MERGER ANTITRUST LAW

LAWJ/G-1469-05 Tuesdays and Thursdays, 11:10 am – 1:10 pm
Georgetown University Law Center Dale Collins
Fall 2023 wdc30@georgetown.edu
www.appliedantitrust.com

GRADED WRITTEN ASSIGNMENT

Instructions

Submit by email by 5:00 pm on Monday, November 20
Send to wdc30@georgetown.edu
Subject line: Merger Antitrust Law: Graded Homework Assignment

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

You must submit the assignment no later than 5:00 pm ET on Monday, November 20, 2022. *Write your answer as a single Word document.* When you are ready to submit your assignment, please email it to me as you would any other homework assignment.

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

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

As we discussed in class, you may cut and paste short passages ***from materials you have collected in a single document*** to introduce a concept, a rule of law, a legal principle, or an economic proposition or formula ("boilerplate"). You may include quotes from cases in the

materials you create for this purpose, but if you do so, prepare the quote and cite the case (in proper Blue Book form) as you would in a brief. You are prohibited from copying/cutting and pasting text from any other source into your take-home answer, regardless of who authored the text.[1]

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

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

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

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

Present your analysis in a well-organized, linear, and concise manner. Think about your answers before writing. *Remember Pascal's apology*: "I am sorry that this was such a long letter, but I did not have the time to write you a short one." Clarity of thinking and exposition is much more important than throwing in the kitchen sink. Penalties will be levied for excessive length, verbosity, lack of organization, or the inclusion of irrelevant boilerplate.

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

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

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

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

It should go without saying that, outside of this assignment, you should not believe anything in the statement of any hypothetical fact situation. I have taken considerable liberties in fashioning the problem and have wholly ignored reality whenever it was convenient. It will be in your best interest to unlearn the "facts" in the hypothetical as soon as possible after you finish the assignment.

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

HONOR STATEMENT

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

Jarred Baby Food Merger

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

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

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

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

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

Background

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

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

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

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

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

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

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

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

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

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

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

Table 1

Jarred Baby Food

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

Table 2

Jarred Baby Food

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

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

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

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

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

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

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

Table 3

Pouch-Packed Baby Food

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

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

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

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

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

Table 4

Diversion ratios (for single-product SSNIPs)

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

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

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

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

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

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

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

Dale Collins
Merger Antitrust Law
Fall 2023

BAYBY FOOD 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.

0. Questions—Calls for a reasoned memorandum of law on a preliminary antitrust analysis[1,2,3,4]

a. Are the antitrust enforcement agencies likely to investigate the transaction?

b. If so, is the FTC likely to take enforcement action against the transaction?

c. Assuming the FTC has an antitrust concern, there is anything the firms can do now or during the investigation that would materially increase the likelihood they would be able to close the deal, including agreeing to some form of consent decree?[5]

[1] It should go without saying that a reasoned memorandum of law should be written using the "IRAC" method (issue, rule, application, conclusion). Once an issue is identified, you should draw the rule from the boilerplate prepared, apply the rule to the facts in the hypothetical, and then state your conclusion on the issue. Although it can be hard to distinguished yourself on the upside with boilerplate since so many students draw their boilerplate from the same sources, you can distinguish yourself on the downside by failing to clearly state the rule to which you are applying to an issue. This is especially important when I do not understand the reasoning in an application. When the rule is clearly stated, I can usually work backwards to figure out the analysis. Without the rule, I am lost (which is not helpful to the grade).

[2] A few of you used various colloquialisms such as "slam dunk," lukewarm" competition, and "fervently believe." The work product here is a formal memorandum of law. While some readers find a colloquial style fine if not refreshing, others find it to be seriously deficient and indicating a lack of seriousness. Because you do not get much credit and can be severely criticized for writing conversationally, the better course of action is to stay formal and avoid colloquialisms. This does not mean you have to write in a stilted style—just keep the writing clear, grammatically correct, and without colloquialisms or flourishes.

[3] When writing your boilerplate, be sure to conform the facts to those in the hypothetical. It does not help your credibility or persuasiveness when writing a formal memorandum on jarred baby food to be referring to ice cream, fountain pens, or brewers. Likewise, if your boilerplate contains a fact or some quoted language, make sure that the fact or quoted language appears in in the instant hypothetical. Some students included boilerplate with a "fact" that did not appear in the jarred baby food hypothetical. This can steer you to the wrong answer in an exam setting and in practice can be detrimental to your career. 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 hypothetical you are addressing.

[4] Be careful with your choice of words, especially were writing conclusions. Rarely in the law, especially in the early stages of a transaction when the facts have yet to be fully developed, are conclusions definitive. So avoid terms like an "airtight defense" or "exceptional synergies" that can overstate the certainty of a conclusion. More measured words that capture the uncertainty inherent in most legal risk analyses.

[5] The hypothetical presented three questions. Some students failed to address the third question. Other students integrated their answers to the third question into the substantive analysis. Although I did not deduct points for this, when presented with specific questions in practice you should organize your memorandum to address each of the questions separately.

Essentially calls for a *preliminary antitrust risk analysis* on the likelihood and outcome of an FTC investigation[6,7,8]

1. **Inquiry risk**[9]
   a. FTC
      i. *HSR reportable*:
         1. *Size of transaction test*: Purchase price $140 million > $111.4 million threshold in 2023[10]
         2. *Size of person test*: Since the size of the transaction is under $445.5 million, the "size of person" test must also be satisfied for the transaction to be prima facie reportable
            a. Sufficient if one party has sales or assets > $222.7 and the other party have sales or assets > $23.3 million[11]
            b. *Puree Promise sales*: 12.94 million cases at $34 per case = $430.96 million > $222.7 million
            c. *Little Jar sales*: 10.31 million case at $32 per case = $329.92 million > $23.3 million
            d. Size of person test is satisfied[12]

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[6] The hypothetical also stated: "At this point, Scott is interested only in the likely outcome of the FTC investigation and not in whether the companies could prevail in litigation." This is a little tricky to handle. While Scott is not interested at this point in whether the companies will prevail, the FTC will be interested in its likelihood of success at trial *if* the parties were to put the agency to its proof in court. Accordingly, you should examine the likely outcome of litigation and relate this to the influence it will have on the FTC's decision whether to challenge the transaction at the end of the investigation, but you do not have to discuss the procedural aspects of litigation or the weighing of the equities. Such discussions are irrelevant to the assignment and distracting.

[7] Some students approached the assignment using the predictive model we develop in Unit 2. This is fine, but it is critical to use *all* of the relevant information available at the time to inform the antitrust risk analysis. The Unit 2 model assumed very little information was available. Here, the hypothetical contains a substantial amount of information to inform the analysis. So, for example, there is information to determine whether the FTC is likely to conclude that the acquisition is 2-to-1, a 3-to-2, or something else for the purpose of applying the number of competitors screen and whether the FTC will have the benefit of the *PNB* presumption of anticompetitive harm.

[8] Be careful with your word choices. The assignment called for a draft of a reasoned memorandum to be sent to the client addressing three questions the client asked at the beginning of a transaction. Use of terms as if the parties were in an investigation or litigation is inappropriate and disorienting (e.g., "The *investigation* determined that . . . "; "We should *allege* two markets."; "PPC may *rebut* . . ."; "the FTC has *not established* . . .").

[9] Some students analyzed inquiry risk after analyzing substantive risk. That is an acceptable approach (and, indeed, the way we approached the risks in class). But if you do it this way, you still have to discuss how the FTC will learn about the facts underlying the substantive analysis after the HSR filings are made in order to inform its decision whether to open an investigation.

[10] As in the past, I am finding a surprising number of students cited the HSR thresholds for years other than the current year. 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.

[11] Note that the "size of person" test uses sales (revenues), not profits.

[12] Although the "size of person" test for transactions valued less than $445.5 million was in the class notes and hence fair game for this assignment, we did not cover it explicitly in class and I gave it short shift in the class slides. I did not deduct points for either missing the test altogether or applying it incorrectly. But I did give some "extra credit" to students who recognized the need for the test and applied it correctly.

3. No exemptions[13]
4. *Conclusion*: HSR reportable

ii. The FTC will learn of the horizontal overlap from the HSR filings

iii. The overlap will lead the FTC to learn about other competitors, which it could do through an Internet, literature, and newspaper search
   1. Only three jarred baby food manufacturers
   2. Pouch-packed baby food and baby-led weaning are very distant substitutes
   3. [Maybe will learn] Puree Promise and Little Jar are the only two companies to compete for the second slot on supermarket shelves for jarred baby food

iv. Moreover, there are possible, if not likely, complaints from some supermarkets that fear the loss of competition for the second slot on their shelves for jarred baby food

v. The FTC's search of publicly available information plus any information it learns from complainants will reveal that this is a 3 → 2 horizontal merger in jarred baby food and 2 → 1 in competition for the second shelf slot

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

vii. The preliminary investigation will reveal that an in-depth second request investigation is warranted

viii. CONCLUSION: Puree Promise should anticipate a preliminary and second request investigation[14]

b. State AGs

   i. There could be interest by some state AGs across the United States because jarred baby food is important to many parents. The AGs would say that they are protecting parents from price increases at the retail level that would likely result from an increase in wholesale prices for the second shelf slot due to the elimination of competition between Puree Promise and Little Jar.

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[13] Most, if not all, students assumed explicitly or implicitly that there were no exemptions applicable to the transaction. While in Unit 4 we discussed some of the most important exemptions, we did not cover all of them. But the assumption is correct: there are no applicable exemptions. I did not consider the requirement of "no exemptions" in grading.

[14] It is not enough to simply state that the transaction is HSR reportable. A complete answer would explain how and why the FTC would find the transaction suitable for an investigation. Also, in the context of the hypothetical, it is important to discuss the type of investigation the FTC is likely to conduct (here, a preliminary and second request investigation).

ii. Interested state AGs almost surely would urge the FTC to investigate and join the FTC's investigation and not undertake a searate investigation themselves[15]

c. Supermarkets and other private parties
   i. Like state AGs, interested private parties could complain to the FTC, further increasing the likelihood of an FTC investigation

2. Substantive risk

a. Relevant product market #1: Manufacture and sale of jarred baby food
   i. *Brown Shoe* factors
      1. Industry and public recognition as a separate economic product category
      2. Aggregate demand is inelastic (estimates -0.6 to -0.8)[16]
      3. Low diversion ratios with other types of baby food and other non-baby food products are low, indicating that these other products are distant substitutes with jarred baby food[17,18]
      4. Peculiar uses and characteristics
         a. Designed to cater to infants' nutritional and developmental needs and their transition to solid foods
         b. Made by blending various ingredients, including fruits, vegetables, meats, and sometimes grains or legumes into purees

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[15] Technically, the assignment asked only about the likelihood of an investigation by the FTC. Consequently, it was not necessary to analyze the inquiry risks associated with state AGs or private parties other than to note that they might be interested in the transaction being investigation and urge the FTC to open an investigation.

[16] Although for reasons discussed in footnote 20, care must be exercised in using consumer aggregate elasticity in a critical loss formula applied at the manufacturer level, it can be used as reasonably strong circumstantial evidence of inelastic demand at the manufacturer level: if aggregate consumer demand is inelastic at current prices and retailers make decisions about what to stock and therefore what to buy from suppliers, then the aggregate demand of retailers in purchasing jarred baby food from manufacturers is likely to be inelastic as well.

[17] As we discussed in class, it is important to keep in mind the difference between cross-elasticities and diversion ratios. Cross-elasticities tell you something about the percentage of a product's *total number of customers* that switch in response to a price increase from that product to another product. Diversion ratios, on the other hand, tell you something about the *percentage* of *marginal customers* that switch from one product to another in response to a price increase. A diversion ratio from product A to product B can be high when a large number of marginal customers switch from A to B, but simultaneously the cross-elasticity between the two products can be low if the percentage of marginal customers to total customers is low. Accordingly, while diversion ratios tell you which products are the closest substitutes, they do not necessarily tell you anything about the cross-elasticity between the two products.

[18] When using diversion ratios to assess next best substitutes, be sure you are comparing apples to apples and not to oranges. Some students looked at Table 4 and concluded that pouch-packed baby food was a closer substitute to Cradle Cuisine than either Puree Promise or Little Jar and therefore should be included in the relevant market. But this compares a group of products to a single product. As the court in *H&R Block* pointed out, the right comparisons are either product to product or group to group. When we compare groups, other jarred baby foods are a much closer substitute to jarred baby foods than either pouch-packed baby food or BLW. Consequently, the diversion ratios from individual jarred baby food products to other products do not provide much support for the inclusion of pouch-packed baby food in the same relevant market.

  c. Typically have a smooth consistency, making them easy for babies to consume and digest
  d. Are convenient, as they are pre-cooked and can be served directly from the jar or heated slightly
  e. Have distinct slotting on supermarket shelves
5. Unique production processes and facilities
6. Distinct customers (parents)[19]

[19] Although the hypothetical did not contain a numerical estimate of the cross-elasticity between the merging firms, some students tried to calculate it for use in their *Brown Shoe* analysis. Most did it incorrectly by using the diversion ratio (70%) as the percentage quantity change in firm B when firm A increases its price by a SSNIP of 5%. But as noted above, the diversion ratio is the percentage of *A's marginal unit sales* that divert to firm B, not the percentage increase in *B's unit sales* which you need to calculate the cross-elasticity.

ii. Hypothetical monopolist test:

REMEMBER: A PRODUCT GROUPING NEEDS TO SATISFY ONLY ONE IMPLEMENTATION OF THE HMT. YOU WILL NOT RECEIVE EXTRA CREDIT FOR SHOWING THAT THE PRODUCT GROUPING SATISFIES MULTIPLE IMPLEMENTATIONS OF THE HMT. [20]

1. *Alternative 1*: One-product SSNIP recapture test
   a. Test two-product candidate market of Puree Promise and Little Jar[21]

$$R^1_{Critical} = \frac{\delta p_1}{\$m_{RAve}} = \frac{\$SSNIP_1}{\$m_{RAve}}$$

	Apply SSNIP to:	
	PP	LJ
%SSNIP	5.00%	5.00%
$SSNIP (- %SSNIP x price)	$1.70	$1.60
$\$m_{RAve}$ (the other product)[22]	12.80	17.00
Critical recapture	13.28%	9.41%
Actual recapture	70%	70%
HMT	PASSES	PASSES

[20] In the prior draft, I included two critical loss tests that used the aggregate demand elasticity of -0.8 at the retail (consumer) level. Generally, you cannot use the elasticity of demand at the retail level as the elasticity of demand at the manufacturer level. Here, however, I think you can if you assume there is no internal diversion among jarred baby food products as their prices are uniformly increased and that there is a one-to-one relationship between the units sold to retailers and the unit the retailers sell to their customers (making the q and Δq the same at both levels). You can see this in the homogeneous products case. Let p be the manufacturer's price, $p(1+x)$ the retailer's price (where x is the percentage markup), and ε_R and ε_M be the aggregate elasticity at the retail and manufacturer levels, respectively. Then:

$$\varepsilon_R = \frac{\frac{\Delta q}{q}}{\frac{\Delta p(1+x)}{p(1+x)}} = \frac{\frac{\Delta q}{q}}{\frac{\Delta p}{p}} = \varepsilon_M$$

But since I have not proved this under the conditions of our hypothetical, I eliminated the critical loss methods from the outline. (BTW, the price in calculating this elasticity would be the share-weighted averages of prices in the relevant market.)

[21] You could have applied the general one-product SSNIP recapture formula to a three-product market, but that would have required the use of recapture-share weighted averages, which are not required for the course and would make the calculations unnecessary complicated.

[22] As an aside, some students thought that the dollar margin was the firm's marginal revenue. This is incorrect. The firm's dollar margin is original price minus marginal cost ($p – c$). The firm's marginal revenue is original price minus a downward adjustment for the decrease in price necessary in order to sell one additional unit of product. Dollar margin is a measure of gross profit on the last unit produced; marginal revenue is a measure of the net incremental revenue of the next unit produced.

b. *Use the "superset theorem"*: Since the two-product candidate market of Puree Promise and Little Jar satisfies the one-product SSNIP test, then the three-product market with Cradle Cuisine does as well.[23]

2. *Alternative 2*: "Brute force" one-product SSNIP on two-product market[24]

[23] The SSNIP must be applied to at least one of the products of the merging firms. Running a one-product SSNIP recapture test on Cuisine Cradle is unnecessary, extraneous, and distracting in a memo that is supposed to be concise and to the point. (But I did not deduct points for this.)

[24] When doing a brute force recapture analysis, it is essential that you use the residual demand elasticity of the firm with the SSNNIP, *not* the aggregate demand elasticity of the product grouping (here, -0.8). A number of students made the mistake of using the aggregate demand elasticity to calculate the number of marginal customers lost by the firm with the SSNIP. Remember, a profit-maximizing firm will not be operating in the inelastic portion of its residual demand curve since it could increase price and make more profits, so that -0.8 cannot be the firm's residual elasticity. If you need the residual demand elasticity of a single profit-maximizing firm at current prices and output, you can calculate it using the Lerner condition ($\varepsilon = 1/\%m$). That said, since enough students made the mistake of using -0.8 as the residual demand elasticity, in those answers I treated this as an ambiguity in the hypothetical and accepted -0.8 as the elasticity to use in the one-product SSNIP recapture test.

Candidate market: Puree Promise + Little Jar Delights

One-product SSNIP: Brute force

	SSNIP Product		
	Puree Promise	Little Jar Delights	
Gain from inframarginal sales			
Price (p)	$34	$32	DATA FROM PROBLEM
%SSNIP (δ)	5%	5%	DATA FROM PROBLEM
%Margin (%m)	50%	40%	
Individual elasticity (ε = 1/%m))	2	2.5	DATA FROM PROBLEM
q1	12.941	10.313	DATA FROM PROBLEM
%Δq = δε	0.100	0.125	
Δq1 = qδε = q%Δq	1.294	1.289	Marginal sales = %Actual loss times q1
q2 = q1 - Δq1	11.647	9.023	Inframarginal sales
$SSNIP	$1.70	$1.60	%SSNIP times p1
Gain	$19.800	$14.438	$SSNIP times q2
Loss from marginal sales			
Δq1	1.294	1.289	Already calculated
%margin	50%	40%	DATA FROM PROBLEM
$margin	$17.00	$12.80	%margin times p1
Loss	$22.000	$16.500	$margin times Δq1
Net gain on SSNIP product	-2.200	-2.063	Gain on inframarginal sales minus loss on marginal sales
Profit on recaptured sales			
To Little Jar from Puree Promise			
Diversion ratio	70.0%		DATA FROM PROBLEM
$\Delta q_{\text{Little Jar}}$	0.906		Recaptured unit sales = Diversion ratio times Δq1
%margin (LJD)	40%		DATA FROM PROBLEM
$margin (LJD)	$12.800		%margin times p_{TaxACT}
Gain on Little Jar Delights	$11.595		$margin times recaptured unit sales
Profit on recaptured sales			
To Puree Promise from Little Jar Delights			
Diversion ratio		70.0%	DATA FROM PROBLEM
$\Delta q_{\text{Puree Promise}}$		0.902	Recaptured unit sales = Diversion ratio times Δq1
%margin (PP)		50.0%	DATA FROM PROBLEM
$margin (PP)		$17.000	%margin times $p_{\text{H\&R Block}}$
Gain on Puree Promise		$15.340	$margin times recaptured unit sales
NET GAIN WITH RECAPTURE	$9.395	$13.277	Net gain on SSNIP product + gain on recaptured sales
One-product SSNIP test:	PASSES	PASSES	

So Puree Promise + Little Jar Delights is a market under a one-product SSNIP test

b. Relevant product market #2: The manufacture and sale of jarred baby food for the second slot on supermarket shelves[25]
    i. Requirements
        1. Customers can be identified
        2. Customers do not engage in arbitrage, so that suppliers can charge different customers different prices for the same product

        The hypothetical provides that both requirements are satisfied
    ii. *Brown Shoe* factors/targeted customer market
        1. Industry recognition as a separate economic product category (supermarket industry practice is for Puree Promise and Little Jar to compete for the second and only remaining slot on supermarket shelves)
        2. High-cross elasticities/diversion ratios between Puree Promise and Little Jar; much lower cross-elasticities/diversion ratios with other products (including Cradle Puree)
        3. Distinct pricing ($34 and $32 per case for PP and LJ vs. $40 per case for Cradle Cuisine)
    iii. Hypothetical monopolist test: Use one-product SSNIP recapture test in the two-product candidate market (performed above)

c. Other, larger relevant markets (e.g., Jarred + pouch-packed baby food, all baby food)
    i. Would satisfy the HMT under the "superset" theorem
    ii. *Brown Shoe* factors: While these broader markets contain products with lower diversion ratios (and presumably cross-elasticities), a good argument can be made that—especially given public recognition as a distinct economic entity—that the large product groupings are a relevant market
    iii. BUT since a merger violates Section 7 when the requisite anticompetitive effect is present in *any* relevant market, one you find a relevant market in which the transaction violates Section 7 it is unnecessary to analyze broader markets unless—
        1. You want to build a stronger case by persuasively showing that the merger also violates Section 7 in another larger relevant to preempt a defense, or
        2. It is necessary to address the larger market because the defense is arguing that the larger market is the only relevant market and the transaction does not violate Section 7 in that market
            a. In H&R Block/TaxACT, for example, the merging parties argued that the smaller DDIY product grouping was not a relevant market and that the merger should be assessed

[25] Identifying the targeted market as just "supermarkets" also works.

only in the market for all methods of tax preparation. To counter this argument, the DOJ showed (a) that all DDIY products should be included in the relevant markets and (b) manual and assisted tax preparation methods should be excluded.

b. But you did not have to follow the H&R Block/TaxACT approach if you made a sufficiently persuasive argument that a smaller product grouping was a relevant market in which to assess the competitive effects of the transaction (even if arguendo the larger product grouping was also a relevant market)[26]

d. Relevant geographic market: The United States[27]
   i. Commercial realities
      1. All manufacturers sell nationwide
      2. Uniform price throughout the U.S. for each manufacturer
      3. Uniform nationwide trade journal advertising across the United States
      4. No imports
   ii. HMT: Same as for relevant product market

e. Market participants and market shares
   i. Current sellers only; no nonseller market participants ("No firms have entered the manufacture and sale of jarred baby food for decades and new entry in the future is unlikely because of declining demand.").
   ii. Market shares: Current producers at current revenues

[26] Most students followed this second approach.

[27] In the past, some students simply asserted that it was "clear" that the relevant geographic market was the United States. I agree with the conclusion, but an assertion is not a reasoned analysis. In writing formal memoranda, you should strike words like "clear" and "obvious" from your vocabulary. You must provide an argument supported with authority.

f. *PNB* presumption: All jarred baby food[28]

HHIs--All Baby Food Market
(using revenue shares)

	Revenue Share	HHI
Cradle Cuisine	65.00%	4225
Puree Promise	20.00%	400
Little Jar Delights	15.00%	225
		4850
Combined	35.00%	
Pre-HHI		4850
Delta		600
Post-HHI		5450

i. Merger Guidelines: Triggers presumption under the Guidelines—comfortably within "red zone":
   1. Post > 2500; Δ > 200
   2. Guidelines: "will be presumed to be likely to enhance market power"

ii. *PNB* itself: Good support (needs to be argued and not just asserted)
   1. Combined firm's share somewhat above *PNB's* threshold of 30%
   2. Direct comparison:

Comparison to PNB

	Combined share	Premerger 2FCR	Postmerger 2FCR	Change
PNB	36%	44%	59%	15%
PP/LJ	35%	86%	1%	15%

Similar combined share and point change in the @FDR, but much higher premerger and postmerger 2FCR

iii. Judicial support: Strong[29]
   1. *United States v. Anthem, Inc.*, 855 F.3d 345 (D.C. Cir. 2017) (merger of second and third largest firms with a delta of 537 and a postmerger HHI of 3000)

[28] I want to reiterate the advantages of using Mathpapa for HHIs and other calculations. You can visually confirm that you have entered the right formula and used the right numbers, and the program will not make any arithmetical errors. There are number of arithmetical errors in the answers that could have been more easily avoided if Mathpapa had been used.

[29] As in the past, I was 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). I think that even the agencies would say this is true (if you could get them to speak truthfully on the subject).

2. *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")
3. *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 presumption with a combined share of 28%, a delta of 400, and postmerger HHI of 4691)
4. *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26 (D.D.C. 2009) (merger of first and third largest firms with a delta of 545 and a postmerger HHI of 5460)

iv. CONCLUSION: Strong *PNB* presumption for all jarred baby food

g. *PNB* presumption: Jarred baby food for the second slot on supermarket shelves
   i. Don't have premerger market shares but do not need them since this is a *merger to monopoly*
   ii. *PNB* facts: Combined share = 100%
   iii. Merger Guidelines: Postmerger HHI = 10000
   iv. Judicial support: Overwhelming, including cases on point for mergers to monopoly:
      1. *Polypore Int'l, Inc. v. FTC*, 686 F.3d 1208, 1218 (11th Cir. 2012)
      2. *United States v. Energy Solutions, Inc.*, 265 F. Supp. 3d 415 (D. Del. 2017)
      3. *United States v. Franklin Elec. Co.*, 130 F. Supp. 2d 1025, 1035 (W.D. Wis. 2000)

3. Recapture unilateral effects

a. Elements:
   i. The products of the merging firms must be differentiated and have different dollar margins (premerger, postmerger, or both)
   ii. The products of the merging parties must be close substitutes for one another
   iii. The products of (most) other firms must be sufficiently more distant substitutes to permit the merged firm to profitably increase price for at least one of its products
   iv. Entry, expansion, or repositioning into the products of the merging firms must be sufficiently difficult so as not to defeat the profitability of the merged firm increasing its prices postmerger

   NB: The theory applies independently of market definition

b. Application in the market for the manufacture and sale of jarred baby food
   i. As noted above in the application of the hypothetical monopolist test, the products of the merging firms are differentiated and have different dollar margins[30,31]
   ii. The products of the merging parties must be close substitutes for one another as shown by diversion ratios to each other of 70% in the wake of a one-product SSNIP (see Table 4)
   iii. The products of all other firms are significantly more distant substitutes to as shown by significantly low diversion ratios (see Table 4)
   iv. Entry, expansion, or repositioning into jarred baby food is very unlikely
      1. No firms have entered the manufacture and sale of jarred baby food for decades
      2. Entry by new firms in the future is unlikely because of declining demand, high existing excess production capacity, and the high cost of building a new minimum-efficient scale manufacturing plant.
      3. Declining demand, excess production capacity, and construction costs also make expansion by incumbent producers untenable.
   v. Differentiated products unilateral effects merger simulation
      1. *Theory*: Consider a two-product market consisting of the differentiated products of the two merging firms. The breakeven recapture rate is then:

$$R^1_{Critical} = \frac{\$SSNIP_1}{\$m_2},$$

where firm 1 is subject to the SSNIP and firm 2 keeps its price at the premerger level. To perform the simulation, replace the critical recapture rate with the actual recapture rate and calculate

[30] Some students did the unilateral effects analysis assuming that the merged firm would consolidate the two brands. I sent around a clarification stating that "Puree Promise has not yet decided whether to consolidate the two brands into a single brand postmerger and is still studying the question." As a lawyer, do *not* assume facts, especially when the assumption is contradicted by the hypothetical. That said, when a fact is important but uncertain, you should do the analysis in the alternative.

[31] Some student concluded that the recapture unilateral effects theory would not apply if Puree Promise consolidated the brands postmerger. This is not correct. The theory applies if the products are differentiated *either* premerger or postmerger (both both). So, for example, when consolidating a lower dollar margin product into a higher dollar margin product, some customers may divert from the now unavailable lower dollar margin product to the higher dollar margin consolidated product. If there is enough diversion, a further price increase in the consolidated product is profit-maximizing and creates an anticompetitive recapture unilateral effect. By contrast, in the ice cream merger, both products had the same dollar margins premerger, and the merged firm consolidated the brands postmerger. There, there is no possibility of diversion since there was no differentiation either premerger or postmerger.

the $\$SSNIP_{max}$ that would equate the critical recapture rate with the actual recapture rate:

$$R^1_{Critical} = R^1 = \frac{\$SSNIP_{max}}{\$m_2},$$

Solving for $\$SSNIP_{max}$ gives the maximum breakeven dollar price increase for firm 1, holding the prices of firm 2 and all nonmerging firms constant given the actual recapture rate. Dividing $\$SSNIP_{max}$ by 2 given the profit-maximizing dollar increase for firm 1 under the same conditions.

Note that $\$SSNIP_{max}/2$ is not necessarily—and usually will not be—the profit-maximizing price for the merged firm because the merged firm will be free to vary the prices of both of the merging products.[32] However, the incremental profits generated by the $\$SSNIP_{max}/2$ will be a lower bound on the incremental profits that the merged firm can create when it profit-maximizes over the prices of both products.

vi. *Application*:

1. Calculate the maximum breakeven price increase for each product given the recapture ratios:

$$R^{PP} = \frac{\$SSNIP^{max}_{PP}}{\$m_{LJ}} \rightarrow 0.70 = \frac{\$SSNIP^{max}_{PP}}{\$12.80} \rightarrow \$SSNIP^{max}_{PP} = \$8.95 \text{ or a 26.4\% breakeven price increase for PP}$$

$$R^{LJ} = \frac{\$SSNIP^{max}_{LJ}}{\$m_{PP}} \rightarrow 0.70 = \frac{\$SSNIP^{max}_{LJ}}{\$17.00} \rightarrow \$SSNIP^{max}_{LJ} = \$11.90 \text{ or a 37.2\% breakeven price increase for LJ}$$

2. Dividing $\$SSNIP^{max}$ by 2 gives the profit-maximizing dollar price increase per case: \$4.48 for Puree Promise and \$5.95 for Little Jar

[32] As a general rule, if the merged firm raises the price of product 2 as well as product one, the profit-maxizing price for product 1 will be lower than $\$SSNIP_{max}/2$.

3. Here is a brute force calculation:

	PP	LJ	
Original price (p)	$34.00	$32.00	From hypothetical
Actual recapture rate	0.70	0.70	From hypothetical
Percentage margin (%m)	50%	40%	From hypothetical
Dollar margins ($M)	$17.00	$12.80	Calculated
$SSNIPmax (= R1 x $m2)	$8.96	$11.90	BE single product price increase
%SSNIPmax	26.353%	37.188%	BE single product percentage price increase
%SSNIPmax/2	**13.176%**	**18.594%**	**Profit-maximizing single product percentage price increase**
$SSNIPmax/2	**$4.48**	**$5.95**	
Original unit sales (q)	12.94	10.31	millions of cases (from hypothetical)
%Δq = %Δp/%m	26.353%	46.484%	Rearranging the Lerner equation
Lost sales (Δq = q x %Δq)	3.41	4.79	millions of cases
Retained sales (= q - Δq)	9.53	5.52	millions of cases
Incremental profits			
Retained sales	$42.70	$32.84	Retained sales times $SSNIPmax/2
Lost marginal sales	$57.98	$61.36	Marginal sales times $SSNIPmax/2
Recaptured sales	$30.56	$57.05	Recaptured sales times original $margin
Total incremental profits	$15.28	$28.52	
Original profits	$220.00	$132.00	
Profit increase	6.945%	21.608%	

4. *Merger simulation conclusion*: A one-product SSNIP merger simulation shows gross upward pricing pressure to increase prices by—
   a. 13.2% or $4.48 per case for Puree Promise, or
   b. 18.6% or $5.95 per case for Little Jar

vii. *Conclusion*: There is strong qualitative and quantitative evidence of substantial gross anticompetitive unilateral effect in both relevant markets:
   1. The manufacture and sale of jarred baby food
   2. the market for the manufacture and sale of jarred baby food for the second slot on supermarket shelves

c. Application in the market for the manufacture and sale of jarred baby food for the second slot on supermarket shelves
    1. Although diversion ratios are not given in this market, the merging firms are the only two firms that compete for the second slot on supermarket shelves. Therefore, the diversion ratio in each direction should be 100%.
    2. This is a merger to monopoly in the relevant market, and therefore "tend[s] to create a monopoly" in violation of the Section 7

4. Auction unilateral effects

a. Requirements
    i. The merger involves the first and second lowest-cost suppliers to one or more customers;
        1. NB: This is what we discussed in the class and in the notes. It is TOO RESTRICTIVE, and I will change this for next year. I should have said that the merging companies were the two closest bidders for the customer's business. Often, this will mean that they are the two lowest bidders or the two lowest-cost suppliers, but this will not necessarily be the case where there is a trade-off between price and quality. So, for example, the two closest bidders may be—as they are in the hypothetical—a company offering a more premium, higher-price product and another company offering a less premium, lower-price product. The other requirements also need to be amended to reflect the more general case.
        2. Some students took the rule as originally stated to imply that the customer always chooses the lowest bid and concluded that since some customers choose Puree Premium over Little Jar there was no anticompetitive unilateral effect. Although intuition should indicate that there is a competitive problem if you eliminate through acquisition only one of the two bidders for the second slot in supermarkets, I gave students full credit for following the implications of my misstated rule.
    ii. The customers can be targeted for price discrimination;
    iii. The third lowest-cost supplier has costs to supply the customer that are (materially) higher than the second-lowest supplier; and
    iv. There are barriers to entry, expansion, or repositioning that will impede a supplier post-merger from achieving the cost structure of the second lowest-cost supplier.

b. Application—When only the two merging firms are bidding, the application of auction unilateral effects is straightforward
    i. The two firms are necessary the first and second lowest-cost suppliers

ii. The customers can be targeted for price discrimination since customers do not arbitrage the products they purchase
iii. There is no third bidder, so this means effectively that the third bidder charges an infinite price
iv. Also already discussed, there is unlikely to be any entry, expansion, or repositioning of other firms.

c. *Conclusion*: The merged firm would be able to increase the price of its products to a level just below that where the supermarket would either the shelf space to one or more pouched baby food products (very distant substitutes with only a 15% diversion ratio) or even a non-baby food product with a higher return to the supermarket on incremental sales per foot of shelf space.

5. Coordinated effects--Applicable

a. Requirements:
   i. The relevant market premerger is susceptible to coordinated interaction
   ii. The merger is reasonably probable to increase either the likelihood or effectiveness of coordinated interaction.

b. Relevant product market #1: Manufacture and sale of jarred baby food
   i. The market is susceptible to coordinated interaction
      1. Only three firms in the market: Cradle Cuisine, Puree Promise, and Little Jar Delights
      2. Although not homogeneous product, differentiation is limited
      3. Already some leader-follower (tacitly coordinated) behavior in prices:
         a. Cradle Cuisine as a 65% share and is the leading in price increases
         b. Puree Promise follows Cradle Cuisine in percentage price increase and timing
         c. Little Jar follows Cradle Cuisine in timing, although it keeps its price a $2 per case below that of Puree Promise
      4. Incentive to coordinate given that inelastic aggregate demand for jarred baby food: Inelastic demand means high rewards to tacit coordinationIncentive to coordinate rather than compete given declining demand for jarred baby food
      5. Forum to coordinate in the Jarred Baby Food Association, which meets several times a year.
      6. Coordinate to lobby the FDA
   ii. The merger will increase the likelihood or effectiveness of coordinated interaction

1. The merger will decrease the number of fims in the market from 3 to 2, which by itself is sufficient to prove that the merger will increase the likelihood or effectiveness of coordinated interaction
2. If, after the merger, Puree Promise plans to consolidate the merging products into a single product, that there will only be two products postmerger, further increasing the ease of coordination interaction (although there is no reason to believe that tacit coordination would be difficult if Puree Promise retained both brands—still only two firms)

c. Relevant market #2: Manufacture and sale of jarred baby food for the second slot on supermarket shelves
   i. A merger to a structural monopoly (as here) monopoly eliminates all competition in the relevant market
   ii. Coordinated effects theory not applicable since there are not two or more firms to coordinate
   iii. However, a merger to monopoly in a relevant market violates the express terms of Section 7 ("tend[s] to create a monopoly")

d. *If addressed*: The theory of coordinated effects is unlikely to apply to other, larger relevant markets (e.g., jarred + pouch-packed baby food, all baby food)
   i. Premerger, the market is unlikely to be susceptible to coordination
      1. Too many firms in the relevant market to tacitly coordinate
      2. Firms produce significantly different types of products with low cross-elasticities and diversion ratios → low incentive to coordinate across product types\
   ii. Postmerger, the merger is unlikely to increase the likelihood or effectiveness of tacit coordination
      1. Still too many firms in the relevant market to tacitly coordinate
      2. Merger do not change the incentives of firms producing different types of products to tacitly coordinate[33]

[33] Some students found coordinated effects in these larger markets by relying on an a "collusive group" postmerger of Cradle Cuisine and the merged firm. They are correct in that there is anticompetitive effect that technically can be characterized as anticompetitive coordinated interaction, but conventionally one would make that argument in a smaller relevant market (here, jarred baby foods) rather than a larger market. Courts have not seen a localized anticompetitive coordinated effect in the cases where the collusive group has a small market share in the larger market. Courts—and I suspect the agencies as well—see "collusive groups" in coordinated effect analysis as analogous to dominant firms with a competitive fringe. Still, I credited student who made the argument but did not deduct for students that did not.

6. Elimination of a maverick—Not applicable

a. There is no indication that either Puree Promise or Little Jar Delights is a maverick in any market
    i. The fact that Little Jar is the lowest priced product is not sufficient to show that Little Jar is a maverick
b. In any event, there are no facts in the hypothetical that indicate that coordinated interaction was less successful with Little Jar in the market than it would have been without Little Jar—This is the key to a maverick theory

DOWNWARD-PRICING PRESSURE DEFENSES

7. Entry/expansion/repositioning defense—Not applicable

a. Requirements: Entry must be—
    i. Timely
    ii. Likely
    iii. Sufficient
b. Entry by new firms in the future is untenable (and hence unlikely) because of—
    i. declining demand,
    ii. high existing excess production capacity by the incumbent producers, and
    iii. the high cost of building a new minimum-efficient scale manufacturing plant.

    NB: No firm has entered the manufacture and sale of jarred baby food for decades, suggesting high barriers to entry
c. Expansion by incumbent producers is untenable because of—
    i. The three incumbent producers each already have substantial excess production capacity
    ii. Aggregate demand for jarred baby food is declining
    iii. Construction costs are high

    No additional capacity was added in the plant upgrades by Cradle Cuisine in 2018 or Puree Promise in 2016[34]
d. Repositioning by other baby food producers is untenable because of—
    i. Declining demand

[34] Some students thought expansion by the merged firm as it gained more market share from aggressively competing with Cradle Cuisine was an expansion defense. This misunderstands the defense. The expansion defense depends on expansion by third-party firms in the relevant market in response to a gross anticompetitive effect caused by the merger (typically, but not always, a price increase). Expansion by the merged firm should be analyzed under the efficiencies defense.

- ii. Costs of acquiring equipment necessary to fill, package, sterilize, label and produce jarred baby food—equipment that is not used by producers of other types of baby food
  1. Although pouch-packed baby food manufacturers use the same type of equipment to puree baby food, they do not have this specialized equipment[35]

8. Efficiencies defense: Two dimensions

- a. Cost reductions
  - i. Fixed cost reductions of $125 million annually from shutting down the Albany plant: not cognizable
  - ii. Marginal cost reductions from shipping production to a more efficient plant:
    1. Amount:

Marginal cost savings

Little Jar's marginal cost	$19.200	per case
Puree Promise's mc	$17.000	per case
MC saving per case	$2.200	per case
LJ's production (2022)	10.310	million cases
Total mc saving per year	**$22.682**	**million**

    2. *Not verified*: In the absence of acceptable third party studies, the FTC will reject this cost savings estimate as unverified
    3. *Not sufficient*: No attempt by the parties at this point to show either that—
       a. Any of the cost savings will be passed on to customers, or
       b. If some or all is passed on, the cost savings will outweigh the incremental cost of any price increases

       But see Steps Puree Promise Might Take below

- b. Increased competition with Crade Cuisine to gain market share and further increase profits

[35] Some students thought repositioning by the merged firm of its product line in some way could be relevant to a repositioning defense. As in the prior footnote, a repositioning defense depends on repositioning by third-party firms in the relevant market in response in response to a gross anticompetitive effect caused by the merger. Repositioning by the merged firm should be analyzed under the efficiencies defense.

i. General ideas, but no specific plan
ii. FTC likely to be very skeptical, even with a plan, that—
    1. The merged firm would find it in the firm's profit-maximizing interest to implement the plan, and
    2. Even if the firm implemented the plan, that the result would neutralize the anticompetitive tendencies of the transaction
iii. Headroom for price reductions
    1. With fixed cost savings of $125 million per year and marginal cost savings of $22.682 million per year, total annual cost savings resulting from the transaction is $147.68 million before transition costs
    2. With pro forma annual combined revenues of $770 million, the total cost saving amounts to 19.2% of total revenues or $6.35 per case:

Total cost savings per year		
Fixed cost savings	$125.00	million
Marginal cost savings	$22.68	million
Total cost savings per year	$147.68	million
Combined sales		
Puree Promise	$440.00	million
Little Jar	$330.00	
TOTAL COMBINED SALES	$770.00	million
Total annual saving as a percentage of total annual revenues	**19.2%**	
Savings per case		
Puree Promise	12.94	million
Little Jar	10.31	million
Total cases	23.25	million
TOTAL SAVINGS PER CASE	**$6.351**	**per case**

    3. Unless the gross upward pricing pressure realistically is greater than 19.2%, the combined company has significant headroom to lower prices while still making the acquisition profitable

NOTE: The FTC does not accept behavioral remedies, so the FTC would not consider a consent order that requires the merged firm to

implement any business plan, much less reduce prices (but see steps Puree Promise Might Take below).[36]

9. Power buyers defense—Not applicable

a. Requirements
   i. For each putative power buyer, the defendants must show the mechanism by which the putative powerful will be able to protect itself from the merger's anticompetitive effects that would otherwise occur
   ii. There are no other buyers in the market that will likely be harmed as a result of the merger

b. Application
   i. There is no explanation of a mechanism for even the largest firms to protect themselves.
      1. The usual mechanism is to shift enough share away from the merged firm to a third-party supplier to make the price increase by the merged firm unprofitable
      2. But the only alternative incumbent third-party supplier is Cradle Cuisine, whose product is substantially more expensive per unit than either Puree Promise or Little Jar—so shifting share to Cradle Cuisine almost certainly will not be in the profit-maximizing interest of retailers
      3. Another possibility to vertically integrate into production or induce other firms to enter the market. But here (as already discussed) the barriers to entry and market conditions make this mechanism untenable
   ii. Even if there is a mechanism for large supermarket chains to protect themselves from the anticompetitive effects of the merger, the small independent retail stores that carry jarred baby food cannot protect themselves from any anticompetitive effect of the merger
      1. If there were large firms that could protect themselves, the smaller firms would constitute a targeted customer relevant market in which the acquisition would be anticompetitive

c. Conclusion—Defense is not applicable

10. Failing firm defense—Not applicable

a. Requirements: The allegedly failing firm—
   i. Must be unable to meet its financial obligations in the near future,

[36] Some students asserted that the merger would cause Cuisine Cradle to compete more aggressively. Perhaps it would, but there is nothing in the hypothetical that evidences this directly. A conclusion of this sort requires an argument from the evidence available; a simple assertion is not persuasive and reduces the credibility of the analysis overall. In this problem, a good approach would have been to include in section of what else Puree Promise could do is develop evidence that Crade Cuisine would compete more aggressively postmerger.

   ii. Would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act, and
   iii. has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger

   NB: The alternative buyer need not match the purchase price of the original buyer—as long as the alternative buyer is willing to pay a price above liquidation value, the alternative buyer qualifies

b. Application
   i. *Failing*. Puree Promise estimates—and its due diligence on Little Jar confirms—that Little Jar will be unable to meet its financial obligations in about two years
      1. Even is true, Little Jar is not currently failing—technically fails the Merger Guidelines and judicial requirements[37]
      2. The FTC could—and may likely—take the view that Little Jar should continue to compete as long as it is financially able to give consumers the benefit of its competition and postpone any anticompetitive effects that may arise from the merger, especially given the apparent lack of any customer benefits from the transaction
   ii. *Restructuring*: Appears unlikely to be successful—
      1.
      2. The company has little debt, no high-cost leases or contracts the company could renegotiate, and no significant assets that it could sell and remain in business, so a Chapter 11 bankruptcy restructuring would not help.
   iii. Alternative buyers
      1. No efforts have been made to sell the company
         a. Little Jar has not engaged an investment banking firm to pursue a possible sale
      2. However—
         a. No one other than Puree Promise has approached Little Jar expressing interest to acquire it

[37] A number of students appeared to assume that Little Jar's failure in two years satisfied this element of the failing firm defense. This needs to be argued. I do not believe that there are any cases on point, so the argument would have to appeal to the FTC's exercise of prosecutorial discretion. That is, the merging parties would have to convince the FTC that the consumer benefits of allowing the deal to go forward now with whatever gross anticompetitive tendencies the transaction may have, rather than wait until Little Jar was actually failing, are outweighed by the consumer benefits the transaction would produce over the next two years. *See infra* p. 27 (Solidify the Failing Company Defense).

b. Little Jar is doubtful, given the condition of the company and the declining market, that anyone other than another jarred baby food producer would be interested in acquiring it.

iv. But generally see Steps Puree Promise Might Take below

RELIEF RISK

11. At the FTC—Nothing to offer in a consent decree to fix any FTC concern

a. Agencies require divestiture relief to negate anticompetitive concerns in horizontal transactions[38]

b. Puree Promise has no incentive to accept a divestiture consent decree
   i. This is a "pure play" acquisition--
   ii. There is nothing to sell other than the only production facility of one of the two merging firms and its associated business, which is effectively a sale of the company
   iii. Little Jar is a much inferior company to Puree Promise, so this does not provide a "trade up" opportunity[39]

c. There is no buyer for the Albany plant
   i. The acquisition of the Albany plant is financially unattractive at any price for a company that does not produce jarred baby food and cannot consolidate the production of the two companies
      1. If Puree Promise could not buy Little Jar without a antitrust problem, then a fortiori Cradle Cuisine could not buy the company
      2. So the divestiture buyer would have to be a company that could not consolidate the production plants and close the Albany plant because of the need for the plant's specialized equipment necessary to pack, sterilize, and prepare jarred baby food for shipment. Under the facts of the hypothetical, even a pouch-packed baby food producer would have to keep the Albany plant running.

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[38] Some students proposed that Puree Promise offer a divestiture consent decree, devoted several paragraphs to explaining the requirements and process for a consent decree, but never said what divestiture the consent decree should order. A proposal that Puree Promise offer a divestiture consent decree to settle the investigation must specify the divestiture to be made and make an argument with supporting facts that (a) the divestiture would negate the FTC's competitive concerns and the FTC should accept it, (b) an upfront buyer acceptable to the FTC is likely to emerge, and (c) the consent decree would preserve enough value of the deal that it should be acceptable to the buyer.

[39] Some students thought a consent decree requiring the divestiture of Little Jar's Albany, NY plant to an "upfront" buyer acceptable to the FTC could solve the competitive problem. But if Puree Promise sells the Albany plant—the only plant Little Jar operates—what is left for Puree Promise to buy? To preserve competition, the FTC would require all of the sales and supply contracts associated with the Albany plant to go with the divestiture sale. Puree Promise would lose all the cost savings of closing down Albany ($125 million) plus the marginal cost savings of shifting production form the high-cost Albany plant to its own lower-cost Pittsburgh plant. There might be a Little Jar headquarters building and perhaps some sales offices left for Puree Promise to acquire, but a consent decree is tantamount to simply dropping the deal.

ii. Little Jar's financial problems cannot be fixed—any non-jarred baby food divestiture buyer would "step into the shoes" of Little Jar financially as well as operationally and expect to earn meager profits for two years or so and then beginning running at a increasingly significant loss
iii. This makes Little Jar unsaleable, especially to an "upfront" buyer that the FTC would demand.[40]
iv. *Bottom line*: there is no consent decree that would negate the FTC's competitive concern and increase the chances of the deal closing at the end of the investigation[41]

d. The agencies do not accept behavioral consent decrees to fix horizontal concerns
   i. In particular, the agencies will not accept price caps on the merged firm to negate a competitive concern about a future price increase.

STEPS PUREE PROMISE MIGHT TAKE

12. Ascertain customer reactions to the transaction

a. *Before announcement*:
   i. Try to determine internally from knowledgeable business people in the loop how customers are likely to react to the transaction
      1. Are any customers likely to support the deal. If so, why?
      2. Are any customers likely to oppose the deal?
         a. If so, why?
         b. Are there any arguments or accommodations to opposing customers to at least neutralize their concerns if not flip them into supporters?
         c. Pay special attention to Little Jar's customers. They are the most likely to be concerned about the deal since they had the choice to purchase form either merging company and

[40] Some students proposing a consent decree solution thought that the Albany plant could be divested to a third party (most likely a pouch-packed baby food producer), but that the Little Jar brand—and presumably the production—could be retained by Puree Promise. This does not work for two reasons. First, the FTC wants a buyer that can "step into the shoes" of the divestiture seller—this means that the brand, production, and supply contracts associated with the Albany plant would have to go to the divestiture buyer. Second, if for the sake of argument, the FTC allowed Puree Promise to keep the brand, production, and supply agreements, this means that the divestiture buyer would have to create its own product and begin its own production. Not only is the successful promotion of a new product entrant into the market likely to be expensive, time-consuming, and uncertain as to its success, the new production would add more output to a market in which demand is declining. To succeed, the divestiture buyer probably would have to aggressively price its product to gain any traction in the market. But given the high costs of operating the Albany plant (which cannot be fixed) and the meager profits Little Jar earns today at current prices, such an aggressive pricing policy would almost surely make the divestiture business even more unprofitable than it is today.

[41] Some students proposed a hell or high water provision in the acquisition agreement to increases the chances of being able to close the deal at the end of the FTC's investigation. But if there is no consent decree that would resolve the FTC's competitive concerns, a hell or high water provision would accomplish nothing.

choose Little Jar. Now they will have to deal with Puree Promise.

ii. Working with Little Jar business people and their counsel, develop a "customer rollout" plan
    1. Develop the best arguments to present to customers as to why they should be in favor of the deal (i.e., the "sales pitch" for the deal)
    2. Determine who are the top 20 customers of each merging party
    3. Determine jointly which individuals with each company on the list should receive a call making the "sales pitch" for deal and who within the merging firms would be best to call that individual

b. *At time of announcement*
    i. Make all the identified customer calls with the "sales pitch" within several days of the announcement of the transaction
    ii. Solicit and discuss any concerns the customer may have
    iii. After the call, take any reasonable steps to assuage any customer concerns

c. If there is not a persuasive "sales pitch" to make to customers, reconsider whether to go forward with the deal

13. Ascertain whether the company has any "bad" documents

a. "Bad" documents are documents that evidence, either directly or circumstantially, that customers will be harmed by the transaction, including indications that the transaction will:
    i. Increase prices on the products of the merging firms
    ii. Eliminate significant close competition between the merging firms
    iii. Result in a decrease in product or service quality by the company firm
    iv. Result in a decrease in product innovation or product diversity

b. Important documents to consider include:
    i. Financial analysis of the transaction (especially assumptions about the trajectory of future prices)
    ii. Other documents prepared to analyze the transaction
    iii. Documents that address business plans for the merged firm
    iv. Strategic plans and other documents prepared in the regular course of business that address competition between the merging firms or competition in baby food generally
    v. Internally or externally prepared market research reports
    vi. Documents that discuss how the company sets its prices or formulates its bids for supply contracts (especially how it considers Little Jar in this process)

    NB 1: The first three categories of documents will have to be submitted in the company HSR filing; the next two categories of documents will be requested by the investigating staff in the first telephone call with the company's counsel

NB 2: "Documents" include any documents created by investment bankers, management consultants, and others retained by the company

c. Prepare and implement a plan to control the writing of new documents
    i. Important to avoid inadvertently creating new bad documents
    ii. Important to include the customer benefits of the transactions whenever possible in as many documents as possible (and especially in documents to be submitted to the FTC in the HSR filings and in any preliminary investigation)

14. Solidify the failing company defense

a. Verify through an expect that Little Jar is likely to be "failing" within the meaning of the defense in the next two years
    i. Right now, all we know is that Little Jar projects this and that Puree Promise agrees with the projection
    ii. Try to develop an argument that, given the current condition of Little Jar and the declining state of jarred baby food, consumers would be better off with the acquisition today than by blocking the acquisition (assuming no less competitive alternative buyer emerges—see below)
        1. The nature of the argument is no apparent given the prospects of anticompetitive effects immediately after that merger and the lack of consumer benefits from the merger
b. Retain an investment banker and shop Little Jar
    i. Given the circumstances, no alternative buyer should be forthcoming—satisfies Requirement 3 of the failing company defense
c. As a general alternative, put the negotiations to acquire Little Jar on pause until Little Jar is on the verge of failing.

15. Solidify the efficiencies defense

a. Verify the marginal cost savings through an appropriate third-party manufacturing expert
b. Verify the fixed cost savings through an appropriate third-party manufacturing expert
    i. Although fixed cost savings are not technically cognizable in an efficiencies defense, they can be important in close cases in persuading the investigating agency as a matter of prosecutorial discretion not to challenge that transaction
    ii. Refine the argument that it is in the long-run profit-maximizing interest of the merged firm to use some of the $125 million per year in fixed cost savings to competitive more aggressively with Cradle Cuisine (probably with a business strategy expert) and verify the fixed cost savings through third-party expert (probably through an industry expert)

1. Although the Merger Guidelines are very short-run oriented in rejecting fixed cost savings as a cognizable efficiency, it may be possible to convince the agencies either that—
    a. As a matter of prosecutorial discretion, they should recognize the fixed cost savings in this transaction as an offsetting procompetitive effect, or
    b. If the case was litigated in court, the court may be persuaded to accept the fixed cost savings in this transaction as an offsetting procompetitive effect, thereby reducing the agency's incentive to bring an enforcement action

c. Estimate, through an appropriate economic expert, an upper bound on the aggregate cost to (direct) customers of the incremental price increases that would result from the merger absent any downward pricing defenses
d. Estimate, through the same economist, the pass-through rate of the marginal cost savings to customers
e. Determine, through the same economist, whether the passed-on cost savings (the downward pricing pressure) is greater than the aggregate cost to customers of any price increases in the absence of efficiencies (the upward pricing pressure)

NOTE: The FTC is still likely to reject the defense at the investigation stage and prefer to test it in court

16. Firm up plans to compete with Cradle Cuisine and gain market share

a. General ideas, but no specific plans
b. Need—
    i. Specific business plans
    ii. AND show that the expected profitability of competing more aggressively against Crade Cuisine will be greater than that of "accommodating" Crade Cuisine
c. WDC: In this market environment, doubtful that an increased market share strategy is more profitable than accommodation

17. Develop evidence that Cradle Cuisine would compete more aggressively for share postmerger than premerger

a. This assumes that the merged firm will purse and aggressive campaign to increase its market share against Crade Cuisine (which needs to be proved)
    i. Otherwise, accommodation by Cradle Cuisine is likely to be its profit-maximizing strategy
b. May be able to produce evidence through—
    i. A careful deposition of Cradle Cuisine designed to elicit favorable responses about greater competition, and

ii. An expert (probably a business school professor who teaches and consults in business strategy)

c. But could be hard to prove to the satisfaction of the FTC since—
   i. Cradle Cuisine controls the evidence here, and
   ii. The FTC likely would find a coordinated effects outcome here compelling given that the transaction is a merger to duopoly (or a merger to monopoly in supermarkets for the second slot)

18. Consider talking to major customers (for example, the major supermarket chains) about passing on some of the cost savings through reduced prices

a. Although the agencies will not accept price caps or other behavioral relief in a consent decree, large customers may be persuaded to support the deal if Puree Promise were to commit to pass some of the cost savings from the transaction (including both fixed and variable cost savings) to the customer (keeping in mind that a skeptical customer will support the deal only if passed-on savings would result in a lower price than the customer pays premerger)
   i. A "commitment to customers" defense was used, for example, in AT&T/Time Warner and Microsoft/Activision
b. As noted in the analysis of efficiencies, unless the gross upward pricing pressure realistically is greater than 19.2% or $6.35 per case on average, the combined company has significant headroom to lower prices while still making the acquisition profitable
   i. The one-product SSNIP merger simulation in the efficiencies analysis shows upward pricing pressure to increase prices by—
      1. 13.2% or $4.48 per case for Puree Promise, or
      2. 18.6% or $5.95 per case for Little Jar
   ii. Both of these are less than the 19.2% or $6.35 total cost reduction per case on average → there is an argument that the downward pricing pressure outweighs the upward pricing pressure if the FTC (or the court) is persuaded that the merged firm will in fact pass on the necessary cost savings
   iii. A commitment then to customers not to increase the prices of Puree Promise or Little Jar would still result in the acquisition being profitable, although this commitment would very significantly reduce the profitability of the acquisition

19. Develop persuasive party and industry witnesses that the transaction is in the interest of consumers

a. Reduces the FTC's incentive to challenge the transaction
   i. Courts in a number of cases—H&R Block/TaxACT, T-Mobile/Sprint, Microsoft/Activision)—have given significant weight to knowledgeable, persuasive business weight and accepted their testimony over contrary testimony by expert economists testifying for the government.

ii. The threat of confronting knowledgeable and persuasive party and industry witnesses at trial can significantly reduce the willingness of the investigating agency to try the case in court

b. With this in mind, the parties should develop witnesses likely to be found knowledgeable and persuasive by a court to testify before the FTC in the investigation (with the implicit threat that the FTC will confront these witnesses in court if it challenges the transaction)
   i. *Puree Promise witnesses*: Testifying on the reasons for the transaction, especially on—
      1. Declining demand for jarred baby food
      2. The fixed and marginal cost savings resulting from the transaction
      3. The incentive and plans of the combined company to use these cost savings to compete more aggressively against Crade Cuisine to gain market share and increase profits
   ii. *Little Jar witnesses*: Testifying—
      1. The decline in their business
      2. The efforts the company has taken to reduce costs
      3. The age and high costs of its Albany production facility
      4. The almost certainty the company will financially fail in the next two years or so
      5. The inability to successfully restructure through Chapter 11
      6. The expected inability to find a buyer other than another jarred baby food manufacturer that could shut down the Albany plant and shift production to their own facility
   iii. *Supermarket and other customer witness*: Testifying on—
      1. Their expectation that Little Jar will fail in the next two years or so unless acquired
      2. The belief (and the supporting reasons why) an acquisition now of Little Jar is in their best interest because it will produce a more competitive jarred baby food market in the short run and especially in the long run compared to blocking the transaction and keeping the companies separate

      NB: since the FTC is likely to develop some customer-witness to testify in opposition to the transaction, it is critical to have other witness to testify in support of the transaction. As AT&T/Time Warner shows, it is important that the witnesses in support have a solid explanation of how the transaction would benefit customers and be procompetitive. Expressing a sincere but unsupported belief is unlikely to influence either the agency or a judge.

20. **Develop a strategy to convince the FTC that, if challenged at the end of the investigation, the merging parties will not voluntarily terminate their transaction but rather put the FTC to its proof in court**
    a. The FTC is under currently severe resource constraints and must carefully consider whether the resources it would expand in litigating this case in court could be better used in reserving the resources to investigate and litigate other transactions
        i. By contrast, if the FTC believes that the merging parties will not litigate, there is no opportunity cost to challenging the transaction
    b. To this end, Puree Promise should—
        i. Develop the witnesses described above (including the expert witnesses) to make the best possible presentations to the FTC during the investigation and thereby present the appearance of being ready, able, and willing to defend the transaction aggressively in court
        ii. Consider negotiating the following provisions in the merger agreement—
            1. An affirmative covenant to litigate if the FTC challenges the transaction
            2. A termination provision that provides the time to litigate the transaction at lest through the conclusion of a Section 13(b) proceeding in federal district court and possibly an expedited appeal as well