

MERGER ANTITRUST LAW

LAW 1469
Georgetown University Law Center
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Tuesdays and Thursdays, 3:30 pm – 5:30 pm

Dale Collins

wdc30@georgetown.edu
www.appliedantitrust.com

CLASS 12 HOMEWORK ASSIGNMENT—INSTRUCTOR’S ANSWER

Instructions

Submit by email by 3:30 pm on Thursday, October 1

Send to wdc30@georgetown.edu

Subject line: Merger Antitrust Law: Assignment for Class 12

Assignment

Part A. One-product SSNIP recapture tests

For these problems, use the profitability (break-even) version of the HMT. Assume linear residual demand, constant marginal costs, and initial prices that maximize each firm’s standalone profits. All prices other than the price receiving the SSNIP remain unchanged. The firms can accommodate all recaptured sales without changing their marginal costs or incurring additional fixed costs.

1. *Insulated water bottles.* Summit Bottle proposes to acquire Ridge Bottle. Each company sells a single model of a one-liter insulated water bottle. A third company, Canyon Bottle, sells a competing one-liter bottle. The products are differentiated by their designs and brand reputations. The investigating agency is considering a candidate product market consisting of the Summit, Ridge, and Canyon bottles.

Each bottle sells for \$40 and has a marginal cost of \$20. Summit currently sells 10,000 bottles per month. Reliable evidence shows that a nontransitory 5% increase in the price of the Summit bottle, with all other prices unchanged, would reduce Summit’s monthly sales by 1,000 bottles. Of these lost sales, 60 would divert to Ridge and 140 would divert to Canyon. The remaining 800 would go to other brands outside the candidate market or would be purchases forgone.

Would a hypothetical monopolist controlling Summit, Ridge, and Canyon find the 5% increase in Summit’s price profitable? Does this one-product SSNIP establish that the candidate market passes the HMT? Use the brute-force method, separately identifying the profit gain on Summit’s inframarginal sales, the profit loss on Summit’s marginal sales, and the profits earned on sales recaptured by Ridge and Canyon.

Answer

A hypothetical monopolist controlling Summit, Ridge, and Canyon would earn an additional \$2,000 per month by increasing Summit’s price by 5%. Because a profitable SSNIP on at least one product in the candidate market is enough, the three-product candidate market passes the HMT under the profitability version of the test. *See* 2023 Merger Guidelines § 4.3.A (SSNIP “for

at least one product in the group”); 2010 Horizontal Merger Guidelines § 4.1.1 (SSNIP “on at least one product in the market, including at least one product sold by one of the merging firms”). Summit is a merging firm’s product.

The original dollar margin on each bottle is $\$40 - \$20 = \$20$. The dollar SSNIP is $5\% \times \$40 = \2 , increasing Summit’s price to $\$42$. Summit retains $10,000 - 1,000 = 9,000$ monthly sales. The brute-force calculation is:

Component	Calculation	Monthly profit change
Gain on Summit’s inframarginal sales	$9,000 \times \$2$	\$18,000
Loss on Summit’s marginal sales	$-1,000 \times \$20$	–\$20,000
Gain on Ridge’s recaptured sales	$60 \times \$20$	\$1,200
Gain on Canyon’s recaptured sales	$140 \times \$20$	\$2,800
Net gain to hypothetical monopolist		\$2,000

Summit’s own profits fall by \$2,000 ($\$18,000 - \$20,000$), but Ridge and Canyon earn \$4,000 on recaptured sales. Those gains more than offset Summit’s loss. Canyon’s recaptured profits count even though Canyon is not a merging party because the hypothetical monopolist controls all three products in the candidate market.

2. *Premium yogurt.* Meadow Dairy proposes to acquire Valley Dairy. Each company sells a premium yogurt, and a third company, Orchard Dairy, sells a competing premium yogurt. The products are differentiated by their flavors, textures, and brand reputations. The investigating agency is considering a candidate product market consisting of these three products.

Each product sells for \$2.00 per container and has a gross margin of 40%, calculated using the constant marginal cost of producing an additional container. Reliable evidence shows that a nontransitory 5% increase in the price of Meadow’s yogurt, with all other prices unchanged, would cause some of Meadow’s sales to divert to other products or be forgone. Of the sales Meadow would lose, 7% would divert to Valley’s yogurt and 9% would divert to Orchard’s yogurt. The remaining 84% would go to products outside the candidate market or would be purchases forgone.

Using an appropriate one-product SSNIP recapture formula, determine whether a hypothetical monopolist controlling all three products could profitably increase Meadow’s price by 5%. State the formula, calculate the critical and actual recapture rates, and explain whether this price increase establishes that the candidate market passes the HMT.

Answer

Because all three products have the same initial prices and percentage margins, the critical recapture rate is the dollar SSNIP divided by the common dollar margin ($\$0.10 \div \0.80), which simplifies to:

$$R_{\text{Critical}} = \frac{\delta}{m} = \frac{0.05}{0.40} = 0.125 = 12.5\%.$$

The actual recapture rate is the sum of the diversion ratios to *all* other products within the candidate market:

$$R_{\text{Meadow}} = 7\% + 9\% = 16\%.$$

Summing the diversion ratios works here because Valley and Orchard earn the same dollar margin. In general, a SSNIP on one product is profitable when the sum of each diversion ratio multiplied by the recapturing product's dollar margin exceeds the dollar SSNIP. Problem 3 applies that approach to products with different prices and margins.

Because actual recapture of 16% exceeds critical recapture of 12.5%, the hypothetical monopolist could profitably impose the 5% SSNIP on Meadow's yogurt. The three-product candidate market therefore passes the HMT under the profitability version of the test.

3. *Accounting software.* LedgerOne proposes to acquire BookEase. Each company sells a monthly subscription to its small business accounting software. The products are differentiated by their features and ease of use. The investigating agency is considering a candidate product market consisting of these two products, although customers also have other accounting software alternatives.

LedgerOne charges \$100 per subscription per month and has a percentage gross margin of 40%. BookEase charges \$80 per subscription per month and has a percentage gross margin of 25%. These margins are calculated using the constant marginal cost of serving an additional subscriber.

Reliable evidence shows that, if LedgerOne increased its subscription price by a nontransitory 5% while all other prices remained unchanged, 20% of the subscriptions LedgerOne lost would divert to BookEase. In a separate price experiment, if BookEase increased its subscription price by a nontransitory 5% while all other prices remained unchanged, 25% of the subscriptions BookEase lost would divert to LedgerOne. In each experiment, the remaining lost subscriptions would go to products outside the candidate market or would be purchases forgone.

Using an appropriate one-product SSNIP recapture formula, determine whether a hypothetical monopolist controlling both products could profitably impose a 5% SSNIP on LedgerOne and, separately, on BookEase. State the formula, calculate the critical recapture rate for each experiment, and compare it with the actual recapture rate. Does the two-product candidate market pass the HMT? Explain.

Answer

This problem extends the recapture approach of Problem 2 to products with different prices and margins. Because the candidate market contains only two products, each product's actual recapture rate is its diversion ratio to the other product. Under the stated assumptions, the critical recapture rate for a SSNIP on product i is:

$$R_{\text{Critical}}^i = \frac{\delta p_i}{\$m_j} = \frac{\$SSNIP_i}{\$m_j}$$

Here, δ is the percentage SSNIP expressed as a decimal, p_i is the original price of the product receiving the SSNIP, and m_j is the original dollar margin on the other product, which recaptures lost sales. The numerator is the dollar SSNIP. The critical recapture rate is the proportion of the lost sales that must be recaptured for the hypothetical monopolist to break even. The product's own margin drops out of the formula because, as Problem 1 showed, a SSNIP costs the product receiving it exactly its lost sales times the dollar SSNIP; the SSNIP is profitable only if the margin earned on recaptured sales covers that cost.

The one-product SSNIP is profitable when actual recapture exceeds critical recapture:

$$R_i = D_{ij} > R_{\text{Critical}}^i.$$

LedgerOne's dollar margin is $40\% \times \$100 = \40 per subscription per month. BookEase's dollar margin is $25\% \times \$80 = \20 . Applying the formula in each direction:

Product receiving the SSNIP	LedgerOne	BookEase
Dollar SSNIP	$5\% \times \$100 = \5	$5\% \times \$80 = \4
Dollar margin on recapturing product	\$20 (BookEase)	\$40 (LedgerOne)
Critical recapture rate	$\$5 \div \$20 = 25\%$	$\$4 \div \$40 = 10\%$
Actual recapture rate	20%	25%
One-product SSNIP profitable?	No	Yes

A 5% SSNIP on LedgerOne is unprofitable because its actual recapture rate of 20% is less than its critical recapture rate of 25%. A 5% SSNIP on BookEase is profitable because its actual recapture rate of 25% exceeds its critical recapture rate of 10%.

The two-product candidate market passes the HMT under the profitability version of the test. As in Problem 1, a hypothetical monopolist needs only to be able to impose a profitable SSNIP on one product in the candidate market; both one-product tests need not succeed. Here, the profitable 5% SSNIP on BookEase is sufficient.

Part B. Market shares, concentration, and the *PNB* presumption

Calls for a reasoned memorandum of law to the client.

You are an associate at Able & Baker LLP working with partner Margaret Chen. The firm represents Intelligent Ones (IO), a manufacturer of low calorie single serve frozen dinners. ConAgra Brands (ConAgra), which produces Healthy Choice low calorie single serve frozen dinners, has approached IO about a possible acquisition. Alice Long, IO's CEO, has asked the firm to assess whether the market shares and concentration resulting from the acquisition would permit the FTC to establish a presumption that the transaction would have an anticompetitive effect in violation of Section 7 of the Clayton Act. Chen has asked you to draft the memorandum.

For purposes of this assignment, assume that the relevant market is the manufacture and sale of low calorie single serve frozen dinners in the United States. The client has provided the following sales data for that market:

Firm (brand)	Sales (in millions of dollars)
Nestlé (Lean Cuisine)	\$142.45
ConAgra (Healthy Choice)	\$57.41
Intelligent Ones	\$50.00
Other/private label firms (six firms)	\$10.22
Total	\$260.08

Assume that the table identifies all market participants, that sales revenues are an appropriate measure of their market shares, and that the six firms in the “other/private label” category are independently owned.

Chen asks that the memorandum explain the *Philadelphia National Bank* presumption, its legal significance, and the legal standards for triggering it, and then apply those standards to the proposed acquisition.

Long wants something concise yet rigorous that she can share with IO’s senior business leaders. Support your analysis with appropriate citations to authority. The client is asking only about the structural prima facie case, not for an ultimate determination whether the acquisition violates Section 7. You need not analyze market definition, other theories of anticompetitive harm, particular substantive defenses, or the merger review process.

INSTRUCTOR’S ANSWER

ABLE & BAKER LLP

TO:
FROM:
DATE:

**ConAgra's proposed acquisition of Intelligent Ones
The *PNB* Presumption**

You asked whether the market shares and concentration resulting from ConAgra Brands' (ConAgra's) proposed acquisition of Intelligent Ones (IO) would permit the FTC to establish a rebuttable structural presumption that the transaction would have an anticompetitive effect in violation of Section 7 of the Clayton Act. This memorandum explains the *Philadelphia National Bank* presumption, its legal significance, and the legal standards for triggering it, and then applies those standards to the proposed acquisition. I assume the relevant market is the manufacture and sale of low-calorie single-serve frozen dinners in the United States, the sales data you provided identify all market participants, and sales revenues are an appropriate measure of market share.

For the reasons explained below, the market shares and concentration resulting from the proposed acquisition would permit the FTC to establish a strong structural prima facie case of anticompetitive effect. The combined firm would have a 41.3% market share, and the transaction would increase the Herfindahl-Hirschman Index (HHI), the standard measure of market concentration, by approximately 849 points to approximately 4,708. Those figures substantially exceed the combined share found sufficient in *Philadelphia National Bank* and the structural thresholds in both the current 2023 and the prior 2010 Merger Guidelines, and they are comparable to or higher than the figures in other cases in which courts have found the presumption established. The *PNB* presumption can be rebutted by sufficient evidence, so this conclusion does not resolve whether the transaction ultimately violates Section 7 of the Clayton Act.

The presumption and its legal significance

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 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. Phila. Nat'l Bank*, 374 U.S. 321, 363 (1963). Specifically, the Court held that a combined firm with at least a 30% share had an "undue percentage share," and that an increase in the combined share of the two largest firms (the two-firm concentration ratio) from 44% to 59%, which the Court described as "this increase of more than 33% in concentration," was a significant increase in concentration. *Id.* at 364-65. The Court did not hold that 30% was the smallest share that could threaten undue concentration; nor did it make 30% a conclusive test of illegality. The presumption rests on the combined share together with a significant increase in concentration. *Id.*

The presumption allows a plaintiff to establish a prima facie case of anticompetitive effect under Section 7 of the Clayton Act from market structure without separately proving a particular

mechanism by which the merger would harm competition. See *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982 (D.C. Cir. 1990). It is rebuttable. Once the plaintiff establishes the presumption, the burden of producing rebuttal evidence shifts to the merging parties. *Id.* at 982.¹ If they successfully rebut the presumption, the plaintiff must produce additional evidence of anticompetitive effect, and the ultimate burden of persuasion remains with the plaintiff throughout. *Id.* at 983.

Courts do not apply the presumption mechanically. Some recent decisions have declined to rest on it, and require additional evidence of competitive effects to find that the plaintiffs have established their prima facie case of anticompetitive harm. See *FTC v. Edwards Lifesciences Corp.*, No. 25-2569 (RC), 2026 WL 228723, at *23 (D.D.C. Jan. 28, 2026) (declining to decide whether concentration statistics for products still in development entitled the FTC to the presumption); *United States v. JetBlue Airways Corp.*, 712 F. Supp. 3d 109, 151 (D. Mass. 2024) (holding that the presumption “does not, on its own, sustain a prima facie case” in airline route markets), *appeal dismissed*, No. 24-1092, 2024 WL 3491184 (1st Cir. Mar. 5, 2024). Most courts, however, continue to treat sufficiently high concentration figures as establishing the prima facie case on their own, as discussed below. Here, moreover, the parties sell established products, and revenue shares are an appropriate measure of competitive significance.

Measuring concentration: the HHI and the Merger Guidelines

Philadelphia National Bank measured concentration with the two-firm concentration ratio. Courts today more often use the HHI, which is the sum of the squares of the percentage market shares of all firms in the market. The “delta” is the increase in the HHI resulting from a merger; for a combination of two firms with shares a and b , it equals $2ab$. See U.S. Dep’t of Justice & Fed. Trade Comm’n, Horizontal Merger Guidelines § 5.3 & nn.9-10 (Aug. 19, 2010) [2010 Horizontal Merger Guidelines]. The HHI reflects each firm’s market share and gives proportionately greater weight to larger firms. *Id.* § 5.3. “Sufficiently large HHI figures establish the FTC’s prima facie case that a merger is anti-competitive.” *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001).

In deciding what HHI levels are sufficiently large, courts look to the thresholds in the Merger Guidelines issued jointly by the Department of Justice and the FTC. The Guidelines do not bind courts, which alone determine the legal predicates for the *Philadelphia National Bank* presumption, but courts often treat them as persuasive authority. See *FTC v. Kroger Co.*, No. 3:24-cv-00347-AN, 2024 WL 5053016, at *16 (D. Or. Dec. 10, 2024). Two versions of the Guidelines are relevant here: the 2023 Merger Guidelines, which the agencies currently apply, and the 2010 Horizontal Merger Guidelines, whose higher thresholds underlie most case law from the last fifteen years.

¹ Although *Philadelphia National Bank* spoke of “evidence clearly showing” that the merger is not likely to have anticompetitive effects, 374 U.S. at 363, the merging parties need not make a “clear” showing. *Baker Hughes* read the Supreme Court’s later decisions, beginning with *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), as having abandoned that requirement. 908 F.2d at 990-91. Instead, the rebuttal burden incorporates a sliding scale that varies with the strength of the plaintiff’s case: “The more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully.” *Id.* at 991.

The 2023 Merger Guidelines. The 2023 Merger Guidelines superseded the 2010 Guidelines and state two alternative triggers for a structural presumption: (1) a postmerger HHI greater than 1,800 and an increase in the HHI greater than 100; or (2) a combined market share greater than 30% and an increase in the HHI greater than 100. A merger satisfying either test is presumed to substantially lessen competition or tend to create a monopoly. U.S. Dep’t of Justice & Fed. Trade Comm’n, Merger Guidelines § 2.1 (Dec. 18, 2023) [2023 Merger Guidelines]. The HHI thresholds are not new: the 1982 Guidelines and every later version until 2010 used them, and the 2023 Guidelines restored them after the 2010 Guidelines had raised them. *Id.* § 2.1 n.15. The second test tracks the 30% share that the Supreme Court found sufficient in *Philadelphia National Bank*. See 374 U.S. at 364. In February 2025, the FTC’s Chairman confirmed that the 2023 Guidelines remain in effect. Memorandum from Andrew N. Ferguson, Chairman, Fed. Trade Comm’n, to FTC Staff, Merger Guidelines (Feb. 18, 2025).

Courts have applied the 2023 thresholds as persuasive authority, including over objections that they are too low. See *Kroger*, 2024 WL 5053016, at *15-16 (“[T]he Court sees no reason to reject the 2023 Merger Guidelines in favor of a previous edition.”); *FTC v. Tapestry, Inc.*, 755 F. Supp. 3d 386, 458-59 & n.35 (S.D.N.Y. 2024) (finding the 2023 thresholds persuasive and describing the 2010 Guidelines as “an outlier by adopting higher thresholds”); see also *FTC v. Henkel AG & Co. KGaA*, No. 25 Civ. 10371 (KPF), 2026 WL 2676755, at *19 n.14, *26-27 (S.D.N.Y. Sept. 11, 2026) (following *Tapestry* in treating the 2023 Guidelines as persuasive and applying their thresholds).

The 2010 Horizontal Merger Guidelines. The 2010 Guidelines provided that mergers resulting in a postmerger HHI above 2,500 and a delta of more than 200 “will be presumed to be likely to enhance market power.” 2010 Horizontal Merger Guidelines § 5.3. While the 2010 Guidelines were in effect, courts frequently cited their thresholds as supporting authority when finding that the predicates for the *Philadelphia National Bank* presumption were satisfied. See, e.g., *FTC v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 172-73 (3d Cir. 2022); *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); *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 postmerger HHI is greater than 2,500.”). Because the transaction here exceeds both the 2023 thresholds and the higher 2010 thresholds, its treatment does not depend on whether a court accepts the lower 2023 thresholds.

Application to the proposed acquisition

Each firm’s share is its sales divided by total market sales. In low-calorie single-serve frozen dinners, the transaction combines ConAgra, the No. 2 firm with a 22.1% share, with IO, the No. 3 firm with a 19.2% share, giving the combined firm a 41.3% share. The transaction would increase the HHI by approximately 849 points, from approximately 3,859 to approximately 4,708:

Low-Calorie Single-Serve Frozen Dinners

Firm (brand)	Sales (\$ millions)	Share	HHI contribution
Nestlé (Lean Cuisine)	142.45	54.8%	3,000
ConAgra (Healthy Choice)	57.41	22.1%	487
Intelligent Ones	50.00	19.2%	370
Others/Private label (6)	10.22	3.9%	3
Total	260.08	100.0%	3,859
Combined share		41.3%	
Premerger HHI			3,859
Delta			849
Postmerger HHI			4,708

Two-firm concentration ratio:

Premerger	76.8%
Postmerger	96.1%
Change	19.2 pp

Note: Shares and HHIs are calculated from unrounded revenues and rounded independently for presentation. “pp” means percentage points.

We do not have individual sales for the six smaller firms. The table assumes equal sales, giving them an aggregate HHI contribution of approximately 2.6 points, rather than treating their combined 3.9% share as the share of one firm. Equal division produces the lowest HHI consistent with their aggregate sales. Any unequal division would increase both the premerger and postmerger HHIs slightly (by at most about 13 points), without changing the combined share or the delta. The conclusion that the presumption applies therefore does not depend on this simplifying assumption. *See* 2010 Horizontal Merger Guidelines § 5.3 n.9 (lack of information about firms with small shares “is not critical because such firms do not affect the HHI significantly”).

The resulting combined market share, market concentration, postmerger HHI, and delta are more than sufficient to predicate the *Philadelphia National Bank* presumption. The combined firm’s 41.3% share significantly exceeds the 30% share found sufficient in *Philadelphia National Bank*. The transaction significantly increases concentration by eliminating one of the three major firms in the market and raising the two-firm concentration ratio from 76.8% to 96.1%. That is an increase of 19.2 percentage points, compared with the 15-percentage-point increase from 44% to 59% in *Philadelphia National Bank*, and it leaves almost the entire market in the hands of two firms. The six remaining firms collectively account for only 3.9% of sales.

The Court in *Philadelphia National Bank* also described the increase in relative terms, as “this increase of more than 33% in concentration.” 374 U.S. at 365. Measured that way, the increase here is 25% (from 76.8% to 96.1%), which is less than in *Philadelphia National Bank*. That

comparison, however, understates the change in a market that is already highly concentrated. Because the two-firm ratio cannot exceed 100%, a ratio that starts at 76.8% can rise by at most about 30%, even if the two largest firms were to absorb every other firm in the market. The Court treated an increase of more than 33% as sufficient, not as a minimum, and the postmerger ratio here (96.1%) far exceeds the 59% in that case. The HHI, which accounts for every firm in the market, confirms that the increase in concentration is significant.

The transaction independently satisfies both structural tests in the 2023 Merger Guidelines. The postmerger HHI of 4,708 exceeds 1,800, and the delta of 849 exceeds 100. Separately, the combined share of 41.3% exceeds 30%, and the same delta exceeds 100. Accordingly, each 2023 test supports the presumption. 2023 Merger Guidelines § 2.1.

The transaction also satisfies the higher thresholds of the 2010 Horizontal Merger Guidelines, on which courts have long relied. The postmerger market would be “highly concentrated,” with a postmerger HHI of 4,708 (above the 2,500-point threshold), and the transaction increases the HHI by 849 points (well above the 200-point threshold), making the merger presumptively anticompetitive under the 2010 Guidelines as well. 2010 Horizontal Merger Guidelines § 5.3.

The closest precedent is *Heinz*, which involved a combination of the second- and third-largest firms in the jarred baby food market, with a combined share of about 33%, behind a dominant leader with about 65%. The merger would have increased the HHI by 510 points to 5,285, and the D.C. Circuit held that the FTC had established its prima facie case, observing that “no court has ever approved a merger to duopoly under similar circumstances.” 246 F.3d at 711, 716-17. The proposed transaction has the same structure (the second- and third-largest firms combining behind a dominant leader, leaving two significant competitors) with a larger combined share (41.3%) and a larger delta (849).

The statistics here are also comparable to, and on several measures higher than, those in more recent cases in which courts found the presumption established. *See, e.g., Hackensack*, 30 F.4th at 172-73 (postmerger HHI of 2,835 and delta of 841; merger “presumptively anticompetitive”); *FTC v. IQVIA Holdings Inc.*, 710 F. Supp. 3d 329, 377-82 (S.D.N.Y. 2024) (combined share above 30% even on defendants’ expert’s estimate; delta of 893 and postmerger HHI of 3,320 even on revised estimates that included additional firms); *United States v. Bertelsmann SE & Co. KGaA*, 646 F. Supp. 3d 1, 37 (D.D.C. 2022) (combined share of 49%, delta of 891, and postmerger HHI of 3,111; combined share “justifies a strong presumption”); *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 208-09 (D.D.C.) (combined share of 47%, delta of 537, and postmerger HHI of 3,000 in the national-accounts market), *aff’d*, 855 F.3d 345 (D.C. Cir. 2017); *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 72 (D.D.C. 2011) (combined share of 28.4%, delta of approximately 400, and postmerger HHI of 4,691). The postmerger HHI here exceeds that in each of these cases, and the delta is comparable to or larger than in each.

Accordingly, on the stipulated market and the sales data provided, the FTC could establish the *Philadelphia National Bank* presumption and thereby make its prima facie showing of anticompetitive effect. Because the combined share and concentration figures exceed the relevant thresholds by wide margins, the presumption would be strong, and IO and ConAgra would bear a correspondingly heavy burden of producing rebuttal evidence. *See Baker Hughes*, 908 F.2d at 991. Whether they could rebut that showing, and whether the FTC could carry its ultimate

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burden of persuasion on the entire record, are separate questions outside the scope of this memorandum.

Please let me know if you have any questions or would like to discuss this matter further.