effects—Not applicable

a. Homogeneous products: Classical recapture unilateral effects not applicable

b. Uniform pricing nationwide: So an auction unilateral effects theory does not apply[7]

4. Coordinated effects--Applicable

a. Premerger susceptibility: YES

i. Homogeneous product

ii. Three firms with a 4-firm fringe with limited capacity

	Capacity		Excess	
	tons	%	tons	%
Top 3	930	81.4%	130	88.4%
Fringe 4	212	18.6%	17	11.6%
	1142	100.0%	147	100.0%

Largest 3 firms have 81.4% of the domestic manufacturing capacity and 88.4% of the excess manufacturing capacity → this is a collusive group

iii. Small firms operating close to capacity → little incentive to cut prices to increase share → should play follow the leader

iv. In fact, prior to Black River's disruptive conduct in the wake of its capacity expansion, all firms (including importers except Tempere) did follow Avalee's price lead

[7] There is an arguable unilateral effect if Tempere is likely to discontinue its sales to Avalee as a result of the merger. But this is contrary to what Tempere says are its postmerger business plans, which is to renew the Avalee contract. There is also a separate question of whether failing to renew the supply agreement, even if a result of the merger, is an actionable anticompetitive effect. I would have credited an argument either way, but no one spotted this issue.

1. Tempere's aggressive pricing when it entered the market in 2015 was largely irrelevant since it had little ability to sell significant volume in the United States

v. Also, the long-term agreement whereby Tempere supplies Avalee with 55K tons annually is evidence of a willingness of the two firms to cooperate with another (much like the evidence that the firms in *H&R Block* cooperated in lobbying the IRS). While a supply agreement between competitors is lawful absent evidence it was used to facilitate price-fixing, on the facts given Tempere's purpose to enter into the agreement was to increase the load on its new plant, which otherwise would have started running with a very low-capacity utilization. The evidence is significant, however, because Tempere and Avalee will be the only two major manufacturers remaining is Tempere's acquires Black River.

b. Postmerger increase in likelihood and effective: DEPENDS

i. In favor of YES

1. 3 → 2 in the collusive group
2. If postmerger Tempere consolidates production into the Black River plant and closes its own plant, then excess capacity in the industry would almost disappear, eliminating any incentives to cut prices and increasing increases to increase prices. Although Tempere does not plan to do this, there is nothing at this point to stop it from changing its mind
3. On a going forward basis, without the merger Tempere is likely to expand its own plant, significantly increasing the total amount of excess capacity in the industry. Tempere's expansion and its resulting excess capacity is likely to lead Tempere to aggressively price its product in order to gain share and further load its plant. If Black River (now on its own, although perhaps under new management) continues to price aggressively, then two of the three major firms in the industry will be competing vigorously. If the acquisition goes forward, Tempere will not expand its plant and this competition will be lost.

ii. In favor of NO

1. If Tempere keeps both its plant and the Black River plant open, it would have significant excess capacity and face the same incentives as Black River does premerger to cut prices in an effort to further load the plant.

For the memorandum to be complete, these issues need to be spotted and argued one way or the other. I credited a reasoned argument either way.

5. **Elimination of a maverick**

    a. Black River is currently a maverick: It has reduced its wholesale price (to capture additional market share and further load its plant) and disrupted Avalee's price leadership

        i. BUT does it matter that Black River is likely to be sold to someone even if Tempere is blocked from acquiring it? Perhaps not, since it appears that Black River's incentive to cut prices comes from its structural excess capacity and its desire to increase its share to load its plant, not from an idiosyncratic management decision. I credited an argument made either way

    b. Arguably, Tempere is a maverick but for the acquisition. Prior to negotiations with Black River, the Tempere board had approved an expansion to double capacity by 2024. Tempere business plan with its internal expansion was to return to aggressive pricing in order to gain share and further load the plant. The acquisition of Black River would stop Tempere's internal expansion.[8]

    c. ALSO, is it likely that Tempere will return to aggressive pricing if it acquires Black River and gains all of Black River's excess capacity (thus replacing Black River as a maverick)?

For the memorandum to be complete, these issues need to be spotted and argued one way or the other. I credited a reasoned argument either way.

DOWNWARD-PRICING PRESSURE DEFENSES

6. **Entry/expansion/repositioning defense—Not applicable**

    a. No evidence of any new firm entering the market[9]

    b. Avalee's plans are too uncertain, and it would take too long for Avalee to build capacity if and when it chose to do so

[8] Alternatively, Tempere's planned expansion but for the Black River merger could have been analyzed under a "potential expander" rubric akin to the elimination of actual potential competition. The labels here are less important than spotting the issue and making an argument.

[9] Some students styled their answers as "the merging firms will argue" that there exist firms that are likely to rapidly enter the production or sale of label stock in the relevant market without incurring significant sunk costs of entry and exit, and that this entry and expansion would be sufficient to prevent any anticompetitive effect from the merger from occurring. They then proceeded to develop the argument why this defense will be rejected. (This was not the only analysis of a defense that was styled this way.) While I did not deduct for this formulation, I could have. Remember, your firm is representing the buyer, so you have influence over what the parties will argue. You and your client only lose credibility with the agency—and with the court if you are litigation—of making arguments that have no support. If a defense is not supportable on the facts, just say so without putting words in your client's mouth.

c. No evidence that any other firm (except for Tempere prior to entering negotiations with Black River) had an interested in expanding its plant

d. In any event, plant expansions or new construction is likely to take too long to come online (two to three years) to avoid an otherwise short-term anticompetitive effect

e. BUT with the merger, Tempere's business plan is to begin aggressive pricing to expand sales and further load the plant immediately. This is a form of expansion defense since it negates Tempere's interest in reducing production in or to increase prices. Whether this will be accepted by the Antitrust Division in the investigation or the court in litigation depends on how persuasive Tempere is that expansion rather than contradiction of production is in its profit-maximizing interest.[10]

7. Efficiencies defense—Not applicable

a. Tempere's reduction in the cost of capacity is not a cognizable efficiency since it only reallocates existing capacity and does not increase it.

   i. Indeed, market capacity in the future is likely to be less with the acquisition that without it, since if Tempere cannot acquire Black River it is likely to significantly expand its own plant.

   ii. No indication of any marginal cost savings, product improvements, or other customer benefit flowing from the transaction (apart from any incentives for Tempere to more aggressively price given its postmerger excess capacity, but this is probably better analyzed as an incentive to expand production (see above))

8. Power buyers defense—Not applicable

a. Uniform converter price of $2000/ton indicates that no converter is exercising buyer power

b. In any event, with 2000 converters, at least some converters will be too small to have any buyer power and be able to resist anticompetitive price increases[11]

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[10] Some students argued that the four fringe firms would defeat an anticompetitive price increase by expanding their production. There are two hurdles to overcome to make this argument. First, the four fringe firms are operating close to capacity and collectively could expand their production by only 17K tons annually. An argument is necessary to say that an expansion of 17K tons would "fill the hole" created by any effort by Avalee and Tempere to tacitly coordinate to increase prices. Given the very inelastic demand for bulk label stock, there is an argument to be made here. But the much bigger problem is that these firms were willing to "follow the leader" when Avalee increased price historically and there is no reason to believe that they would not do the same in a postmerger world.

[11] Some students also said that there was no obvious mechanism for a converter to exercise market power. But given the extent of excess capacity in the industry post the Black River expansion there is an obvious mechanism for a large enough firm: threaten to shift enough of the firm's bulk label stock requirement to Black River to make it worthwhile for the incumbent supplier to reduce prices. But with a uniform price of $2000/ton across the country we

9. Failing firm defense—Not applicable

a. No indication that Black River is cannot service its debts

b. No indication that even if Black River cannot service its debts, it could not be reorganized in bankruptcy

c. Two other bidders for Black River plant who are not actual or potential competitors (and therefore would present no antitrust concerns if either acquired Black River)

RELIEF RISK

10. At the DOJ

a. If there is a merger review, it is likely to be done by the Antitrust Division. During the Biden administration, AAG Jonathan Kanter has refused to enter into any consent decree settlement. Tempere should be advised that the likelihood of a consent decree settlement with the Division is low to nonexistant.

b. A "fix it first" trade up solution

i. Kanter has been willing to allow the merging parties to "fix it first," that is, divest the overlapping business of one of the parties to a third party to whom the Division does not object prior to the closing of the main deal. If it were willing, Tempere could do a "trade up" fix by selling its own (smaller) plant to a third-party divestiture buyer. Assuming a qualified buyer, there is a good to excellent chance that the Division would accept this as a "fix it first." [12]

ii. If the DOJ would not accept a trade up divestiture as a "fix it first," the margining parties could "litigate the fix" by entering into a definitive agreement with a qualified divestiture buyer. Here, it would not be necessary for the merging parties to close the divestiture deal unless and until the court permitted it.

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do not see this. The absence of price variation suggests either that no converter is large enough to matter to a bulk label stock supplier or that the prices in the market have already been (uniformly) negotiated down to as low a level as they will go (perhaps because of tacit collusion).

[12] Some students suggested that Tempere could sell a "portion" of its excess capacity to a third-party divestiture buyer. Three problems here. First, how does one divest a "portion" of the excess capacity of a plant? I am not saying that it cannot be done—in fact, some chemical plants have multiple owners that spit the output according to their equity shares—but you need an explanation of how to do it. Second, how much capacity do you need to sell to negate the antitrust concerns? You need an argument as to how much to sell and why this should resolve the antitrust concerns. Finally, the Antitrust Division would be the agency to investigate the transaction, and Kanter has yet to accept a straightforward consent decree for the sale of an entire business, much less a complicated consent decree involving the splitting of a plant, which is likely to require continuous monitoring. That leaves the parties with a "litigate the fix" option, which brings us back to the first and second problems. The "trade up" option of selling the Tempere plant is much more straightforward, especially if it is necessary to "litigate the fix.".

c. On an entirely separately track, the antitrust harms arise from a postmerger situation where Tempere closes its plants and consolidates its production in the Black River plant. This essentially eliminates the excessive capacity in the industry and with it the incentive to price aggressively. Tempere could try to settle the investigation with a commitment to keep both plants operating consistent with its current business plan.

   i. The problem again is that the Antitrust Division under AAG Kanter has yet to accept a divestiture consent decree, much less a behavioral consent decree, in any merger. It is most unlikely that a consent decree to keep both plants open would be accepted by the Antitrust Division.

   ii. Failing a consent decree solution with the Division, the parties could litigate. They could try to convince the judge that their business plans to keep both plans open were in their profit-maximizing interests, so that no judicial order was required (much like AT&T in AT&T/Time Warner with respect to distributing Time Warner content) or, failing that, to accept an order that ensured that keep both plants would continue to operate (similar to what UnitedHealth did in UnitedHealth/Change, although there it was with respect to a divestiture and not a behavioral requirement).

WHAT CAN TEMPERE DO NOW TO IMPROVE THE CHANCES OF CLEARING ANY INVESTIGATION WITHOUT ENFORCEMENT ACTION?

11. Contract with Avalee

a. Tempere should open negotiations with Avalee to renew the contract *contingent* on Tempere's acquisition of Black River. Providing Avalee assurance of supply (especially at current terms) should eliminate much of Avalee's concerns about the transaction. Moreover, making the commitment contingent on the success of the Black River acquisition should realign Avalee's interests not to complain about the deal. Finally, it ensures that Avalee will not be strapped for bulk label paper and will be able to continue to supply its customers, which should also mitigate some if not all of their concerns.

12. Possible state AG consent decree

a. If Tempere wants to pursue a consent decree to keep both plant open (or even a trade up option) and the Antitrust Division will not settle, another possibility is a separate settlement with the state AG in the state where Tempere has its plant. State AGs have shown more willingness to enter into consent decrees (especially behavioral decrees) than the Division, and a state decree would impose a legal obligation on Tempere just as much as a federal decree. Tempere may be able to use an appropriate state decree to avoid federal litigation altogether or, if the Division commences suit anyway, the state decree will be part of the competitive landscape in which the court will assess the likely effects of the transaction.

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Merger Antitrust Law
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PROVIDENCE HOSPITAL/MID MONTANA CLINIC MERGER

Outline

This outline summarizes the analysis of the hypothetical. The issues presented range from easy to spot and analyze to quite complicated. In the time available, no answer could spot, much less analyze, all of the issues. The exams were ranked ordered based on their completeness and analytical persuasiveness. I then applied the law school's curve to assign grades

1. **Questions—**Asks for a draft memorandum of law giving a preliminary risk assessment to the client and addressing the following topics:
    a. the risk that the transaction will be subject to an antitrust review by the Federal Trade Commission or state antitrust authorities,[1]
    b. the theories of anticompetitive harm that the transaction is likely to present
    c. any defenses to these theories the merging parties may be able to develop, *and*
    d. the likely outcome of any investigation (including any possibility of a consent settlement)
    e. identify any information that needs to be developed to refine the analysis further

2. **Initial observations:**
    a. Type of transaction: This transaction is both—
        i. *Horizontal* since both Providence and MMC operate nonhospital outpatient clinics in Missoula, *and*
        ii. *Vertical* since MMC provides both—
            1. Medical staff services to St. Mary's (a hospital-competitor to Providence)
                a. MMC general surgeons provide trauma coverage,
                b. MMC OB/GYNs provide childbirth coverage, and
                c. MMC pediatricians provide emergency pediatric coverage
               (St. Mary's could not operate without these services)
            2. Referrals—accounting for 60% of St. Mary's inpatient admissions (St. Mary's could not operate without these referrals)
    b. Targeted customers
        i. Commercial health insurance companies
        ii. Patient-beneficiaries of commercial health insurance companies
    c. Violates—
        i. *Horizontal*: Section 7 in each medical specialty providing services to each targeted customer class
        ii. *Horizontal*: Section 2 through a merger-to-monopoly in the OB/GYN and general surgery markets
        iii. *Vertical*: Section 7 by foreclosing St. Mary's in—
            1. Referrals
            2. Pediatric staff services in emergency pediatric coverage
            3. OB/GYN staff services in childbirth coverage
            4. General surgery in trauma coverage

[1] The problem states that the FTC reviews transactions involving medical providers.

iv. *Vertical*: Section 2 by monopolizing or attempting to monopolize hospital services in the Missoula metropolitan area

INQUIRY RISK

3. Inquiry risk

a. Summary
    i. Likely to open an investigation or file a complaint
        1. FTC
        2. Montana AG
        3. St. Mary's—private action if FTC and Montana AG fail to block
    ii. Likely to complain to the federal and state antitrust enforcement agencies
        1. St. Mary's
        2. Insurance companies
        3. City of Missoula
        4. Possibly the Montana Department of Health
b. Purchase price $36 million in cash → does not meet the HSR reporting threshold → not HSR reportable[2]
c. BUT the transaction is public: MMC put itself up for sale, Providence and St. Mary's bid, and Providence won the bid
d. St. Mary's will certainly alert the FTC and the Montana Attorney General to the transaction (if it has not done so already), since St. Mary's could not function without MMC's medial staff services and referrals
    i. St. Mary's almost surely will contact their lawyers as soon as they heard that Providence won the bidding for MMC, and St. Mary's lawyers will know enough to contract the FTC and the Montana AG's office.
    ii. Separately, the FTC's investigations and challenges to hospital mergers and hospital acquisition of physician groups are well known in the industry, so St. Mary's would know who to call even without contacting its lawyers.[3]
e. Given that—
    i. Providence and St. Mary's operate the only two hospitals in Missoula
    ii. St. Mary's could not operate without MMC's medical services and referrals, *and*
    iii. Providence and MMC are the two largest operators of nonhospital outpatient clinics and the only operators of outpatient clinical services for OB/GYN and general surgery

    The FTC and the Montana AG's Office will have serious antitrust concerns about the pending acquisition and open a joint investigation into it (with the expectation of blocking the deal)

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[2] A number of students noted that the transaction was not HSR reportable but that the FTC would open an investigation. In a non-HSR reportable transaction, the inquiry analysis must address how the transaction will come to the attention of the agency and why the agency would conclude that it should open an investigation. The most common reason is that the agency will be alerted to the transaction by a complaint from a customer or a competitor (or, in this case, perhaps the city or a state agency) and that the complaint will provide enough information to warrant at least a preliminary investigation of the transaction.

[3] We did not cover these types of FTC challenges in the course, so I do not expect you to know this.

   f. Even if St. Mary's does not complain, the Montana AG's office would likely learn about the deal through the Missoula press, Missoula city officials, or the Montana State Department of Health
   g. Insurance companies could also complain to the FTC and the Montana AG's office
   h. Since the acquisition poses an existential threat to St. Mary's if foreclosed from MMC doctors and referrals, St. Mary's could and probably would bring a private if the FTC or Montana AG's office failed to block the transaction[4]

SUBSTANTIVE RISK—THEORIES OF HARM AND DEFENSES

4. Summary

   a. Horizontal problem in—
      i. Adult PCP nonhospital outpatient services in the Missoula area
      ii. Pediatrician nonhospital outpatient services in the Missoula area
      iii. OB/GYN nonhospital outpatient services in the Missoula area
      iv. General surgery nonhospital outpatient services in the Missoula area
   b. Vertical foreclosure problem with St. Mary's as the target in—
      i. Referrals
      ii. MMC general surgeons to provide trauma coverage
      iii. MMC OB/GYNs to provide childbirth coverage
      iv. MMC pediatricians to provide emergency pediatric coverage

5. Relevant product markets

   a. Summary
      i. Adult PCP nonhospital outpatient services
      ii. Pediatrician nonhospital outpatient services
      iii. OB/GYN nonhospital outpatient services
      iv. General surgery nonhospital outpatient services[5]
   b. *Targeted customer markets*:
      i. Commercial medical insurance companies on price
      ii. Patient-beneficiaries of commercial medical insurance companies on copays and medical service quality

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[4] The question asked about the risk that either the FTC or a state AG would investigate, so technically the risk of a private action by St. Mary's was outside the scope of the question. Accordingly, I did not deduct for failing to spot the risk of a private action by St. Mary's.

[5] Some students concluded that the relevant market was nonhospital outpatient physician services. This is not correct. Given the disjoint nature of the four specialties in question, there is very little or no cross-elasticity of demand across specialties (e.g., if a patient needs OB/GYN services, they will not find pediatric services substitutable). Nor is a cluster market appropriate here since the services are not all usually provided in the same place and the supply conditions differ by specialty (remember why ink and toner were not included in the consumable office supplies market in Staples /Office Depot). Finally, since the number of specialties to consider is only four, there is little analytical convenience in creating a cluster market that combines them.

Separately, a number of students concluded that the relevant product market was adult primary care practitioners (PCPs) but failed to identify the other three specialties as relevant product markets. PCPs are medial specialists just as are pediatricians, OB/GYNs, or general surgeons. Notwithstanding the description in the appendix of PCPs as particular type of medical specialist, I suspect that these students thought that PCP was the cluster market that included all of the specialties of interest. Given this possible confusion, I did not deduct for the failure to identify the other specialties as product markets.

Note: Government payers set fees uniformly nationwide on a "take it or leave basis" and so can protect themselves from supracompetitive price increases. While this could be a separate targeted customer market, there would be no anticompetitive harm to a government payer.

c. *Brown Shoe* factors
   i. Each of the four services consists of medical doctors with specialized training and experience in treating a specific class of medical conditions
   ii. Patients demand treatment from specialists in each of these for services when they develop a medical condition in that class
   iii. Specialists in one class are not trained to deliver medical services in another class of medical conditions
d. Hypothetical monopolist test—Use critical loss
   i. The facts describe demand for services in each specialty to be essentially inelastic for each of the two types of targeted customers
      1. Patients with commercial insurance are not sensitive to increases in price (i.e., have inelastic demand)
      2. Health insurance companies are sensitive to patient demand and are not sensitive to (uniform) increases in price
   ii. With inelastic demand, there is essentially no actual loss of customers with the imposition of a uniform SSNIP
   iii. When there is no actual loss, the HMT test is satisfied under a unit critical loss implementation

6. Relevant geographic market—Missoula metropolitan area

a. Commercial realities
   i. Patients travel to outpatient medical service provider
   ii. Patients are unwilling to travel more than 20 miles from home for any of the four relevant services
   iii. All nonhospital outpatient clinics in Missoula Country are in the city of Missoula and within three miles of each other
   iv. The closest location of nonhospital outpatient clinics outside of the Missoula metropolitan area is 60 miles away in Superior, MT
b. Hypothetical monopolist test
   i. Demand from services in each specialty in the Missoula metropolitan area is essentially inelastic for each of the two types of targeted customers
   ii. With inelastic demand, there is essentially no actual loss of customers to outside providers with the imposition of a SSNIP
   iii. When there is no actual loss, the HMT test is satisfied under a until critical loss implementation

7. Horizontal analysis

a. Market participants and market shares
   i. *Market participants*: Separately in each of the four relevant specialties, all nonhospital outpatient physicians in Missoula with that specialty
   ii. *Market shares*: Can use number of nonhospital outpatient physicians in each of the four specialties in Missoula

b. *PNB* presumption
    i. *Note*: Need to use brute force to calculate before and after market shares and HHIs because not all MMC physicians will transfer to providence
    ii. HHI calculation—see chart at end[6]
c. Explicit theories of anticompetitive harm
    i. Unilateral effects
        1. Merger to monopoly in—
            a. OB/GYN nonhospital outpatient services
            b. General surgery nonhospital outpatient services
        2. Merger to near-monopoly in—
            a. pediatrician nonhospital outpatient services
    ii. Coordinated effects
        1. The only two major firms in each nonhospital relevant market
        2. Merger results in only one major firm, facilitating coordination with the fringe in—
            a. pediatrician nonhospital outpatient services
            b. Adult PCP nonhospital outpatient services

        NB: Arguably, the auctions to be "in-network" for an insurance company could mitigate or eliminate the coordinated effect. To be complete, this issue should have been spotted and argued one way or the other.
d. Downward pricing pressure defenses
    i. Entry/expansion/repositioning—Barriers too high
        1. Recruiting physicians into Missoula is very difficult
            a. For the last three years, Providence has been trying unsuccessfully to recruit additional pediatricians, OB/GYNs, and general surgeons to expand its hospital and clinics
            b. Recruiting physicians in Missoula is challenging because of the area's geographic location, perceived adverse weather conditions, and the lack of Montana OB/GYN and pediatrics residency programs
    ii. Efficiencies (three claimed)
        1. 340B Program—INAPPLICABLE
            a. The efficiency only benefits Medicare and Medicaid patients, which are not in any of the relevant markets where an anticompetitive effect is threatened
            b. Efficiencies are not a defense in markets where the there is a merger to monopoly
            c. No evidence of verifiability or sufficiency in other markets
        2. Access to St. Joseph's lab—REJECTED
            a. Decreases turn-around time for lab patients, but provides no cost savings → No downward pricing pressure to offset any upward price increases to insurance companies

[6] Some students concluded that there was insufficient information in the hypothetical to perform an HHI analysis. While the hypothetical did not provide revenues for each market participant, it did list the number of doctors by specialty by market participant. The number of doctors provided a sufficient metric of market significance to be used to calculate the market shares and HHIs.

b. Efficiencies are not a defense in markets where the there is a merger to monopoly
c. No evidence of verifiability or sufficiency in other markets
d. Also, not merger-specific if MMC could have created its own laboratory on-site

3. Improve MMC patient service quality by embedding behavioral health therapists into MMC's primary care clinics, assisting in enrolling MMC cancer patients in clinical trials outside the Missoula area, and creating an electronic medical record (EMR) system for MMC—REJECTED
    a. In each case, claimed efficiency is not merger specific: If MMC invested the resources, it could accomplish each of these efficiencies without the merger
    b. Efficiencies are not a defense in markets where the there is a merger to monopoly
    c. No evidence of verifiability or sufficiency in other markets

iii. Failing firms—Not applicable
    1. Revenues have been increasing, *and*
    2. No indication that MMC will not be able to continue to be a profitable business into the future

8. Vertical analysis

a. Foreclosure
    i. MMC provides essential inputs to St. Mary's, a competitor of Providence
        1. Referrals
        2. Various medical services
    ii. If Providence acquires MMC, providence will have the ability to foreclose St. Mary's from these inputs
        1. Purchase agreement contemplates that MMC physicians will become Providence employees
            a. Can have hospital staff privileges only at Providence St. Joseph's, *and*
            b. any local referrals they make would have to be to physicians in Providence St. Joseph's hospitals and clinics
        2. MMC physicians becoming Providence employees will be under a five-year employment contract, so that unless released none of these physicians could go join another practice or become a St. Mary's employee for five years (i.e. the foreclosure is for at least five years)
        3. Becoming Providence employees is not a strict requirement, but Providence can terminate the purchase agreement if more than 8 MMC physicians decline to become Providence employees—So far:
            a. Two pediatricians are going to Grant Creek Family Clinic
            b. One OB/GYN is retiring
            c. One general surgeon is retiring
        4. Referrals
            a. Assuming that these are the only departures from MMC, then the number of nonhospital outpatient physicians outside of the Providence system and potentially available to make referrals

i. All Missoula physicians available to make referrals: 24, down from 67
ii. MMC physicians: 2, down from 23

b. CONCLUSION—Since premerger merger the 23 MMC physicians accounted for 60% of the referrals to St Mary's, it is unlikely that the 2 non-Providence MMC physicians could provide St. Mary's with the referrals it needs to remain viable.

5. Provide medical services at St. Mary's
   a. Availability
      i. Pediatricians: 2, down from 8
      ii. OB/GYN: 0, down from 8
      iii. General surgery: 0, down from 6
   b. According, St. Mary's would have—
      i. No OB/GYN to provide childbirth coverage
      ii. No general surgeons to provide trauma coverage
      iii. Probably an insufficient number of pediatricians provide emergency pediatric coverage
   c. CONCLUSION—St. Mary's could not operate, or at least compete to be included as the hospital in an insurance network covering Missoula
   d. The foreclosure would result in reducing the number of hospitals in Missoula that could compete for inclusion in an insurance network from two to one

iii. Providence has no financial incentive not to foreclose St. Mary's. Indeed, the natural implications of Providence's business plan will be to foreclose ST. Mary's

iv. The foreclosure of St. Mary's from MMC referrals and physician services will cause St. Mary's to close and result in Providence's monopolization of hospital services in the Missoula market

LIKELY OUTCOME OF ANY INVESTIGATION

9. Likely outcome

a. The FTC and the Montana AG will conclude that the deal violates Section 7 by:
   i. Increasing prices in the Missoula metropolitan area in the provision of—
      1. Adult PCP nonhospital outpatient services
      2. Pediatrician nonhospital outpatient services
      3. OB/GYN nonhospital outpatient services
      4. General surgery nonhospital outpatient services

      to commercial health insurance companies
   ii. Increasing prices and lowering service quality in the Missoula metropolitan area in the provision of—
      1. Adult PCP nonhospital outpatient services
      2. Pediatrician nonhospital outpatient services
      3. OB/GYN nonhospital outpatient services
      4. General surgery nonhospital outpatient services

to patient beneficiaries of commercial health insurance companies

b. The FTC and the Montana AG will conclude that the deal violates Section 2 by foreclosing essential inputs to St. Mary's, resulting in Providence's monopolization of hospital services in the Missoula metropolitan area
c. The transaction cannot be fixed to eliminate antitrust violations
    i. Divestiture relief
        1. Unlike the DOJ, which has refused to enter into any consent decree since Jonathan Kanter became the AAG, the FTC has accepted divestiture consent decree in some cases
        2. A necessary (although perhaps not a sufficient) condition for the FTC to accept a divestiture consent decree in a horizontal merger is that, for each problematic market, the overlapping business of one of the merging parties must be completely divested
        3. The analogous condition in a vertical case is that the divestiture must eliminate the vertical aspect of each problematic market (e.g., to eliminate the vertical problem in hospital services, the merging parties must divest either St. Joseph or MMC)
        4. There is no divestiture relief that would negate the antitrust problems in this transaction and preserve any meaningful part of the acquisition
    ii. Behavioral relief
        1. While the FTC has accepted divestiture consent decrees, it has not accepted a behavioral relief consent decree since last half of the Trump administration
        2. Moreover, both the DOJ and FTC reject behavioral relief consent decrees that require continuous monitoring for compliance
        3. There is no behavioral relief that would negate the problem[7]

[7] Several students suggested a consent decree containing price caps to ensure that no antitrust price increase would occur. As we discussed in Unit 5, the federal antitrust authorities have *never* accepted price caps in a consent decree to solve a threatened price increase. There might be a possibility that the Montana State AG would accept a consent decree with a price cap, but that would need to be made explicit in the answer to be credited.

Separately, several students suggested that MMC physicians postacquisition be allowed to provide medical staff services and make referrals to St. Mary's. First, this is behavioral relief that the FTC in the Biden administration has not accepted. Second, even if the FTC was willing to entertain behavioral relief in some cases, this would not be one of them. Not only would the suggested relief require continuous monitoring to ensure compliance, but it begs the question of whether, even if allowed, MMC physicians now employed by Providence would make any referrals to St. Mary's and, even if they did, would the number of referrals be sufficient to keep St. Mary's in business. As for the provision of medical staff services to St. Mary's, these staff services would have to be provided by Providence (since MMC physicians would be Providence employees), entangling Providence and MMC in the foreseeable future contrary to express FTC policy.

PROVIDENCE HOSPITAL/MID MONTANA CLINIC MERGER

HHI Chart

Premerger

Provider	Adult PCP	Pediatricians	OB/GYN	General surgery	Total
Providence St. Joseph's	36	4	8	4	52
St. Mary's	6				6
Mid Montana Clinic (MMC)	23	6	8	6	43
University Doctors, P.C.	6	1		0	7
Center for Family Medicine	3			0	3
Baker Family Medicine	1			0	1
Grant Creek Family Clinic	4	1		0	5
Sole practitioners	2				2
	81	12	16	10	119

	Adult PCP		Pediatricians		OB/CYN		General surgery	
	Share	HHI	Share	HHI	Share	HHI	Share	HHI
	44.4%	1975	33.3%	1111	50.0%	2500	40.0%	1600
	7.4%	55	0.0%	0	0.0%	0	0.0%	0
	28.4%	806	50.0%	2500	50.0%	2500	60.0%	3600
	7.4%	55	8.3%	69	0.0%	0	0.0%	0
	3.7%	14	0.0%	0	0.0%	0	0.0%	0
	1.2%	2	0.0%	0	0.0%	0	0.0%	0
	4.9%	24	8.3%	69	0.0%	0	0.0%	0
	2.5%	3	0.0%	0	0.0%	0	0.0%	0
	100.0%	2934	100.0%	3750	100.0%	5000	100.0%	5200
Combined share	72.8%		83.3%		100.0%		100.0%	
Premerger HHI		2934		3750		5000		5200

Departures from MMC

	Adult PCP	Pediatricians	OB/GYN	General surgery	Total
One OBGYN → retiring		1	1		
One surgeon → retiring				2	
Two pediatricians → GRFC					

Postmerger

Provider	Adult PCP	Pediatricians	OB/CYN	General surgery	Total
Providence St. Joseph's	59	9	15	8	91
St. Mary's	6	0	0	0	6
University Doctors, P.C.	6	1	0	0	7
Center for Family Medicine	3	0	0	0	3
Baker Family Medicine	1	0	0	0	1
Grant Creek Family Clinic	4	1	0	0	5
Sole practitioners	2	0	0	0	2
	81	11	15	8	115

	Adult PCP		Pediatricians		OB/CYN		General surgery	
	Share	HHI	Share	HHI	Share	HHI	Share	HHI
	72.8%	5306	81.8%	6694	100.0%	10000	100.0%	10000
	7.4%	55	0.0%	0	0.0%	0	0.0%	0
	7.4%	55	9.1%	83	0.0%	0	0.0%	0
	3.7%	14	0.0%	0	0.0%	0	0.0%	0
	1.2%	2	0.0%	0	0.0%	0	0.0%	0
	4.9%	24	9.1%	83	0.0%	0	0.0%	0
	2.5%	3	0.0%		0.0%		0.0%	0
	100.0%	5458	100.0%	6860	100.0%	10000	100.0%	10000
Combined share	72.8%		81.8%		100.0%		100.0%	
Premerger HHI		2934		3750		5000		5200
Delta		2524		3110		5000		4800
Postmerger HHI		5458		6860		10000		10000