

The Cereal Merger **INSTRUCTOR'S ANSWER**

Note: This answer is much longer and more detailed on the explanation than anything I would expect for a graded homework assignment or an exam answer. I prepared this to further explain the law and the reasoning. Going forward and preparing for the final exam, you should be thinking about what “boilerplate” descriptions of legal concepts and economic tools you should prepare in advance to cut and paste into the exam answer. You should also be thinking about strategies for writing a more compact memorandum that addresses each element of the prima facie case and each defense.

You have asked me to prepare a memorandum analyzing whether the Commission should seek a preliminary injunction in federal district court to block the proposed acquisition of GrainWell Foods Corporation by Kiddos Cereal Company, pending resolution of the merits in an administrative trial. In particular, you have asked me to assess the strength of the FTC's prima facie case and whether the FTC can defeat the parties' defenses. You have also asked me to address how the court is likely to balance the equities and the public interest, as well as the likely outcome of a preliminary injunction proceeding. Finally, you have asked me to assess why Kiddos has not proposed a consent decree divesting Jungle Rings. You noted that, with an appropriate divestiture package and acceptable buyer, a divestiture of Jungle Rings should resolve the Commission's competitive concerns. What accounts for Kiddos's failure to advance such a proposal, and what implications does this explanation have, if any, for the analysis of the competitive effects of the unstructured transaction?

Short Answer

The Commission has a strong case that the proposed acquisition is likely to substantially lessen competition in the nationwide manufacture and sale of children's ready-to-eat (RTE) cereals in violation of Section 7 of the Clayton Act. Both the *Brown Shoe* factors and the hypothetical monopolist test compellingly support children's ready-to-eat (RTE) cereals as a relevant product market. The relevant geographic market is the United States, supported by uniform nationwide pricing, national distribution to retailer distribution centers, competition for centrally sourced national retail accounts, production scale economics requiring national operations, and confirmation by the hypothetical monopolist test that a nationwide 5% price increase would be profitable.

In this market, the merger would result in a combined firm with a 57.8% share of revenues, a postmerger Herfindahl-Hirschman Index (HHI) of 4,366, and an HHI increase of 515. These concentration levels are well above the thresholds that trigger the presumption of illegality under both the case law and the Merger Guidelines. Moreover, the *PNB* presumption is reinforced by strong additional evidence of unilateral effects, maverick elimination, and coordinated effects. First, the merger produces recapture unilateral effects. Kiddos is Jungle Rings' closest rival, with approximately 55.6% of Jungle Rings' lost sales diverting to Kiddos. A one-product SSNIP recapture test demonstrates that the merged firm could profitably raise Jungle Rings' price by 5%, with actual recapture of 55.6% substantially exceeding the critical recapture threshold of

21.25%. Second, Kiddos' internal documents describe the transaction as bringing "discipline to the children's cereal aisle" and reducing "short-term promotional chaos," confirming that Jungle Rings has been a maverick since its entry, disrupting incumbents in pricing and promotions, and its acquisition by Kiddos would eliminate this competitive constraint. Third, even apart from the elimination of Jungle Rings as a maverick, the transaction is likely to increase the risk of coordinated effects. The market is already susceptible to tacit coordination due to high concentration and constrained shelf space allocated through transparent annual category resets, and the acquisition's elimination of one of the four major competitors and increase in concentration would at least marginally heighten the probability, effectiveness, and stability of coordinated behavior. While this coordinated effects theory is the weakest of the three explicit theories of harm, it still provides additional support for finding the transaction anticompetitive.

The parties cannot rebut the Commission's prima facie case. Even assuming broader product markets exist, Section 7 prohibits mergers that may substantially lessen competition "in any line of commerce"—and the parties do not rebut the evidence of likely harm in children's cereals. The parties' remaining defenses lack record support. First, their claim that "remaining competitors" will constrain pricing fails. CerealCorp lacks the ability or incentive to neutralize the competitive loss, and the postmerger market structure increases the likelihood of coordinated interaction. Additionally, private-label cereals play only a limited role, and non-cereal breakfast alternatives are weak substitutes. Second, despite its modest market share, Jungle Rings has acted as a price-constraining competitor, as Kiddos's own documents show, disrupting pricing and spurring increased promotional activity. Third, assertions that Jungle Rings would exit the market absent the merger are contradicted by the brand's recent performance and GrainWell's documented plans to continue investment. Fourth, entry, expansion, and repositioning by rivals would not be timely, likely, or sufficient given the substantial barriers documented in the record—barriers that Jungle Rings' own launch experience illustrates rather than refutes. Finally, the claimed efficiencies are neither merger-specific nor adequately verified and would, in any event, be insufficient to outweigh the transaction's likely anticompetitive effects.

Finally, while an appropriately structured divestiture of Jungle Rings could resolve the competitive concerns raised by the transaction, Kiddos has not proposed such a remedy. An analysis of the transaction's value to Kiddos shows why. Even without a divestiture, the parties' claimed synergies fall approximately \$130.5 million short of covering the transaction costs and deal premium, indicating that Kiddos expects to derive at least that amount in undisclosed value. Kiddos' internal documents describe the transaction as bringing "discipline" to the market and reducing "promotional chaos," indicating that this value would come from eliminating Jungle Rings as a competitor. This strategic dynamic—that the deal only makes economic sense if Kiddos derives substantial value from suppressing competition—strongly reinforces the inference of likely anticompetitive harm from the unstructured transaction. This analysis also suggests that Kiddos will not propose a divestiture remedy to settle the investigation or "litigate the fix" at trial.

For these reasons, the Commission should authorize the staff to seek a preliminary injunction to block the transaction. Given the Commission's strong likelihood of success on the merits, a court should find that the equities and public interest strongly favor preliminary relief, as the harm to competition from allowing the merger to proceed would be irreversible and outweigh any private equities of the merging parties. Given the high probability that a court would issue a preliminary

injunction blocking the transaction, Kiddos is likely to elect not to litigate the merits but to terminate the merger agreement if the Commission challenges the transaction.

Governing Law and Procedure

Section 7 of the Clayton Act. Section 7 of the Clayton Act prohibits mergers and acquisitions “where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.” 15 U.S.C. § 18. By its terms, a Section 7 violation requires proof of three essential elements: (1) a relevant product market (“line of commerce”), (2) a relevant geographic market (“section of the country”), and (3) a reasonably probable anticompetitive effect in that market. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) (noting need only show a “reasonable probability that the merger will substantially lessen competition” in any relevant market to prevail on the merits of an underlying Section 7 claim).

Section 13(b) preliminary injunction standard. The Commission may seek to preliminarily enjoin a transaction under section 13(b) of the FTC Act upon “a proper showing that, weighing the equities and considering the Commission’s likelihood of ultimate success, such action would be in the public interest.” 15 U.S.C. § 53(b); *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 22 (D.D.C. 2015). The Commission satisfies this standard if it “has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation.” *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1071 (D.D.C. 1997); *see* *FTC v. Microsoft Corp.*, 136 F.4th 954, 965 (9th Cir. 2025) (“Viewed through the lens of the FTC’s burden under § 7, the question under § 13(b) is whether the FTC’s evidentiary showing raised sufficiently serious and substantial questions as to a ‘reasonable probability that the merger will substantially lessen competition’ in any relevant market.” (citing *Brown Shoe*, 370 U.S. at 325)). Courts recognize that a preliminary injunction blocking a merger often serves as dispositive relief, given the timing pressures and deal termination dates. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714-16 (D.C. Cir. 2001). Although the Commission’s motion will formally invoke the Section 13(b) standard, the analysis of the likelihood of success should reflect that courts understand preliminary relief in merger cases typically functions as a permanent injunction.

The Baker Hughes burden-shifting framework. In merger cases, courts apply the three-step burden-shifting framework established in *United States v. Baker Hughes Inc.*, 908 F.2d 981 (D.C. Cir. 1990):

- *Step 1.* The plaintiff must establish a prima facie case by proving (1) a relevant product market, (2) a relevant geographic market, and (3) that the merger is reasonably likely to substantially lessen competition in that market. The anticompetitive effect element is often demonstrated through market share and concentration evidence sufficient to trigger the *Philadelphia National Bank* presumption, which provides that once the plaintiff establishes that a merger will result in a firm controlling an undue percentage share of the relevant market and producing a significant increase in concentration, a presumption arises that the merger will substantially lessen competition. *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 363 (1963). The plaintiff may also support or reinforce the prima facie case with additional evidence demonstrating specific mechanisms of competitive harm, such as unilateral or coordinated effects.

- *Step 2.* If the plaintiff satisfies its prima facie burden, the burden of production shifts to the defendant to introduce evidence that rebuts the presumption or creates a genuine factual dispute as to at least one element of the prima facie case.
- *Step 3.* If the defendant has created a genuine issue of material fact on one or more elements of a Section 7 violation, the plaintiff has the ultimate burden of persuasion to prove, on the record as a whole, that the merger is reasonably likely to substantially lessen competition in the relevant market.

Baker Hughes, 908 F.2d at 982-83. Courts apply this framework on a sliding scale: the stronger the plaintiff's prima facie case, the more compelling the defendant's rebuttal evidence must be to create a genuine issue of material fact. *Id.* at 983; *see also Phila. Nat'l Bank*, 374 U.S. at 363-71.

Organization of this memorandum. This memorandum analyzes the proposed transaction under the *Baker Hughes* framework as applied by federal courts. Part I establishes the Commission's prima facie case, beginning with the relevant product market (children's ready-to-eat cereals) and geographic market (the United States), followed by analysis of market concentration and the *Philadelphia National Bank* presumption. Part I then presents additional evidence of competitive effects, including both unilateral effects and coordinated effects. Part II evaluates the parties' defenses, including challenges to market definition, claims that remaining competitors will constrain pricing, assertions that Jungle Rings is competitively insignificant or would exit absent the merger, arguments that entry or expansion would be timely and sufficient, and the parties' claimed efficiencies. Part III addresses why Kiddos has not proposed a consent decree divesting Jungle Rings and analyzes the implications of that strategic choice for evaluating the transaction's competitive effects. Part IV synthesizes this analysis to assess the Commission's overall likelihood of success on the merits. Part V addresses the balance of equities and public interest considerations. Part VI provides an overall recommendation on whether the Commission should seek a preliminary injunction.

I. The Prima Facie Case

The following analysis addresses the key substantive elements of the Commission's prima facie case under Section 7. Specifically, I consider (1) the definition of the relevant product market; (2) the definition of the relevant geographic market; (3) the market shares and concentration levels resulting from the transaction, including the applicability of the *Philadelphia National Bank* structural presumption; and (4) explicit theories of anticompetitive harm.

A. The relevant product market

There are two complementary approaches to product market definition: the *Brown Shoe* "outer boundaries" and "practical indicia" framework and the hypothetical monopolist test (HMT). Both point to the manufacture and sale of children's ready-to-eat (RTE) cereals as the relevant product market.

Brown Shoe judicial tests. Under *Brown Shoe*, the "outer boundaries" of the relevant product market are determined by "the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); *see United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956) (analyzing cross-elasticity); *United States v. Grinnell Corp.*, 384 U.S. 563, 571-72 (1966) (analyzing reasonable interchangeability). *Brown Shoe* further recognized that "within

this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes,” whose boundaries may be identified using “practical indicia,” including industry or public recognition, product characteristics and uses, distinct customers, distinct prices and price sensitivity, and specialized vendors. 370 U.S. at 325. Modern courts generally treat the indicia as circumstantial evidence of substitutability rather than as a separate legal test. *Flovac, Inc. v. Airvac, Inc.*, 817 F.3d 849, 855 (1st Cir. 2016) (holding “the requirements for establishing a relevant submarket are no different than those for establishing a relevant market”). Courts also treat the *Brown Shoe* practical criteria as illustrative rather than exhaustive and consider additional indicia, such as pricing differences, customer classes, distribution channels, and marketing evidence, when probative of substitutability. *See, e.g., FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 27 (D.D.C. 2015); *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 52-62 (D.D.C. 2011); *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1038-40 (D.C. Cir. 2008).

The investigation record establishes that children’s ready-to-eat cereals constitute a relevant product market under both *Brown Shoe*’s “outer boundaries” test and its “practical indicia” framework.

Reasonable interchangeability and cross-elasticity. When a single children’s brand raises price 5% (others held constant), it loses about 23% of its volume, and approximately 91% of those lost sales divert to other children’s cereals; only about 6% divert to adult or health/diet cereals, and 3% to non-cereal breakfasts. Conversely, when an adult cereal raises its price by 5%, roughly 88% of the lost volume remains within adult cereals, and when a health/diet cereal raises its price, about 84% remains within that segment. These asymmetric diversion patterns show each segment constrains itself far more than it constrains others, indicating children’s cereals are not reasonably interchangeable with adult or health/diet products from the perspective of a significant number of consumers.

Industry or public recognition. The record reflects that industry participants and analysts commonly divide RTE cereals into children’s, adult, and health/diet segments based on ingredients, branding, and target demographics. Kiddos is a national manufacturer focused on children’s cereals, while GrainWell is the leading producer of adult cereals and has only recently entered the children’s segment with Jungle Rings. The parties’ internal planning materials focus on competition within the children’s segment and do not treat adult or health/diet cereals as meaningful substitutes, which is strong recognition evidence under *Brown Shoe*.

Product characteristics and uses; distinct customers. Children’s cereals are sweeter, more colorful, and child-branded; adult cereals emphasize grains, fiber, and satiety; health/diet cereals stress low-carb/high-protein or other nutritional attributes. These attributes target different buyer criteria: parents selecting for children versus adult consumers selecting for nutrition and satiety—further evidence of limited practical interchangeability.

Distinct prices and costs. Average wholesale prices differ across segments (children’s ≈ \$3.70; adult ≈ \$3.10; health/diet ≈ \$4.25), as do marginal costs (children’s ≈ \$2.90; adult ≈ \$2.19; health/diet ≈ \$2.83). Persistent price and cost differences align with the distinct positioning and formulations of each segment, supporting a finding of separate markets.

Marketing and distribution; retailer treatment. Marketing strategies differ by segment (e.g., child-directed branding for children’s cereals versus nutrition-forward messaging for adult and health/diet), and retailers allocate shelf space by segment during annual category resets.

Manufacturers tailor promotional spending, slotting, and trade terms to segment-specific objectives—consistent with industry recognition of distinct competitive sets.

Production considerations. While facilities can run multiple cereals, the record indicates that qualifying or repurposing lines for branded SKUs takes time (weeks) due to cleaning, allergen, and quality assurance protocols, and that lines or plants are often dedicated by segment. Repositioning products across segments typically requires reformulation and relabeling, reinforcing meaningful differences beyond branding.

Conclusion under Brown Shoe. Taken together, the evidence shows children’s RTE cereals constitute a relevant product market: high within-segment cross-elasticity and low cross-segment interchangeability satisfy the “outer boundaries” test, and every major practical indicium—industry recognition, product characteristics and uses, distinct customers, price and cost differences, segment-specific marketing/distribution, and production considerations—points the same way. The merging parties’ own documents are particularly probative of the fact that children’s cereals are a distinct market for antitrust analysis.

The hypothetical monopolist test (HMT). Modern courts also apply the hypothetical monopolist test to define relevant product markets. The HMT asks whether a hypothetical monopolist controlling a candidate group of products could profitably impose a small but significant and non-transitory increase in price (typically 5%). *See FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338–49 (3d Cir. 2016); *Chi. Bridge & Iron Co. v. FTC*, 534 F.3d 410, 429–30 (5th Cir. 2008); *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 51–59 (D.D.C. 2011); U.S. Dep’t of Justice & Fed. Trade Comm’n, Merger Guidelines § 4 (rev. 2023). If such a price increase would be profitable, the candidate market satisfies the test; if customers would defeat the increase by switching to products outside the candidate market, the market definition must be expanded.

In markets for homogeneous products—where all products are functionally identical and sell at a single prevailing market price—the HMT must be implemented by testing a uniform price increase across all products in the candidate market. Because homogeneous products command a uniform price, a hypothetical monopolist cannot selectively raise the price of some products while holding others constant; any price increase must apply uniformly to all products. The uniform SSNIP is profitable if sufficient sales are retained in the candidate market such that the profit gain from the increased margin on inframarginal sales (units that continue to be sold at the higher price) exceeds the profit loss from marginal sales (units no longer sold due to customers switching to products outside the candidate market or forgoing purchase entirely). If the price increase would be unprofitable because too many customers would switch to products outside the candidate market, the market definition must be expanded to include the next-best substitutes. *See* 2010 Horizontal Merger Guidelines § 4.1.1.

In differentiated product markets—where products have distinct characteristics, branding, or positioning and command different price points—the HMT can be implemented in two ways. First, as in homogeneous markets, courts may test whether a hypothetical monopolist could profitably impose a uniform SSNIP across all products in the candidate market. *See FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 33 (D.D.C. 2015). Second, and more commonly in differentiated product cases, courts apply a single-product variant: the candidate market is valid if a hypothetical monopolist could profitably raise the price of at least one product sold by a merging firm by a SSNIP amount, even while holding other prices constant. *See id.*; *United States v.*

Anthem, Inc., 236 F. Supp. 3d 171, 198 (D.D.C. 2017); *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 121 (D.D.C. 2016); 2010 Horizontal Merger Guidelines § 4.1.1. Under the single-product approach, when the price of one product in the candidate market increases, some customers will switch to other products within the candidate market (recapture), while others will switch to products outside the market. The single-product SSNIP is profitable to the hypothetical monopolist if the combined profit gain—consisting of the increased margin on inframarginal sales of the product subject to the price increase plus the profit gained by other products in the candidate market from recapturing diverted sales—exceeds the profit loss from sales that divert outside the candidate market. This approach recognizes that in differentiated product markets, firms may have pricing power over their own differentiated products even if a uniform price increase across all products would be unprofitable due to greater competitive constraints at the market-wide level.

The 2010 and 2023 Merger Guidelines eliminated the “smallest market principle,” which previously required that only the narrowest market satisfying the HMT could be considered a relevant market. The Guidelines now recognize that broader markets satisfying the HMT can also constitute relevant markets where they “better reflect[] commercial realities and more accurately answer[] the competitive question the Agencies are investigating.” 2010 Horizontal Merger Guidelines § 4.2; 2023 Merger Guidelines § 4. Courts have applied this framework to analyze transactions in multiple markets—both narrow and broad—where each satisfies the HMT. *See FTC v. Staples, Inc.*, 190 F. Supp. 3d at 121 (analyzing both narrow and broad markets); *United States v. H&R Block, Inc.*, 833 F. Supp. 2d at 50 (similar). Where multiple candidate markets satisfy the HMT, the narrowest market is typically most probative of competitive effects because it isolates the products between which competition is most direct. Still, a broader market may be appropriate if it better captures the commercial reality of how firms compete and how the merger will affect competition. *See* 2010 Horizontal Merger Guidelines § 4 n.4. The commercial realities inquiry examines factors such as how the merging parties organize their businesses, which products they view as competitive with one another in their ordinary-course business documents, and where the transaction’s competitive effects are most significant.

Since children’s cereals are differentiated products with distinct branding, characteristics, and price points, we can apply a one-product SSNIP recapture test. Under this implementation, the candidate market satisfies the HMT if a hypothetical monopolist could profitably raise the price of at least one children’s cereal brand by 5% while keeping all other prices in the candidate market constant.

The critical recapture rate $R_{Critical}^i$ —that is, the minimum percentage of unit sales lost by the product whose price is increased that are recaptured by other products in the candidate market for the SSNIP to be profitable for the hypothetical monopolist—is determined by the following equation:

$$R_{Critical}^i = \frac{\$SSNIP_i}{\$m_{Ave}},$$

where $\$SSNIP$ is the dollar value of the SSNIP for the product whose price is being increased, and $\$m_{Ave}$ is the diversion-weighted average of the dollar margins of the recapturing firms. We will apply the SSNIP to Jungle Rings. Jungle Rings sells for \$3.40 per box, so the dollar value of

a 5% SSNIP is \$0.17. When Jungle Rings raises its price, the sales it loses are recaptured in the candidate market by established children's cereal brands, which have an average wholesale price of \$3.70 per box and marginal costs of \$2.90 per box, yielding a dollar margin of \$0.80 per box. Accordingly:

$$R_{Critical}^i = \frac{\$0.17}{\$0.80} = 21.25\%.$$

The investigation revealed that when the price of a single children's RTE cereal brand increases by 5% (holding other prices constant), 91% of that brand's lost unit sales would be recaptured by other children's RTE cereals. Since the actual recapture ratio (91%) substantially exceeds the critical recapture ratio (21.25%), a hypothetical monopolist controlling all children's cereals could profitably impose a 5% price increase on Jungle Rings while holding other children's cereal prices constant. As a result, children's RTE cereals satisfy the HMT.¹

Conclusion. Children's ready-to-eat cereals constitute a relevant product market for analyzing the competitive effects of the Kiddos/GrainWell transaction. The investigation record establishes that children's cereals satisfy both the *Brown Shoe* "outer boundaries" test, demonstrating high cross-elasticity within the segment and low cross-elasticity with products outside the segment, and the "practical indicia" framework with every major indicium—industry recognition, product characteristics, distinct customers, price and cost differences, and specialized marketing—

¹ **Note to students:** the hypothetical also provides enough information to do a critical loss test. The usual formula for critical loss is:

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

Assume a delta of 5% and apply the profitability test. There are several valid ways to implement this test. I credited a correct application of any of these ways.

First, because Jungle Rings' share is small, you could have ignored its differences in price and percentage margin and applied the critical loss formula using the percentage margin of the established children's brands as a "close enough" approximation of the actual market-wide critical loss. The percentage margin on the established children's brands is $(3.70 - 2.90)/3.70 = 21.62\%$. The approximate critical loss is then:

$$CL_{appx} = \frac{5}{5 + 21.62} = 18.8\%.$$

Second, you could have applied a sufficiency test by using the higher of the two margins, thereby creating a lower bound on actual critical loss. By using the highest percentage margin, you create the lowest possible market-wide critical loss. The percentage margin on Jungle Rings is $(3.40 - 2.90)/3.40 = 14.70\%$. Therefore, use the established brand's margin in the formula (as we did above), which yields a lower bound critical loss of 18.8%.

Third, you could have used a revenue share-weighted average of the margins in the critical loss formula. Here, you need to make an assumption not explicit in the hypothetical: that unit brand losses are proportional to revenue market shares. If so, then $\%m_{ave} = (0.95)(21.62) + (0.05)(14.70) = 21.27\%$ (which also confirms your intuition about approximating critical loss by using the established brands' percentage margin). This yields:

$$CL_{actual} = \frac{5}{5 + 21.27} = 19.0\%.$$

The hypothetical states that the actual loss from a uniform 5% SSNIP in children's brands is 10%. Since actual loss is less than the critical loss in any of the three formulas, children's RTE cereals pass the critical loss test in all three implementations.

Finally, you could have used brute force accounting to test whether a 5% SSNIP in children's brands would be profitable to a hypothetical monopolist of all children's brands. Here, you would need to make an explicit assumption about the percentage losses of each brand when a uniform SSNIP is applied. The most apparent assumption is that all brands lose the same share as the candidate market as a whole (10%).

pointing to a distinct market. Children's cereals also satisfy the single-product SSNIP recapture implementation of the hypothetical monopolist test since a hypothetical monopolist controlling all children's cereals could profitably raise the price of Jungle Rings by 5% while holding other prices constant.

While other, broader candidate markets—such as all ready-to-eat cereals or all ready-to-eat breakfast products—might also satisfy the hypothetical monopolist test, children's cereals better comports with the commercial realities of how the merging parties compete and how the transaction will affect competition. The merging parties organize their businesses around the children's cereal segment, their internal documents analyze competition exclusively within that segment, and the competitive concerns raised by this transaction—particularly the elimination of Jungle Rings as a disruptive competitor—manifest entirely within children's cereals. Accordingly, children's cereals is an appropriate relevant product market in which to assess the competitive effects of the proposed acquisition.

B. The relevant geographic market

The second essential element of a prima facie Section 7 case is the relevant geographic market—“the area of effective competition ... in which the seller operates, and to which the purchaser can practicably turn for supplies.” *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961); accord *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 359 (1963). The relevant geographic market must both “correspond to the commercial realities of the industry and be economically significant.” *Brown Shoe Co. v. United States*, 370 U.S. 294, 336-37 (1962). Courts describe the inquiry as identifying “some geographic area in which a firm can increase its price without 1) large numbers of its customers quickly turning to alternative supply sources outside the area; or 2) producers outside the area quickly flooding the area with substitute products.” *Heerwagen v. Clear Channel Commc'ns*, 435 F.3d 219, 227 (2d Cir. 2006); *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 441 (4th Cir. 2011); see *FTC v. Advocate Health Care Network*, 841 F.3d 460, 468 (7th Cir. 2016); *Saint Alphonsus Medical Center-Nampa Inc. v. St. Luke's Health System, Ltd.*, 778 F.3d 775, 784 (9th Cir. 2015). The Supreme Court has recognized that an element of “fuzziness would seem inherent in any attempt to delineate the relevant geographical market,” *Phila. Nat'l Bank*, 374 U.S. 360 n.37, and thus the boundaries of a relevant geographic market “need not . . . be defined with scientific precision,” *United States v. Connecticut Nat'l Bank*, 418 U.S. 656, 669 (1974), or “by metes and bounds as a surveyor would lay off a plot of ground,” *United States v. Pabst Brewing Co.*, 384 U.S. 546, 549 (1966).

Modern courts use the hypothetical monopolist test to determine whether a hypothetical monopolist controlling sellers in a candidate region could profitably impose a small but significant and non-transitory price increase. *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 51-59 (D.D.C. 2011); *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338-49 (3d Cir. 2016); 2023 Merger Guidelines § 4. Where firms sell products nationwide at effectively uniform terms and compete for national accounts, courts often find the United States to be the relevant geographic market. See *United States v. Anthem, Inc.*, 855 F.3d 345, 366-68 (D.C. Cir. 2017); *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1037-40 (D.C. Cir. 2008).

The judicial and hypothetical monopolist tests strongly support the United States as the relevant geographic market.

Judicial “commercial realities” test. The investigation record demonstrates that cereal manufacturers compete on a national scale and that the United States satisfies the *Philadelphia National Bank* test for a relevant geographic market. Manufacturers sell at uniform wholesale prices nationwide, distribute cereals to retailer distribution centers across the country using common carriers, and compete for centrally sourced national retail accounts. Production economics mandate national operations: regional-only production is rarely viable due to significant scale economies, and the top five retail chains, which control 65% of U.S. sales, require national service capability. All recent entry attempts have been national in character, with no examples of sustained regional competition. Regional competitors cannot “flood the area” to constrain a nationwide price increase because they lack the production scale, distribution networks, and retail relationships necessary to compete effectively. Manufacturers organize their businesses nationally, analyze competition on a national basis, and do not track or respond to regional competitive conditions. These commercial realities confirm that buyers “practically turn” to suppliers competing on a national scale and that sellers “deprive each other of significant levels of business” through nationwide competition rather than regional rivalry.

Uniform national pricing and distribution. Although consumers purchase cereals from local retail stores, the relevant market for analyzing the merger of two manufacturers is the geographic scope of manufacturer competition, where manufacturers compete to supply retailers. *See FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 47-48 (D.D.C. 2015) (finding a national market for foodservice distribution in addition to local delivery markets). Manufacturers set wholesale prices nationally and compete for national retail accounts operating distribution centers nationwide. The investigation record reveals that revenues “represent national sales across all primary distribution channels” and provides average wholesale prices for established firms by segment: \$3.70 (children’s), \$3.10 (adult), and \$4.25 (health/diet). Ready-to-eat cereals are shipped nationally to retailer distribution centers using common carriers and third-party logistics providers. Product characteristics—lightweight packaging and a long shelf life—enable economical long-haul shipments to retailer distribution centers. These features align with cases crediting shipment patterns and centralized sourcing when identifying broad geographic markets. *See, e.g., United States v. Grinnell Corp.*, 384 U.S. 563, 575 (1966) (finding a national market where the business of providing accredited central station alarm service operated on a national level, with national planning, insurer certification, and rate-making, nationwide contracts, and a uniform national schedule of prices and terms); *Sysco*, 113 F. Supp. 3d at 49 (finding a national market where the defendants touted their nationwide distribution capabilities to customers; bid against other broadline foodservice companies with multi-regional capabilities; coordinated the marketing, negotiating, and managing of nationwide customers through “national account” teams; and entered into a single supply contracts whose terms, including pricing, applied across regions); *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 50 (1998) (finding a national market where pricing in one region to one customer often affected pricing nationwide and where negotiated contracts with group purchasing organizations provided for the same prices to all of their members throughout the country).

Industry structure requires national scale. The record indicates substantial economies of scale in production: plants operating below roughly 150-200 million units annually face materially higher per-unit costs, and “regional-only” production is rarely viable for branded products. Major manufacturers operate multiple plants located around the country to achieve efficient utilization. On the demand side, large retailers expect national service levels (including on-time, in-full metrics), and “purely regional rollouts” rarely secure or retain premium placements across major

chains because regional pilots cannot be rolled out quickly enough within annual category-reset cycles. Retail concentration reinforces this dynamic: the top five retail chains account for roughly 65% of U.S. cereal sales, and securing placement with at least three to four of these accounts is necessary for national viability. Regional competitors cannot “flood the area” in response to price increases because they lack the production scale, distribution capabilities, and retail access that national competitors require.

Entry patterns confirm national scope. All recent children’s cereal launches reported in the record were nationally advertised. Jungle Rings was supported by national advertising and approximately \$65 million in promotional spending, quickly securing shelf placement in most major grocery chains, although other national advertising efforts failed to sustain distribution. The record contains no examples of sustained regional success; regional pilots have either failed or could not scale to national placements. Kiddos’ strategic objective is to “operate as a full-line national competitor,” and its internal documents contain no reference to regional markets or regional competitive dynamics.

Supply-side substitution cannot constrain a nationwide price increase. The record contains no evidence of foreign cereal manufacturers serving U.S. retailers, and the barriers documented—such as limited shelf access with concentrated national retailers, brand-building requirements, and production capacity—suggest that entry would not be timely enough to defeat a nationwide SSNIP. The experience of attempted entrants underscores the difficulty of achieving national distribution even for well-funded firms; foreign entry would face even greater obstacles.

The record affirmatively demonstrates the absence of regional markets. Manufacturers do not analyze competition regionally, set prices regionally, organize sales forces regionally, or produce regionally. Kiddos’ internal documents analyze national market share and national competitive dynamics without reference to regional variation. The investigation found no evidence that manufacturers track regional market shares, respond to regional competitive conditions, or make regional pricing decisions. Regional political boundaries have no competitive significance in this industry.

The hypothetical monopolist test confirms the existence of a national market. As shown in the product market analysis, a hypothetical monopolist controlling all children’s cereals nationwide could profitably impose a 5% price increase on Jungle Rings. This satisfies the one-product SSNIP recapture implementation of the HMT and indicates that customers could not defeat this price increase by turning to suppliers outside the United States.²

Conclusion. Manufacturer competition in ready-to-eat cereals operates on a national scale: production follows national economic trends, retailers source centrally and expect national service, recent entry has been national in character, and a nationwide SSNIP would be profitable. The United States is therefore a relevant geographic market.

C. Market participants, market shares, and the *PNB* presumption

In *Philadelphia National Bank*, the Supreme Court held that “a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase

² **Note to students:** Actually, the hypothetical failed to provide the necessary facts for this conclusion. I needed to include explicitly that the diversion ratios provided in the hypothetical were for U.S. manufacturers and excluded foreign manufacturers.

in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.” *United States v. Philadelphia National Bank*, 374 U.S. 321, 363 (1963). Specifically, the court held that a combined firm with at least 30% share and an increase in the 2-firm concentration ratio from 44% to 59% was sufficient to constitute “undue market share” and cause a “significant increase in concentration” to predicate the *PNB* presumption. *Id.* at 364 (“Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat.”) (footnote omitted). The *PNB* presumption is rebuttable, not conclusive. *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 497-98 (1974) (holding that the structural presumption can be rebutted by evidence showing that postmerger competition will remain effective)

Modern courts continue to apply the *PNB* presumption but have refined its implementation through HHI-based thresholds from the Merger Guidelines. Under the 2010 Horizontal Merger Guidelines, mergers in highly concentrated markets with a postmerger HHI greater than 2500 and a delta greater than 200 are “presumed to be likely to enhance market power.” 2010 Horizontal Merger Guidelines § 5.3. Although not binding as legal authority, modern courts frequently cite the 2010 Guidelines as supporting authority when finding mergers that increase the HHI by 200 or more points and result in a postmerger HHI of 2500 satisfy the predicates for the *PNB* presumption. *See, e.g., FTC v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 172 (3d Cir. 2022); *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 988 F.3d 690, 704 (4th Cir. 2021); *United States v. Anthem, Inc.*, 855 F.3d 345, 349 (D.C. Cir. 2017); *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 347 (3d Cir. 2016); *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke’s Health Sys., Ltd.*, 778 F.3d 775, 786 (9th Cir. 2015); *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 568 (6th Cir. 2014); *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 128 (D.D.C. 2016) (“Staples’ proposed acquisition of Office Depot is therefore presumptively illegal because the HHI increases more than 200 points and the post-merger HHI is greater than 2,500.”). The 2010 Guidelines also provide that in moderately concentrated markets (that is, markets with an HHI between 1500 and 2500), transactions that increase the HHI by more than 100 points “potentially raise significant competitive concerns and often warrant scrutiny.” 2010 Horizontal Merger Guidelines § 5.3.

The 2023 Guidelines reduce these thresholds and state that mergers increasing the HHI by 100 or more points, resulting in a postmerger HHI of 1800, satisfy the predicates for the *PNB* presumption. 2023 Merger Guidelines § 2.1. The 2023 Merger Guidelines also reintroduced the 30% combined firm threshold, which had been absent from the prior guidelines. *Id.* It remains to be seen whether courts will adopt these lower thresholds, although one has already done so. *See FTC v. Tapestry, Inc.*, No. 1:24-CV-03109 (JLR), 2024 WL 4564523, at *39 (S.D.N.Y. Oct. 24, 2024).

In children’s ready-to-eat cereals, the transaction combines Kiddos, the number 1 firm with a 52.9% share, with Jungle Rings (GrainWell’s children’s cereal brand), the number 4 firm with a 4.9% share, resulting in a combined firm share of 57.8%. The transaction would increase the HHI by 515 points to 4,366:

Table 1
Nationwide Children's RTE Cereals

Manufacturer	Revenues (\$millions)	Share	HHI contribution
CerealCorp	\$3,220	31.35%	983
Kiddos	\$5,430	52.87%	2795
GrainWell	\$500	4.87%	24
FitStart	\$0	0.00%	0
NutraLife	\$0	0.00%	0
SunnyMorn	\$200	1.95%	4
Store Brands	\$620	6.04%	36
Other	\$300	2.92%	9
	\$10,270	100.00%	3851
Combined share		57.74%	
Premerger HHI			3851
Delta			515
Postmerger HHI			4366

The resulting combined market share (57.8%), market concentration, HHIs, and delta substantially exceed what courts have accepted as sufficient to predicate the *PNB* presumption. The combined firm's 57.8% share nearly doubles the 30% threshold established in *Philadelphia National Bank*. This transaction would significantly increase concentration by eliminating one of only four significant branded competitors and raising the 2-firm concentration ratio from 84.2% to 89.1%. Although this 4.9 percentage-point increase is lower than the 15 percentage-point increase in *PNB*, it occurs in a market that is far more concentrated both premerger (84.2% versus 44% in *PNB*) and postmerger (89.1% versus 59% in *PNB*). The transaction effectively consolidates a highly concentrated oligopoly into a dominant-firm/fringe structure, with the combined entity controlling nearly 58% of the market and facing only one other significant competitor (CerealCorp at 31.4%), with the remainder fragmented among store brands and small players. Given the extremely high level of premerger concentration, the nearly five percentage-point increase to 89.1% represents a near-duopoly market structure and presents greater competitive concerns than the increase challenged in *PNB* itself.

The transaction also substantially exceeds the Merger Guidelines thresholds that courts regard as informative, although not binding. The market postmerger is "highly concentrated" with a postmerger HHI of 4,366 (well above the 2,500-point threshold). The transaction increases the HHI by 515 points (substantially above the 200-point threshold), making the merger presumptively anticompetitive under the 2010 Horizontal Merger Guidelines. 2010 Horizontal Merger Guidelines § 5.3. The transaction also exceeds the lower thresholds established in the 2023 Merger Guidelines, which state that mergers increasing the HHI by 100 or more points, with a postmerger HHI of 1,800 or more, are presumptively unlawful. By either standard, the structural evidence strongly supports the *PNB* presumption.

Judicial precedent confirms the application of the *PNB* presumption. Courts have applied the *PNB* presumption to transactions with market shares, concentration levels, and HHI statistics substantially lower than those present here. In *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001), the D.C. Circuit affirmed a preliminary injunction where the combined firm would have held only 33% of the market—barely half the 57.8% share here—and a comparable delta,

although with a higher postmerger HHI of 5,285. Similarly, in *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36 (D.D.C. 2011), the court enjoined a merger creating a firm with only a 28% share—less than half the 57.8% share this transaction would produce—with a comparable postmerger HHI of 4,691 and a lower delta of 400. More recently, courts have also blocked mergers with HHI statistics well below those present here. More recently, courts have applied the PNB presumption at substantially lower concentration levels. In *FTC v. Tapestry, Inc.*, No. 1:24-CV-03109 (JLR), 2024 WL 4564523 (S.D.N.Y. Oct. 24, 2024), the court blocked a merger creating a combined firm with a 58.7% share—nearly identical to the 57.8% share here—but with a substantially lower postmerger HHI of 3,646 and a higher delta of 2,197. Courts have also blocked mergers with combined shares and HHI statistics that are significantly lower. *See United States v. Bertelsmann SE & Co.*, 646 F. Supp. 3d 1 (D.D.C. 2022) (49% share, postmerger HHI of 3,111, delta of 891); *FTC v. Hackensack Meridian Health, Inc.*, 30 F.4th 160 (3d Cir. 2022) (approximately 50% share, postmerger HHI of 2,835, delta of 841); *United States v. Anthem, Inc.*, 855 F.3d 345 (D.C. Cir. 2017) (47% share, postmerger HHI of 3,000, delta of 537); *FTC v. Advocate Health Care Network*, 841 F.3d 460 (7th Cir. 2016) (55% share, postmerger HHI of 3,517, delta of 1,423); *FTC v. IQVIA Holdings Inc.*, 710 F. Supp. 3d 329 (S.D.N.Y. 2024) (46% share, postmerger HHI of 3,635, delta of 997).

The structural evidence here substantially exceeds the thresholds established in *Philadelphia National Bank*, the Merger Guidelines, and judicial precedent. This transaction ranks among the more concentrated challenges brought by the agencies in recent decades.

D. Explicit theories of anticompetitive harm

The PNB presumption is reinforced by strong additional evidence of both unilateral and coordinated effects. Kiddos is Jungle Rings' closest rival in children's cereals, with diversion from Jungle Rings to Kiddos of approximately 55.6% of Jungle Rings' lost sales. The market is already susceptible to tacit coordination due to high concentration, constrained shelf space allocated through transparent annual category resets, and frequent nationally scheduled promotions, and the acquisition's increase in concentration would heighten the probability, effectiveness, and stability of coordinated softening of promotions and price competition.

Unilateral effects. The acquisition of GrainWell by Kiddos is likely to produce anticompetitive recapture-based unilateral effects in the nationwide market for the manufacture and sale of children's RTE cereals. Unilateral effects occur when a merger eliminates significant "local" competition between the merging firms, enabling the merged entity to raise prices or engage in anticompetitive conduct, regardless of how other competitors, inside or outside the market, respond. *See* U.S. Dep't of Justice & Fed Trade. Comm'n, Horizontal Merger Guidelines § 6.1 (Aug. 19, 2010) ("2010 Merger Guidelines"); U.S. Dep't of Justice & Fed Trade. Comm'n, Merger Guidelines § 2.2 (Dec. 18, 2023). The theory has been widely accepted by courts. *See, e.g., United States v. JetBlue Airways Corp.*, 712 F. Supp. 3d 109, 151-52 (D. Mass. 2024); *United States v. Bertelsmann SE & Co. KGaA*, 646 F. Supp. 3d 1, 38-42 (D.D.C. 2022); *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 237 (S.D.N.Y. 2020); *FTC v. RAG-Stiftung*, 436 F. Supp. 3d 278, 318-21 (D.D.C. 2020); *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 61-65, 67-70 (D.D.C. 2015); *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 81-88 (D.D.C. 2011).

The Kiddos/GrainWell merger implicates recapture unilateral effects. These effects occur when the merged firm can profitably increase the price of one merging product significantly because

the profit lost from that product's reduced sales is more than offset by the profit gain from the other merging products (whose prices remain unchanged) when they recapture some or all of the lost unit sales. For recapture unilateral effects to apply, at least four "screening" conditions must be satisfied: (1) the merging products must be differentiated from one another; (2) they must be close substitutes for one another, so that a price increase in one product will cause substantial diversion of that product's marginal lost sales to the other merging product; (3) non-merging firms' products are sufficiently more distant that they do not absorb most of the diversion; and (4) entry, expansion, or repositioning by others is not so easy and rapid as to defeat the merged firm's incentive to raise price. Although some courts consider these conditions sufficient, a fifth requirement should be added: (5) the profits gained from the recaptured sales must more than offset the profits lost on the product whose price was increased. This fifth condition is necessary because satisfying the four structural market conditions does not guarantee that the price increase will be profitable.

The investigation record establishes that the four qualitative screening conditions for recapture unilateral effects are satisfied. First, the products of the merging firms are differentiated. Kiddos offers multiple branded products, such as Dino Bombs and Frosty Critters, while GrainWell offers Jungle Rings. Each product features unique packaging, cartoon characters, and flavor profiles that appeal to different consumer preferences and occupy specific shelf positions. Second, Kiddos is a close substitute for Jungle Rings. When Jungle Rings raises its price by 5% (holding other prices constant), approximately 55.6% of its lost volume diverts to Kiddos products.³ Third, the products of third-party firms are significantly more distant competitors to Jungle Rings than Kiddos. CerealCorp, the next-closest substitute, captures only 33.0% of Jungle Rings' lost volume, substantially less than the 55.6% diverted to Kiddos. Fourth, entry, expansion, and repositioning are neither timely, likely, nor sufficient to overcome the merged firm's incentive to raise prices. The record documents substantial barriers, including brand-building costs exceeding \$100 million for new launches, constrained shelf space allocated through annual category resets, and production scale requirements (plants operating below 150-200 million units annually face materially higher costs). The failure of four out of five recent nationally advertised children's cereal launches demonstrates the high barriers to successful entry. (See the analysis of the entry/expansion/repositioning defense below for more detail.)

The fifth condition—that the price increase would be profitable—is also satisfied. Using the one-product SSNIP recapture test for a two-product candidate market (the merged firm), we ask whether the merged firm could profitably raise Jungle Rings' price by 5% while holding all other prices constant. The critical recapture ratio—the minimum percentage of Jungle Rings' lost unit sales that Kiddos products must recapture for the SSNIP to be profitable—is calculated as follows:

$$R^{\text{Jungle Rings}} = \frac{\$SSNIP_{\text{Jungle Rings}}}{\$m_{\text{Kiddos}}}.$$

³ I will focus on increasing the price of Jungle Rings because (1) as the acquired product with a smaller market share, it is the most likely candidate for a post-merger price increase, (2) the high diversion ratio from Jungle Rings to Kiddos (55.6%) makes this the most probative test for demonstrating unilateral anticompetitive effects, and (3) the low diversion ratio from Kiddos to Jungle Rings (10.3%) means that a Kiddos price increase would be less likely to satisfy the profitability condition since Jungle Rings would recapture relatively little of Kiddos' lost sales.

Where Jungle Rings sells for \$3.40 per box, a 5% price increase yields a dollar SSNIP of \$0.17. Kiddos' established children's cereals have an average wholesale price of \$3.70 per box with marginal costs of \$2.90 per box, yielding a dollar margin of \$0.80. Therefore:

$$R^{\text{Jungle Rings}} = \frac{\$0.17}{\$0.80} = 21.25\%.$$

Since the investigation established that 55.6% of Jungle Rings' lost sales would divert to Kiddos products—substantially exceeding the critical recapture threshold of 21.25%—the merged firm would have a unilateral incentive to raise Jungle Rings' price postmerger. This price increase would be profitable even without coordinated responses from competitors.

Elimination of a maverick. The acquisition is also likely to have anticompetitive effects by eliminating Jungle Rings as a maverick competitor. A maverick is a firm that disrupts tacit coordination or otherwise constrains market pricing in ways that materially benefit consumers, often through aggressive pricing, innovation, or other competitive conduct. The antitrust concern is that the merger would eliminate a uniquely disruptive firm whose conduct materially constrains market pricing or behavior—either by deterring coordination or by disciplining a rival—resulting in a less competitive postmerger equilibrium. The theory can manifest as either coordinated effects (when a maverick is acquired by a firm more accommodating to its rivals and likely to suppress the maverick's disruptive behavior, or when a maverick acquires a rival and becomes more accommodating) or unilateral effects (when the maverick exerts significant competitively disciplining influence on the acquiring firm and the merger eliminates that discipline). Courts and the agencies recognize elimination of a maverick as a valid theory of Section 7 anticompetitive harm, but require strong evidence that the firm truly is, and will remain, a maverick absent the merger.

The leading doctrinal framework comes from *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 80 (D.D.C. 2011), which sets out a four-part test: (1) the market must be conducive to a materially higher degree of coordinated interaction than it currently exhibits; (2) the disruptive conduct of the maverick must materially contribute to the market's current lower level of coordination; (3) the merger must make it likely that the disruptive conduct will be discontinued; and (4) the loss of disruptive conduct must likely result in a materially higher degree of coordination that harms consumers.

The investigation record establishes that all four conditions of the *H&R Block* maverick test are satisfied.

- *First*, the children's cereal market is conducive to a materially higher degree of coordinated interaction than it currently exhibits. The market is highly concentrated, with a postmerger HHI of 4,366 and only two significant competitors (the combined firm at 57.8% and CerealCorp at 31.4%). Shelf space is constrained and allocated through annual category resets, which create visibility into shelf positioning and competitive placement. Manufacturers compete for centrally sourced national retail accounts.
- *Second*, Jungle Rings' disruptive conduct materially contributes to the market's current lower level of coordination. GrainWell launched Jungle Rings in mid-2024 with aggressive pricing (\$3.40 versus \$3.70 for established brands), supported by approximately \$65 million in promotional spending and slotting allowances. The brand quickly achieved national distribution and captured 5% of the segment within its first

year. According to GrainWell's internal documents, the company planned to continue this aggressive competitive strategy for at least two more years absent the merger, with the goal of further building brand recognition and expanding shelf presence. Jungle Rings is a smaller entrant with only a 5% share. GrainWell was entering the children's cereal segment from its established position in adult cereals. Kiddos' internal documents describe the transaction as bringing "discipline to the children's cereal aisle" and reducing "short-term promotional chaos."

- *Third*, the merger makes it likely that Jungle Rings' disruptive conduct will be discontinued. Kiddos is the acquiring firm and the dominant incumbent with a 52.9% share. Kiddos' internal memos describe the transaction as a way to "bring discipline to the children's cereal aisle" and reduce "short-term promotional chaos."
- *Fourth*, the loss of Jungle Rings' disruptive conduct will likely result in a materially higher degree of coordination that harms consumers. With Jungle Rings absorbed into Kiddos, the market structure effectively becomes a near-duopoly, with only CerealCorp remaining as a significant independent competitor at 31.4%.

The elimination of Jungle Rings as a maverick competitor reinforces the Commission's *prima facie* case. The record demonstrates that Jungle Rings has disrupted pricing and promotional behavior in a concentrated market conducive to coordination, and that Kiddos intends to eliminate this disruption through the acquisition. This maverick elimination theory provides an independent basis for finding likely anticompetitive effects and strengthens the inference of harm established through the structural presumption and unilateral effects analysis.

Coordinated effects. Finally, even if Jungle Rings were not a maverick brand, the merger increases the likelihood of anticompetitive coordinated effects in the nationwide market for children's ready-to-eat cereals. Coordinated effects arise when a merger increases the probability, effectiveness, or stability of tacit collusion. Tacit collusion is the process by which firms in an oligopoly coordinate their behavior—such as pricing, promotional, or output decisions—without any explicit agreement, relying instead on mutual recognition of interdependence and accommodating responses over time. Coordinated effects involve conduct that is profitable only if rivals engage in accommodating responses. Coordinated effects have been well-accepted by courts as a Section 7 theory of anticompetitive harm in horizontal mergers when the result is likely to be higher prices, lower market output, reduced market product or service quality, or a reduced rate of technological innovation or product improvement.

Courts apply a two-element test: (1) the relevant market must be susceptible to tacit coordination, and (2) the merger must make tacit coordination more likely, more effective, or more stable. Factors relevant to the first element include whether the market is highly concentrated, whether there have been prior actual or attempted coordination efforts, whether there is market transparency on the dimensions of competition that firms will allegedly coordinate (usually prices or output), whether there are limited competitive responses from noncoordinating firms that would disrupt coordination (such as entry, expansion, or repositioning), whether firms have aligned incentives to coordinate, and whether coordination would be profitable or provide other advantages. Some courts presume that if a market satisfies the *PNB* thresholds premerger, the market satisfies the first requirement. For the second element, most courts find that if the first requirement is satisfied, the elimination of a significant competitor through the merger makes out a *prima facie* showing that the merger will make

coordination more likely, more effective, or more stable. The coordinated effects theory does not require that coordination involve every firm in the relevant market; it is sufficient for coordination to occur among some subset of firms (the collusive group) that collectively can influence a dimension of competition, especially market price or aggregate output, even if others do not participate.

Even setting aside the maverick evidence, the investigation record satisfies both elements of a coordinated-effects theory. First, as shown in the previous section on the elimination of Jungle Rings as a maverick, the children's cereals market is already susceptible to tacit accommodation. Second, the merger increases the probability, effectiveness, and stability of tacit coordination by eliminating Jungle Rings, substantially increasing concentration (increasing the HHI by 515 points to 4,366), and leaving the combined firm at about 57.8% and CerealCorp at about 31.4%. With one fewer independent decision-maker and greater symmetry between the two largest firms, the Kiddos and CerealCorp. are likely to find it easier to reach and sustain tacit coordination on pricing and promotional intensity.

While coordinated effects, standing alone, would likely be an insufficient basis to bring this case absent the maverick-elimination evidence, the theory is not irrelevant. The market's susceptibility and the merger's amplification of concentration and symmetry modestly reinforce the overall inference of anticompetitive harm. In that sense, the coordinated effects theory, although weaker than the other two explicit theories of harm, still lends incremental support to the Commission's *prima facie* case.

E. Conclusion on the *prima facie* case

On the investigation record, the Commission can make out a strong *prima facie* case that the proposed acquisition is likely to substantially lessen competition in the nationwide market for children's RTE cereals. A children's RTE cereal relevant product market is supported by both the *Brown Shoe* judicial tests and the hypothetical monopolist test. A national geographic market is supported by uniform nationwide pricing, national distribution to retailer distribution centers, competition for centrally sourced national retail accounts, and production-scale economics that require national operations. The transaction would create a combined firm with a 57.8% share, increase the HHI by 515 points to 4,366, and eliminate one of only four significant competitors, establishing a strong *PNB* structural presumption of anticompetitive harm. The structural presumption is reinforced by recapture unilateral effects indicating a substantial increase in the price of Jungle Rings, the elimination of Jungle Rings as a disruptive competitor, and a heightened risk of coordinated effects.

Defenses

The parties advance six principal defenses. First, they contend that the relevant product market is substantially broader than children's cereals and includes either all RTE cereals or all ready-to-eat breakfast products. Second, they argue that remaining competitors—particularly CerealCorp, along with private labels and non-cereal breakfast alternatives—will continue to constrain pricing postmerger. Third, they assert that Jungle Rings exerts only a marginal competitive constraint due to its small share and limited brand strength. Fourth, they contend that Jungle Rings is not a sustainable brand and would likely have been discontinued absent the merger. Fifth, they argue that entry, expansion, and repositioning by other competitors remain timely, likely, and sufficient to prevent durable anticompetitive effects. Finally, they claim that the

transaction will generate substantial, merger-specific efficiencies that will benefit consumers and outweigh any competitive concerns. For the reasons set forth below, none of these defenses successfully rebuts the Commission's prima facie case.

A. Market definition

The merging parties argue that the relevant product market is substantially broader than children's cereals. At a minimum, they contend the market includes all RTE cereals—children's, adult, and health/diet products combined. Alternatively, they argue that the market extends beyond packaged, ready-to-eat breakfast alternatives to include granola bars, toaster pastries, yogurt, and other convenient breakfast items. They point to (1) cross-category substitution under a 5% uniform increase, and (2) competition for the same scarce shelf space managed through annual category resets with the same retail buyers.

This defense fails. Even if the Court were to assume *arguendo* that all RTE cereals or all breakfast products also constitute a relevant product market in which this merger poses no competitive harm, the merger would still violate Section 7. By its terms, Section 7 prohibits any merger where, "in *any* line of commerce in *any* section of the country," the effect may be substantially to lessen competition. 15 U.S.C. § 15 (emphasis added); *see Brown Shoe*, 370 U.S. at 325 ("Because § 7 of the Clayton Act prohibits any merger which may substantially lessen competition '*in any line of commerce*' (emphasis supplied), it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition."); *United States v. Pabst Brewing Co.*, 384 U.S. 546, 549 (1966) (observing that Section 7 "requires merely that the Government prove the merger may have a substantial anticompetitive effect *somewhere* in the United States") (emphasis added); *FTC v. Microsoft Corp.*, 136 F.4th 954, 965 (9th Cir. 2025) (noting that a finding of substantial anticompetitive effects in any one market "provides an independent basis for the injunction"); *United States v. Anthem, Inc.*, 855 F.3d 345, 368 (D.C. Cir. 2017) (same).

Here, as demonstrated above, the investigation record shows that the nationwide manufacture and sale of children's RTE cereals constitutes a relevant product market and that the proposed merger would substantially lessen competition in that market. This showing satisfies the Commission's burden under Section 7. The existence of broader markets in which the merger might not harm competition—even if established—would not cure the violation. Moreover, the parties have not contended that children's RTE cereals fail to satisfy the *Brown Shoe* practical indicia or the hypothetical monopolist test. They merely argue that broader markets also exist. This concession reinforces the view that children's cereals constitute a valid, relevant market for Section 7 analysis. The merging parties' entire market definition defense is therefore legally irrelevant to the Section 7 analysis.

B. Remaining competitive discipline

The parties argue that the transaction will not diminish competitive discipline because other competitors will continue to constrain pricing behavior postmerger. They contend that CerealCorp will continue to exert substantial influence on pricing behavior given its significant share (approximately 31% of children's cereals by revenue), extensive retail relationships, and long-standing brand recognition. The parties assert that CerealCorp has the capability and incentive to respond aggressively to competitive opportunities. They further point to the presence

of private-label cereals (about 6% of the children's segment) and to non-cereal breakfast alternatives (such as granola bars, toaster pastries, and yogurt) as sources of price pressure that would continue to discipline postmerger pricing. According to the parties, these competitors would make sustained price increases or reduced promotional intensity unprofitable for the combined firm.

The defense fails. The parties fundamentally misunderstand how eliminating a close and disruptive competitor affects pricing incentives in a highly concentrated market. The relevant question is not whether other competitors exist or have significant shares, but whether they can replace the competitive constraints that the merging parties currently impose on each other and the market through close substitution, Jungle Rings' disruptive maverick behavior, and Jungle Rings' role as an independent decision-maker whose elimination facilitates tacit coordination.

CerealCorp. The parties' emphasis on CerealCorp's 31% share and competitive capabilities fails to address how CerealCorp could replace any of the three competitive constraints eliminated by the merger.

First, CerealCorp postmerger cannot replace the competitive constraint Kiddos places on Jungle Rings premerger. When Jungle Rings raises its price by 5%, 55.6% of its lost volume diverts to Kiddos, but only 33.0% diverts to CerealCorp. This diversion difference shows that Kiddos imposes substantially greater pricing discipline on Jungle Rings than CerealCorp does. Moreover, the one-product SSNIP recapture test confirms that CerealCorp cannot prevent a unilateral postmerger price increase: the merged firm could profitably raise Jungle Rings' price by 5% because Kiddos' 55.6% recapture rate substantially exceeds the 21.25% critical threshold, even accounting for diversion to CerealCorp and other competitors. CerealCorp's presence does not restore the competitive constraint that the merger is likely to eliminate.

Second, CerealCorp will not replace Jungle Rings' disruptive maverick behavior postmerger. In a highly concentrated market where only two significant competitors control nearly 90% of segment revenues, CerealCorp is more likely to follow any price increase by the merged firm than to adopt the premerger pricing and promotional strategies of Jungle Rings. Economic theory and empirical evidence demonstrate that in concentrated markets with high barriers to expansion, remaining competitors typically accommodate rather than challenge price increases by larger rivals, particularly when doing so allows all firms to earn higher margins. *See* Horizontal Merger Guidelines § 7.1 (2023). Kiddos' own internal documents reinforce this concern: Kiddos described the transaction as bringing "discipline to the children's cereal aisle" and reducing "short-term promotional chaos," suggesting an expectation that competition would be less intense postmerger than premerger.

Third, CerealCorp's presence does not prevent the coordinated effects from eliminating Jungle Rings as an independent decision-maker. The merger reduces the number of significant competitors, creating a near-duopoly. In this highly concentrated market with constrained shelf space allocated through annual category resets that create visibility into competitive placement, and with manufacturers competing for centrally sourced national retail accounts, both remaining large competitors face strong incentives to accommodate rather than compete. With only two significant firms controlling nearly 90% of the market, aggressive pricing or promotional competition by either firm would trigger responses that harm both firms' substantial inframarginal sales, making accommodation the profit-maximizing strategy for each. The increased market symmetry and transparency facilitate tacit coordination on pricing and

promotional intensity. Courts have long recognized that as concentration increases and the number of competitors declines, tacit coordination becomes more likely, more effective, and more stable. *See United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 92 (D.D.C. 2011). The parties' assertion that CerealCorp will constrain the merged firm's pricing fundamentally misunderstands oligopoly incentives: in a near-duopoly, both firms benefit more from mutual accommodation than from aggressive competition.

Private labels and non-cereal breakfast alternatives. The parties' reliance on private-label cereals and non-cereal breakfast alternatives is similarly misplaced. These products cannot replace any of the three competitive constraints eliminated by the merger.

Store brands account for only approximately 6% of the children's RTE cereal segment. The investigation record indicates that store brands are positioned as low-cost alternatives sold under retailer-controlled labels, compete on price rather than brand identity, and rarely engage in national advertising. Their limited market presence and differentiated positioning indicate they provide only modest competitive constraint on branded children's cereals. Store brands cannot replace the local competition between Jungle Rings and Kiddos that will be eliminated as a result of the merger. The diversion evidence shows that when Jungle Rings raises its price by 5%, approximately 89% of diverted sales go to Kiddos and CerealCorp, with less than 12% going to other children's cereals (including store brands) and products outside the segment. Store brands recapture only a minimal share of diverted sales, demonstrating they are not close substitutes for the merging parties. Store brands also cannot replace Jungle Rings' maverick behavior, as they do not engage in the aggressive promotional strategies and brand-building that characterized Jungle Rings' entry. Finally, their 6% share means they lack the scale to prevent coordinated effects between two large firms controlling nearly 90% of the market.

Non-cereal breakfast alternatives provide even weaker constraints. When a single children's cereal brand raises its price by 5%, only 3% of lost volume diverts to non-cereal breakfast options. This minimal diversion demonstrates that products such as granola bars, toaster pastries, and yogurt are weak substitutes for children's cereals. The parties offer no evidence that non-cereal alternatives could or would expand output sufficiently to constrain postmerger pricing by the combined firm. These products cannot replace the competitive constraints that the merger will eliminate.⁴

C. Jungle Rings' unsustainability

The parties contend that Jungle Rings is not a sustainable brand and would likely have been discontinued absent the merger. They assert that GrainWell launched Jungle Rings only recently, that the brand's early performance has been modest and costly to maintain, and that Jungle Rings depends heavily on advertising and slotting payments to preserve shelf space. The merging parties point to GrainWell's board-level documents, prepared before the merger negotiations began, showing that GrainWell was evaluating exit options and considering reallocating promotional resources to more profitable products. While acknowledging that earlier internal planning documents projected continued promotional support for at least two years, the parties argue that subsequent assessments cast growing doubt on the brand's long-term viability. In their

⁴ Entry, expansion, and repositioning by incumbent firms and potential competitors are addressed below.

view, even without the merger, Jungle Rings would likely have been discontinued, and its elimination cannot reasonably be attributed to the transaction.

This defense fails on both factual and legal grounds.

Factual grounds. Even accepting the parties' characterization of the documentary evidence, the record does not support their unsustainability claim. The best reading of GrainWell's internal documents is that GrainWell's current plan is to continue its aggressive competitive strategy for Jungle Rings for at least two more years absent the merger. While the company was evaluating whether to continue this strategy or reallocate resources to other business opportunities, no decision had been made to discontinue Jungle Rings or change course. The existence of strategic evaluations does not demonstrate that exit was imminent or even likely. Rather, it only shows ordinary corporate planning, in which management evaluates competing uses of capital and investment resources.

Moreover, the investigation record reveals that Jungle Rings was profitable, even in its first year of introduction. With \$500 million in annual revenue, an average price of \$3.40 per box, and marginal costs of \$2.90 per box, Jungle Rings generates approximately \$73.5 million in annual gross margin contribution. Even after accounting for approximately \$65 million in promotional spending and slotting allowances, Jungle Rings generates a positive contribution. Notably, the parties have not contended that Jungle Rings is unprofitable. Jungle Rings' actual and projected financial performance convincingly refutes the claim by the merging parties that Jungle Rings is unsustainable and likely to be discontinued.

Legal grounds. The parties' argument that GrainWell might someday exit Jungle Rings for strategic reasons does not make out any recognized antitrust defense.

First, even assuming the failing company defense applies to a brand—and no case law supports such an extension—the parties fail to establish it. The allegedly failing entity must demonstrate that it: (1) would be unable to meet its financial obligations in the near future, (2) would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act, and (3) 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. *See Citizen Publishing Co. v. United States*, 394 U.S. 131, 137-38 (1969); *FTC v. Heinz*, 246 F.3d 708, 720-21 (D.C. Cir. 2001); 2010 Horizontal Merger Guidelines § 11; 2023 Merger Guidelines § 11. Leaving aside how the second requirement would apply to a brand, Jungle Rings fails to satisfy the first and third requirements: Jungle Rings has a positive contribution margin, even after accounting for its promotional and slotting allowance expenses, and there is no evidence in the investigation record, nor do the parties contend, that Grainwell has made any effort to sell Jungle Rings to another purchaser that would keep Jungle Rings in operation.

Second, any argument that Jungle Rings' competitive significance should be discounted in the antitrust analysis because GrainWell might exit for strategic business reasons fails under *United States v. General Dynamics Corp.*, 415 U.S. 486, 501-04 (1974). *General Dynamics* permits discounting future competitive significance only when evidence shows a material, inevitable decline, such as coal reserves already committed under long-term contracts and unavailable for future competition. Here, the record shows the opposite. GrainWell planned to continue Jungle Rings' aggressive strategy for at least two years absent the merger, with national distribution achieved and a 5% segment share within the first year, none of which suggests an inevitable

diminution in its competitive force. The parties point only to the possibility that GrainWell might someday reallocate capital to other business opportunities. Courts assess competitive effects based on the market structure absent the merger, not on speculation that a profitable brand might be discontinued for unrelated strategic reasons.

The parties' unsustainability argument provides no basis for rebutting the FTC's *prima facie* case.

D. Entry/expansion/repositioning

The parties argue that any anticompetitive effects would not be durable because new entry, brand extensions, and output expansion remain timely, likely, and sufficient to constrain postmerger pricing. They contend that the cereal market continues to evolve, with manufacturers regularly introducing new products, repositioning existing brands, and testing cross-segment extensions. The parties cite three examples they claim demonstrate the viability of entry: GrainWell's Jungle Rings launch, FitStart's pilot of a children's cereal, and MorningJoy's ongoing U.S. market exploration. They particularly emphasize Jungle Rings itself as proof that entry is viable, noting that within approximately 15 months, Jungle Rings achieved national distribution, secured shelf placement in most major grocery chains, and captured 5% of a \$10 billion segment. According to the parties, while barriers are substantial, they are not insurmountable for well-capitalized entrants with appropriate strategies. The parties further argue that firms with existing retail relationships or access to third-party manufacturing can scale more rapidly than *de novo* entrants, that private-label suppliers provide ongoing price pressure, and that annual category resets allow retailers to allocate space to new products. The parties contend that the children's cereal segment's size—over \$10 billion in annual wholesale revenues—is large enough to attract additional national competitors at efficient scale, particularly if postmerger pricing creates profit opportunities. In the parties' view, these dynamics would enable timely, likely, and sufficient entry or expansion to constrain pricing power and prevent any postmerger effects from becoming durable.

Under the 2023 Merger Guidelines, entry is timely only if it is "rapid enough to replace lost competition before any effect from the loss of competition due to the merger may occur," and the entry must be durable such that an entrant that does not plan to sustain its investment would not ensure long-term preservation of competition. 2023 Merger Guidelines § 3.2; *see* 2010 Horizontal Merger Guidelines § 9.1, although the 1992 Merger Guidelines and some case law allow for two years for entry to occur and offset the merger's competitive harm. *See* 1992 Horizontal Merger Guidelines § 3.2; 1982 Merger Guidelines § III.B; *United States v. Bazaarvoice, Inc.*, No. 13-CV-00133-WHO, 2014 WL 203966, at *70 n.19 (N.D. Cal. Jan. 8, 2014); *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 73 n.28 (D.D.C. 2011); *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 59 (D.D.C. 2009). Entry is likely only if it would be profitable, accounting for the assets, capabilities, and capital required, as well as the risks involved, including costs that would not be recovered if the entrant later exits. 2010 Horizontal Merger Guidelines § 9.2; 2023 Merger Guidelines § 7. Entry is sufficient only if it would deter or counteract the competitive effects of concern, and must at least replicate the scale, strength, and durability of one of the merging parties. 2010 Horizontal Merger Guidelines § 9.3; 2023 Merger Guidelines § 7. The investigation record shows that none of these elements are satisfied.

Timeliness. Entry is not timely. Production and distribution timelines make timely entry implausible. Qualifying or repurposing production lines requires 8 to 16 weeks, while greenfield

builds or major retrofits have 12- to 24-month lead times. Repositioning adult or health cereals into the children's segment requires reformulation and new label approvals. Regional rollouts cannot expand rapidly because annual category resets gate chainwide placement. The top five retail chains account for 65% of cereal sales, and available co-packing capacity covers less than 10% of a major brand's volume. Brand-building compounds these delays: achieving consumer recognition sufficient for sustainable retail velocity typically requires 2 to 3 years, and new brands typically require 3 to 5 years to achieve positive EBITDA.

Jungle Rings illustrates these barriers rather than refuting them. Despite GrainWell's existing production capacity and retail relationships, Jungle Rings required approximately 15 months and \$65 million in promotional spending to reach 5% share, and GrainWell projects that at least two more years of continued support will be necessary. This far exceeds any reasonable timeliness standard. The broader track record confirms the point: of five nationally advertised children's cereal launches between 2020 and 2024, only Jungle Rings succeeded. FitStart withdrew its pilot after four months, and MorningJoy executives stated that entry would require "multi-year investment with uncertain returns," with "shelf access remaining the primary gating factor."

Likelihood. Entry is not likely. The capital requirements are prohibitive. New cereal brands typically require 3 to 5 years to achieve positive EBITDA, with cumulative cash requirements often exceeding \$150 to \$200 million. Launch-phase advertising often exceeds \$100 million over the first 18 to 24 months, representing largely unrecoverable sunk costs. Plants operating below 150 to 200 million units annually face materially higher per-unit costs, and regional-only production is rarely viable. Shelf positioning requires slotting fees and promotional allowances, and continued placement depends on meeting velocity thresholds; reductions in trade spend commonly lead to rapid share loss. A substantial share of new SKUs are delisted within 12 to 18 months.

The track record demonstrates these risks are material. Of five nationally advertised children's cereal launches between 2020 and 2024, four failed after collectively investing over \$200 million. NutraMorning, despite a well-capitalized launch with national advertising and premium slotting fees, exited within two years, citing unsustainable promotional costs. Even Jungle Rings—the sole success—has not achieved self-sustaining profitability; it required approximately \$65 million in first-year promotional spending, and GrainWell projects that at least two more years of continued support will be necessary. Jungle Rings succeeded only because GrainWell possessed established retail relationships and existing production capacity—advantages unavailable to most potential entrants. This 80% failure rate demonstrates that entry is unlikely to be profitable. The parties' assertion that the segment's \$10 billion size attracts competitors does not overcome the documented capital requirements, sunk costs, and high failure rates.

Sufficiency. Entry is not sufficient. To be sufficient, entry must replicate Jungle Rings' competitive significance. Despite its 5% share, Jungle Rings functions as a meaningful constraint. When Kiddos raises prices by 5%, approximately 10.3% of diverted volume flows to Jungle Rings, and Kiddos' internal documents describe Jungle Rings as creating "promotional chaos" and state the transaction would "bring discipline to the children's cereal aisle." No potential entrant could plausibly replicate this role. Plants operating below 150 to 200 million units annually face materially higher costs. Large retailers carry only 80 to 120 cereal SKUs, and shelf positioning for children's cereals is negotiated during annual resets based on slotting fees and proven velocity. Established brands with long-standing retail relationships are given priority.

The children's segment is characterized by strong brand preferences, and achieving consumer recognition requires 2 to 3 years of sustained promotional activity. Even Jungle Rings required \$65 million in first-year promotional spending and faces an ongoing need for sustained support.

The parties' examples do not demonstrate sufficient entry. Jungle Rings itself required GrainWell's established retail relationships, existing production capacity, and \$65 million in first-year spending to reach 5% share—capabilities no other firm in the record possesses. FitStart, despite its established presence in adjacent segments, withdrew after four months due to poor sales. Of five recent launches, four failed before achieving competitive significance after investing over \$200 million collectively. Private-label cereals account for only 6% of the children's segment and compete on price rather than brand identity, not replicating the competitive role of branded manufacturers. Annual category resets do not guarantee sufficient entry: a substantial share of new SKUs are delisted within 12 to 18 months, and initial placement does not translate into a durable competitive presence.

The investigation record demonstrates that entry, expansion, or repositioning would be timely, likely, and sufficient to prevent anticompetitive effects. The substantial barriers documented in the record—multi-year timelines, capital requirements of \$150 to \$200 million or more, constrained retail access, and an 80% failure rate for recent launches—demonstrate that entry cannot negate the merger's likely anticompetitive effects. The parties' entry defense therefore provides no basis for rebutting the Commission's *prima facie* case.

E. Efficiencies

The parties argue that the transaction will generate substantial, merger-specific efficiencies that will benefit consumers and outweigh any competitive concerns. They project approximately \$150 million in recurring annual cost savings from three sources: \$65 million in fixed-cost savings from consolidating production into GrainWell's more modern facilities with substantial unused capacity and superior automation; \$35 million in marginal-cost efficiencies from lower labor and energy costs per unit on more efficient production lines; and \$50 million from eliminating duplicative R&D, sales, and administrative functions. Using Kiddos' 10% discount rate over a ten-year horizon, the parties calculate a present value of approximately \$922 million, which they contend exceeds the \$900 million acquisition premium. The parties assert these efficiencies are merger-specific and cannot be achieved through less restrictive means, as Kiddos' aging facilities lack the automation and capacity utilization necessary for comparable cost reductions. They further contend that none of the claimed efficiencies depends on retaining Jungle Rings, and that the cost savings will be passed through to retailers and consumers through lower wholesale prices and increased promotional support, particularly given continued competitive pressure from CerealCorp, private labels, and adjacent product categories. According to the parties, these procompetitive benefits demonstrate that the Commission should close the investigation without taking enforcement action.

The Supreme Court has historically expressed skepticism toward efficiencies as a defense to anticompetitive mergers. In *Brown Shoe*, the Court stated that "Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets" and "resolved these competing considerations in favor of decentralization." *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962). In *Philadelphia National Bank*, the Court observed that a merger whose effect "may be substantially to lessen competition" is not saved because "on some ultimate reckoning of social or economic debits and credits, it may be deemed

beneficial,” noting that “Congress determined to preserve our traditionally competitive economy” and “therefore proscribed anticompetitive mergers, the benign and the malignant alike.” *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 371 (1963). In *Procter & Gamble*, the Court held that “possible economies cannot be used as a defense to illegality,” explaining that “Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition.” *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967).

Notwithstanding these Supreme Court statements, modern lower courts have been willing to assume, at least for purposes of analysis, that efficiencies may be considered in rebutting the government’s prima facie case. See *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1222 (11th Cir. 1991); *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 349 (3d Cir. 2016); *FTC v. Advocate Health Care*, No. 15 C 11473, 2017 WL 1022015, at *12 (N.D. Ill. Mar. 16, 2017). The most sensible way to read the modern approach is that efficiencies can be used as a *negative* defense to disprove the anticompetitive effect element of the prima facie case, but not as an *affirmative* defense to permit a merger that has the requisite anticompetitive effect in the relevant market. See *Univ. Health*, 938 F.3d at 1222 & n.29; *Steves & Sons, Inc. v. Jeld-Wen, Inc.*, No. 3:16-CV-545, 2024 WL 5171177, at *10 (E.D. Va. Dec. 19, 2024). Even so, courts continue to treat efficiencies with considerable skepticism, and no modern court has yet sustained an efficiencies defense in a merger challenge.

Under the Merger Guidelines, the efficiencies defense has four requirements. 2010 Horizontal Merger Guidelines § 10; 2023 Merger Guidelines § 3.3. First, the claimed efficiencies must be merger-specific, meaning they are likely to be accomplished with the proposed merger and unlikely to be achieved without it. Second, the efficiencies must be verifiable, meaning the parties must substantiate their claims with evidence that is not speculative or aspirational so that the agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved, and why each would be merger-specific. In addition, the agencies and the courts are increasingly requiring verification by qualified independent third parties. Third, the efficiencies must be sufficient to prevent the anticompetitive effects of concern and must benefit consumers in the relevant market in a timely way. Inherent in this requirement is that the efficiencies must be passed on to consumers rather than simply retained by the merged firm as increased profits or distributed to shareholders. When, as here, the anticompetitive concern is higher prices postmerger, the efficiencies must generate sufficient downward pressure on prices to offset the upward pressure resulting from the merger’s reduction of competition and so negate any anticompetitive price increase. Because a profit-maximizing firm sets prices where marginal revenue equals marginal cost, only changes in marginal costs resulting from the merger will affect the merged firm’s prices. Fourth, the efficiencies cannot arise from anticompetitive reductions in output or service. Modern courts have accepted the Guidelines’ framework for analyzing an efficiencies defense. See *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 349 (3d Cir. 2016); *United States v. Anthem, Inc.*, 855 F.3d 345, 352-55 (D.C. Cir. 2017); *FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 69-70 (D.D.C. 2018); *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 94-98 (D.D.C. 2017); *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 82-86 (D.D.C. 2015); *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 91 (D.D.C. 2011). Courts have expressed skepticism toward efficiencies claims, noting that projections may be viewed with particular doubt when generated outside the usual business planning process, and no modern court has yet sustained an efficiencies defense in a merger challenge.

The parties fail to satisfy their burden of production on any of the four requirements for an efficiencies defense.

Merger-specific. The parties have not adduced evidence that the claimed efficiencies are merger-specific. Kiddos operates four plants, three of which are aging, while GrainWell operates two modern facilities with substantial unused capacity and advanced automation. The parties project \$65 million in annual fixed-cost savings from closing one older Kiddos plant and shifting production to GrainWell's facilities, and \$35 million in marginal-cost efficiencies from lower labor and energy costs per unit on more efficient production lines. However, the parties have not shown that Kiddos could not achieve these savings by upgrading its own facilities rather than acquiring GrainWell. The \$50 million in savings from eliminating duplicative R&D, sales, and administrative functions similarly has not been shown to be achievable only through this merger rather than through operational improvements or shared services arrangements.

Verifiable. The parties have not adduced sufficient evidence to verify their efficiency claims. Although the parties' projections are supported by internal analyses produced during the Second Request and are consistent with the rationale presented in investor materials and staff briefings, the record does not indicate that qualified independent third parties have verified the claimed efficiencies. Courts view projections with particular skepticism when generated outside the usual business planning process. Without verification by independent experts, the efficiency claims remain speculative.

Sufficient. The parties have not adduced sufficient evidence that the claimed efficiencies would prevent anticompetitive effects in the relevant market. The anticompetitive concern here is higher prices in the children's cereal segment. Because a profit-maximizing firm sets prices where marginal revenue equals marginal cost, conventional economic theory holds that only marginal cost savings are likely to be passed on to consumers to offset any upward pricing pressure resulting from the merger. To include fixed cost savings as cognizable efficiencies, the parties must present evidence that passing on some or all of these savings is in the profit-maximizing interest of the merged firm. Here, the bulk of the cost savings is in fixed costs—\$65 million in fixed-cost savings and \$50 million in administrative savings—and the parties have offered no explanation for why it would be in the profit-maximizing interest of the merged firm to pass any of these savings on to customers. The claimed marginal cost savings amount to only \$35 million annually. The parties have offered no evidence of how much of these savings would be passed on to customers, much less whether the passed-on savings would be sufficient to offset the upward pricing pressure arising from the merger's unilateral and coordinated effects and the elimination of Jungle Rings as a maverick brand.

Moreover, the parties' claim that cost reductions will be passed through to consumers is further undermined by the transaction's economics. Kiddos is paying an acquisition premium of approximately \$900 million, and the present value of the claimed recurring efficiencies over ten years is approximately \$922 million. The acquisition premium thus nearly exhausts the entire claimed efficiency gains, leaving only approximately \$22 million in net present value after accounting for the premium. This suggests that Kiddos expects to capture the efficiency gains for itself rather than passing them through to consumers.

Not anticompetitive. While the parties assert that none of the claimed efficiencies depends on retaining Jungle Rings and that the cost savings derive from operational consolidation that would be fully realized even if Jungle Rings were divested, this does not fully address whether the

efficiencies arise from anticompetitive effects. To the extent that any claimed savings result from reduced promotional spending, advertising, or product variety in the children's cereal segment—the kind of competitive restraint Kiddos' internal documents suggest when describing the transaction as bringing “discipline” to the market—such savings would constitute anticompetitive reductions in output or service rather than cognizable efficiencies. The record does not establish that all of the claimed savings are unrelated to such anticompetitive reductions.

The parties' efficiencies defense provides no basis for rebutting the Commission's prima facie case.

E. Conclusion on defenses

On the evidence in the investigation record, the parties will fail to rebut the Commission's prima facie case. Their market definition challenges do not overcome the evidence that children's cereals constitute a relevant product market. Jungle Rings has functioned as a significant competitive constraint despite its modest share, and the record contradicts claims that the brand would exit absent the merger. Entry, expansion, and repositioning would be neither timely, likely, nor sufficient to prevent anticompetitive effects. The claimed efficiencies are neither adequately verified nor demonstrated to be merger-specific or sufficient to offset competitive harm. A court should conclude that the merging parties have failed to satisfy their burden of production on any of the defenses they claim and that the Commission's prima facie case remains unrebutted.

A Jungle Rings Divestiture

Finally, you have asked me to assess why Kiddos has not proposed a consent decree divesting Jungle Rings. You note that, with an appropriate divestiture package and acceptable buyer, a Jungle Rings divestiture should resolve the Commission's competitive concerns. In particular, you have asked me to explain what accounts for Kiddos' failure to advance such a proposal and what implications, if any, my explanation has for the analysis of the competitive effects of the unstructured transaction.

The merging parties have not proposed divesting Jungle Rings to address the FTC's competitive concerns. This failure is revealing, particularly because finding an acceptable buyer should not be difficult. Jungle Rings gained 5% share of the children's RTE cereal market in its first year and is profitable on a contribution margin basis even after its aggressive promotional spending. GrainWell's internal documents project continued growth with sustained promotional support, and assuming a reasonable projected growth rate of at least 1% annually, Jungle Rings would reach an 8% share in three years, generating \$822 million in revenue and approximately \$121 million in annual contribution margin—demonstrating substantial upside potential for a buyer. Even at its current valuation, however, Jungle Rings represents an attractive acquisition opportunity. Staff estimates Jungle Rings' current going concern value at \$420 million. Assuming a 40% “fire sale” discount typical of consent decree divestitures, an acquisition price of \$252 million would represent exceptional value. Established cereal manufacturers such as FitStart, NutraLife, or SunnyMorn—firms with existing cereal manufacturing operations, retail relationships, and industry expertise—could acquire immediate access to a 5% share of a \$10+ billion segment with a demonstrated growth trajectory while avoiding the \$150-200 million

in launch costs, multi-year brand-building timeline, and substantial failure risk that characterize de novo entry.

Given the strength of the Section 7 case against this transaction and the straightforward solution of a Jungle Rings divestiture, Kiddos' failure to propose such a remedy is revealing. The economic analysis below demonstrates that Kiddos would prefer to walk away from the transaction entirely rather than close a restructured deal with a Jungle Rings divestiture. This revealed preference indicates that there is substantial undisclosed value to Kiddos in acquiring Jungle Rings—value that, if lost through divestiture, would make the restructured transaction economically irrational.

The transaction's financial structure demonstrates why this is the case. If Kiddos were required to divest Jungle Rings as a condition of closing, the deal would destroy shareholder value compared to simply terminating the transaction and paying the contractual breakup fee. Under a divestiture scenario, Kiddos would realize the claimed operational synergies, with a net present value of \$922 million, but would also incur \$152.5 million in transaction-related costs, comprising \$75 million in integration and transition costs and \$77.5 million in external advisory and deal expenses. Additionally, Kiddos would suffer a \$168 million reduction in transaction value from divesting Jungle Rings, based on the staff's estimate that Jungle Rings has a current going concern value of \$420 million but would sell for only \$252 million (a 40% discount) in a consent decree divestiture. Finally, Kiddos would pay the \$900 million acquisition premium over GrainWell's pre-announcement market capitalization. The net result would be a loss of \$298.5 million in shareholder value.

By contrast, if Kiddos simply walked away from the transaction, it would pay only the \$225 million reverse termination fee specified in the merger agreement and realize no synergies, resulting in a net loss of \$225 million. Walking away is economically superior by \$73.5 million. No rational management team would proceed with a transaction that destroys \$73.5 million more in shareholder value than the readily available alternative of paying the breakup fee and abandoning the deal.

The analysis reveals an even more fundamental problem: even the unrestructured transaction does not make economic sense based purely on the operational efficiencies the parties have claimed. The parties project operational synergies with a net present value of \$922 million, but this figure must be reduced by \$152.5 million in transaction-related costs, yielding net synergies of \$769.5 million. Yet Kiddos is paying a \$900 million acquisition premium to obtain these synergies. The premium exceeds the net present value of claimed synergies by \$130.5 million. For this transaction to be economically rational, Kiddos must be obtaining at least \$130.5 million in additional value beyond the operational cost savings.

The most logical source of this additional value is the benefit of eliminating Jungle Rings as a competitive constraint, thereby enabling Kiddos postmerger to raise prices, reduce promotional spending intensity, and "bring discipline to the children's cereal aisle," as the company's internal documents put it. This \$130.5 million gap between the premium paid and the net operational synergies represents the quantifiable minimum value that Kiddos places on the anticompetitive effects of this merger. It constitutes direct economic evidence that the transaction's primary purpose is to eliminate competition rather than achieve the operational improvements emphasized in the parties' presentations to staff.

Kiddos' failure to propose a Jungle Rings divestiture, despite the apparent availability of acceptable buyers, reveals that the transaction is economically rational only if Kiddos retains Jungle Rings and eliminates it as a competitive constraint. The financial analysis demonstrates that Kiddos would prefer to terminate the transaction and pay the \$225 million breakup fee rather than proceed with a divestiture that would cost \$298.5 million in shareholder value. Moreover, even the unstructured transaction cannot be justified by the parties' claimed operational synergies alone: the \$130.5 million gap between net synergies and the acquisition premium represents the quantifiable minimum value Kiddos places on the anticompetitive effects of eliminating Jungle Rings as a competitor. This revealed-preference evidence constitutes direct economic proof that the transaction's primary purpose is to reduce competition rather than to achieve operational improvements, strongly corroborating the Commission's *prima facie* case and undermining the merging parties' defenses.

Weighing the Equities

Under section 13(b) of the FTC Act, a preliminary injunction is appropriate "upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest." 15 U.S.C. § 53(b). This weighing requires the court to consider both public and private interests. The public interest considers the relative costs and benefits to the public of allowing the merger to close during the pendency of litigation or of preventing its closing until the proceeding concludes. The private interests include the corporate interests of the merging parties. *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 172 (D.D.C. 2000). When the Commission establishes a strong likelihood of success on the merits, the balance of equities and public interest strongly favor preliminary relief. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 726 (D.C. Cir. 2001).

A. Public equities

The public equities strongly favor preliminary relief. Where the FTC shows a likelihood that the proposed transaction will substantially lessen competition, the public interest in effective enforcement of the antitrust laws weighs heavily in favor of granting an injunction. *Heinz*, 246 F.3d at 726; *Swedish Match*, 131 F. Supp. 2d at 173.

If the merger proceeds, competitive harm would be immediate, substantial, and irreversible. The merger would eliminate one of only four significant competitors, creating a near-duopoly with the combined firm controlling 57.8% of the market and CerealCorp at 31.4%. As the above analysis shows, the merged firm could profitably raise Jungle Rings' price by at least 5% immediately, likely triggering accommodating increases across the segment. The merger would eliminate Jungle Rings as a maverick whose aggressive pricing has disrupted the market—a purpose Kiddos' internal documents confirm by describing the transaction as bringing "discipline to the children's cereal aisle." The concentrated postmerger structure would increase the likelihood of tacit coordination between the two remaining major competitors.

There is also a strong public interest in ensuring that the FTC can order effective relief if it succeeds on the merits at trial. *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 86 (D.D.C. 2015). Courts have long held that the only way to ensure effective relief can be ordered after trial is to prevent companies from merging during the pendency of litigation. Relief is unlikely to be fully effective if parties are permitted to consummate their transaction, even if subject to a hold-separate order, and the court must unwind the transaction after the conclusion of the merits trial. *FTC v. PPG*

Indus., Inc., 798 F.2d 1500, 1506-09 (D.C. Cir. 1986). "Section 13(b) itself embodies congressional recognition of the fact that divestiture is an inadequate and unsatisfactory remedy in a merger case." *Heinz*, 246 F.3d at 726. Once consummated, horizontal mergers are "very difficult to undo." *Id.* Even if divestiture were subsequently ordered, Jungle Rings could not be restored as the independent, disruptive competitor it was premerger.

Beyond preventing irreversible harm, preliminary relief serves the public interest in deterring anticompetitive mergers generally. Congress "determined to preserve our traditionally competitive economy" and "proscribed anticompetitive mergers, the benign and the malignant alike." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 371 (1963). The transaction would eliminate competition in a consumer staple purchased by millions of American families, with price increases harming a wide swath of the public.

B. Private equities

The merging parties are likely to argue that a preliminary injunction would impose substantial financial harm during the delay of administrative proceedings, which could extend 6 to 24 months depending on appeals, before they could close their transaction. For purposes of the equities analysis, we credit these contentions.

The parties could argue that during this delay, Kiddos would forgo the benefits of the combined entity. The parties claim operational synergies of approximately \$150 million annually. The economic analysis demonstrates that Kiddos is paying a premium \$130.5 million above what these operational synergies justify, indicating additional expected benefits of approximately \$130.5 million annually. If the court ultimately determines the transaction is lawful, all benefits—including those from eliminating Jungle Rings as a competitor—would constitute legitimate gains from a lawful transaction. On this basis, the parties could argue that Kiddos would forgo approximately \$140 million to \$560 million in benefits during a 6- to 24-month delay. The parties would further argue that GrainWell would incur time-value losses of \$175 million to \$700 million on the \$3.5 billion purchase price (at Kiddos' 10% discount rate), and that both parties would face business deterioration, increased integration costs, and opportunity costs. The total harm could range from approximately \$315 million to \$1.3 billion, depending on the length of the delay.

C. Weighing the equities

Even accepting the merging parties' contentions, however, four considerations demonstrate that the public equities substantially outweigh the private equities. First, the private harms are entirely contingent on the Commission losing, while competitive harm from consummation is likely and irreversible. Courts properly give far greater weight to irreversible public harm. *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008). Second, when the Commission demonstrates a strong likelihood of success, courts consistently hold that the public interest in preventing irreversible competitive harm outweighs even substantial private financial harm. *See FTC v. Weyerhaeuser Co.*, 665 F.2d 1072 (1981); *accord FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327 (2016); *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (2001); *Sysco*, 113 F. Supp. 3d at 88.

Moreover, if the parties elect to terminate the transaction rather than litigate the merits in an administrative proceeding—as the economic analysis strongly suggests Kiddos will do—this decision should not be credited as a private equity weighing against preliminary relief. Courts are

almost universally unmoved by such arguments, reasoning that control over whether to litigate the merits is entirely within the merging parties' control. If the parties are unwilling to litigate the merits, it must be because either the private benefits of the merger are not substantial or the probability of success on the merits is low. In either case, the unwillingness to litigate demonstrates that the private equities are weak.

D. Conclusion

The balance of equities and public interest decisively favor preliminary relief. The irreversible harm to competition substantially outweighs the contingent financial costs to the merging parties. The private harms, while potentially substantial, are precisely the costs Congress determined parties must bear when pursuing anticompetitive transactions. A court should find that the equities and public interest weigh in favor of the Commission's motion for a preliminary injunction.

Conclusion

For the reasons set forth above, the Commission should seek a preliminary injunction to block the proposed acquisition of GrainWell Foods Corporation by Kiddos Cereal Company pending resolution of the merits in an administrative trial. The Commission has a strong *prima facie* case that the transaction will substantially lessen competition in the nationwide market for children's ready-to-eat cereals. Both the traditional judicial tests and the hypothetical monopolist test support children's ready-to-eat cereals as the relevant product market and the United States as the relevant geographic market. The *PNB* presumption makes out a *prima facie* case of anticompetitive harm, which is reinforced by the merger creating anticompetitive unilateral effects, eliminating Jungle Rings as a maverick competitor, and increasing the risk of coordinated effects. The merging parties' defenses fail to rebut this showing: their market definition arguments are legally irrelevant under Section 7's "any line of commerce" standard; the record contradicts their claims that Jungle Rings is insignificant or unsustainable; entry barriers are too high for timely, likely, and sufficient competitive responses; and the parties have failed to satisfy their burden of production to show that the claimed efficiencies are merger-specific, verifiable, and sufficient to outweigh the transaction's likely anticompetitive effects. Moreover, Kiddos' failure to propose a Jungle Rings divestiture—despite the apparent availability of acceptable buyers—strongly indicates that the transaction's value derives primarily from eliminating competition rather than achieving operational synergies, as demonstrated by the \$130.5 million gap between the acquisition premium and net claimed efficiencies. The balance of equities and public interest strongly favors preliminary relief, as the irreversible harm to competition substantially outweighs the contingent financial costs to the merging parties. Accordingly, a federal court is highly likely to grant the Commission's motion for a preliminary injunction.