

MERGER ANTITRUST LAW

LAW 1469
Georgetown University Law Center
Fall 2026

Tuesdays and Thursdays, 3:30 pm – 5:30 pm
Dale Collins
wdc30@georgetown.edu
www.appliedantitrust.com

CLASS 15 WRITTEN ASSIGNMENT—INSTRUCTOR’S ANSWER

Instructions

Submit by email by 3:30 pm on Thursday, October 15¹
Send to wdc30@georgetown.edu
Subject line: Merger Antitrust Law: Assignment for Class 15
Assignment: Calls for a memorandum of law.

INSTRUCTIONS

This is an untimed, ungraded homework assignment. Submit it by email to me before the deadline, as you would do for any other homework assignment.

You may consult any written source, including, without limitation, the class notes, cases, outlines (commercial or otherwise), books, treatises, the Internet, Westlaw, and Lexis-Nexis.² If this were an exam question, you would have to do your own work and not talk about the problem with any student or other person until after the return date. But since this is only a practice exam question, feel free to discuss the problem with others in the class. The idea here is to learn how to write an answer to this type of hypothetical, so do whatever works best for you.

Present your analysis in a well-organized, linear, and concise manner. Think about your answer before writing. Remember Pascal’s apology: “I am sorry that this was such a long letter, but I did not have the time to write you a short one.” Clarity of thinking and exposition are much more important than throwing in the kitchen sink. Do not, for example, tell me things you know are not relevant to the answer; it will just cost you time and obscure the analysis. In a graded assignment, excessive length, verbosity, or lack of organization can adversely affect your grade.

The “facts” in the hypothetical should be complete in that they present what is known at the time the analysis is requested. As in life, some information you would like to have may simply not be available. Analyze the facts as they are presented in the question. Do *not* make up additional facts.

It should go without saying that, outside of this assignment, you should not believe anything in the statement of any hypothetical fact situation. I have taken considerable liberties in fashioning the problems and have ignored reality whenever it was convenient.

¹ I will distribute the instructor’s answer/feedback memorandum after 5:00 pm on Wednesday. I appreciate that this is before the return date for the assignment, but I would like you to have an opportunity to look at the instructor’s answer before class.

² For the graded homework assignment and the final exam, you may not use any AI or LLM tools, including AI features embedded in software. I have not placed this restriction on this assignment, but use such tools with caution. In my testing, these systems frequently hallucinate and misanalyze legal issues.

This homework assignment is final. Do not expect any clarifications or corrections. If you believe there is an error or inconsistency in the problem, please state your assumptions about the issue in your discussion of that issue. You may email me if you wish, but I will either not respond or respond to the class as a whole. *For this reason, and more importantly, because we will continue working on cases that may further illuminate concepts relevant to the homework assignment, I suggest you wait until shortly before the due time to submit your answer.*

You should assume that all demand, inverse demand, and residual demand curves are linear, that marginal costs are constant, and that all firms maximize their profits given their residual demand curves and marginal costs. Treat each demand finding in the hypothetical as a separate empirical result; you need not reconcile them with one another.

Ice Cream Merger

You are an attorney at the FTC, and your group is reviewing Clare's pending acquisition of Benny's, two manufacturers of ice cream. The acquisition is for all cash, and Clare's is paying a 40% premium for Benny's stock. Melissa Brown, your section chief, has asked you to prepare a memorandum recommending whether the FTC should sue in federal district court to permanently enjoin the transaction. Consistent with the Commission's current approach to litigated merger challenges, the FTC would try the merits of its Section 7 claim in the district court rather than in an administrative proceeding. In particular, Ms. Brown is seeking your analysis of how strong the FTC's prima facie case of a Section 7 violation is likely to be and whether the FTC can defeat the defenses the merging parties advanced during the investigation. Clare's and Benny's have not said whether they would agree to defer closing until the court decides the merits, but they have told the staff that they will terminate their transaction if the court enters a preliminary or permanent injunction. Ms. Brown therefore also would like you to address whether the FTC could obtain a permanent injunction and, if the parties will not agree to defer closing until the court decides the merits, a preliminary injunction under Section 13(b) of the FTC Act.

Ms. Brown instructed you to assume that the acquisition of stock or assets and interstate commerce requirements are satisfied and outside the scope of your analysis. Your Section 7 analysis should address only the relevant product market, the relevant geographic market, and the transaction's reasonably probable competitive effects.

The FTC's investigation has revealed the following facts.

The industry recognizes two types of ice cream: premium ice cream and regular ice cream. Premium ice cream has more butterfat content, less overrun (that is, less air, which makes it more creamy), and more calories than regular ice cream. Premium and regular ice cream are made on the same machines. Switching is gallon-for-gallon, can be accomplished within hours, and involves negligible switching costs. The marginal costs of producing premium and regular ice cream, however, differ because of the difference in the cost of ingredients. The marginal cost of producing premium ice cream is \$2.80 per gallon, while the cost of producing regular ice cream is \$2.40 per gallon. Marginal costs, which are constant, have not changed in recent years and are not expected to change in the future.

Notwithstanding this ease of switching on the production equipment, Clare's, which entered into the manufacture of premium ice cream three years ago, is the only regular ice cream manufacturer that has begun new production of premium ice cream over the last ten years. A second firm, Dino's, entered into the manufacture of premium ice cream four years ago, but Dino's did not produce regular ice cream and entered the market de novo.

The staff found that expenditures needed to establish a premium brand's reputation are sunk. No other firm has concrete plans to enter premium ice cream, and a new premium brand would require at least three years to obtain material consumer acceptance. Dino's has available production capacity, but it has not provided a specific expansion schedule or projected the sales it would gain beyond the growth it would achieve without the merger.

Ice cream products are differentiated by content and brand. Within each segment, brands are differentiated from one another. While prices can and have varied among brands within both premium and regular ice cream, actual prices charged by manufacturers during the investigation have converged—with no sign of collusion—throughout the country to \$4.00 per gallon for premium ice cream and \$3.00 per gallon for regular ice cream.³

Each named manufacturer sells its brand-name products throughout the United States at the stated nationwide price. The ten store brands have equal sales, with each accounting for one-tenth of the aggregate store-brand gallons and revenues shown in the table. The following chart gives sales for ice cream manufacturers:

Ice Cream											
Manufacturer	Premium Ice Cream				Regular Ice Cream				All Ice Cream		
	Gallons	Revenues	Profits	Revenue Share	Gallons	Revenues	Profits	Revenue Share	Total Revenues	Revenue Share	Total Profits
Clare's	43.8	\$175	\$53	5.0%	1,608.3	\$4,825	\$965	31.7%	\$5,000	26.7%	\$1,018
Breyers	8.8	\$35	\$11	1.0%	1,588.3	\$4,765	\$953	31.3%	\$4,800	25.6%	\$964
Al's	393.8	\$1,575	\$473	45.0%	808.3	\$2,425	\$485	15.9%	\$4,000	21.4%	\$958
Benny's	350.0	\$1,400	\$420	40.0%	0.0	\$0	\$0	0.0%	\$1,400	7.5%	\$420
Turkey Hill	0.0	\$0	\$0	0.0%	300.0	\$900	\$180	5.9%	\$900	4.8%	\$180
Blue Bell	8.8	\$35	\$11	1.0%	205.0	\$615	\$123	4.0%	\$650	3.5%	\$134
Izzy's	8.8	\$35	\$11	1.0%	138.3	\$415	\$83	2.7%	\$450	2.4%	\$94
Wells	8.8	\$35	\$11	1.0%	88.3	\$265	\$53	1.7%	\$300	1.6%	\$64
Dino's	43.8	\$175	\$53	5.0%	0.0	\$0	\$0	0.0%	\$175	0.9%	\$53
Eddy's	8.8	\$35	\$11	1.0%	0.0	\$0	\$0	0.0%	\$35	0.2%	\$11
Store brands (10)	0.0	\$0	\$0	0.0%	338.3	\$1,015	\$203	6.7%	\$1,015	5.4%	\$203
	875.0	\$3,500	\$1,050	100.0%	5,075.0	\$15,225	\$3,045	100.0%	\$18,725	100.0%	\$4,095

³ I appreciate that this is a very counterfactual assumption. I could make the problem more realistic by introducing different prices for different products, but then you would have to deal with some arithmetical complications in applying the hypothetical monopolist test that I am sure you would rather avoid.

Note: Gallons, revenues, contribution margins, and cost savings are in millions. The amounts labeled 'Profits' are contribution margins equal to revenues minus the stated marginal costs; they do not deduct fixed costs.

There are high cross-elasticities of demand between brands within each ice cream segment and low cross-elasticities between individual products across these two segments. So, for example, if one premium ice cream manufacturer were to increase its price by 5% while the other premium ice cream manufacturers held their prices constant, the higher-priced manufacturer would experience a total unit sales loss of one-sixth (about 16.7%). All of those lost sales would shift to other premium brands, with none shifting to regular ice cream or non-ice-cream products. The same pattern holds for regular ice cream brands: if one regular brand were to increase its price by 5% while the others held their prices constant, it would lose 25% of its unit sales, all to other regular brands. The investigation did not find empirical estimates of diversion between particular pairs of premium brands, including between Clare's and Benny's.

For a 5% uniform increase in the price across all brands of premium ice cream, however, each premium brand would lose 8% of its unit sales to regular ice cream and none to other brands of premium ice cream or non-ice cream products. For a 5% uniform increase in the price of all brands of regular ice cream, each regular brand would lose 7.5% of its unit sales to premium ice cream and none to other brands of regular ice cream or non-ice cream products. When the price of all brands of ice cream (premium and regular) is increased by 5%, there would be no switching between premium and regular brands of ice cream, but each brand of premium ice cream would lose 3% of its unit sales to non-ice cream alternatives, while each brand of regular ice cream would lose 5% of its unit sales to non-ice cream alternatives.

Clare's (the buyer) is the largest manufacturer of regular ice cream and, tied with Dino's, the third largest manufacturer of premium ice cream. Benny's (the target) is the second-largest manufacturer of premium ice cream but manufactures no regular ice cream. In its meetings with the staff, Clare's discussed its deal rationale and made five arguments in defense of the transaction:

Clare's deal rationale:

1. Clare's is buying Benny's to become a more significant player in premium ice cream. Clare's began manufacturing and selling premium ice cream only three years ago. While Clare's has invested almost all of its premium ice cream profits in advertising its premium brands, it has only achieved a market share of 5%. This rate of growth is too slow for Clare's management. Clare's believes its inability to gain market share more quickly is primarily due to its reputation as a regular ice cream manufacturer, where Clare's is known as a large but undistinguished producer with little of the "flair" associated with premium ice cream brands. Following the merger, Clare's plans to drop Clare's premium brand name and consolidate all its premium operations into Benny's brand, one of the best brands in the premium ice cream business.
2. Clare's plans to invest its savings from the acquisition in the premium ice cream business, aggressively take on Al's, the premium ice cream market leader, and grow the merged firm's volume and market share.
3. Since entering the premium ice cream space, Clare's has introduced many new premium ice cream flavors, some of which have become quite popular. Before Clare's entry, the other premium ice cream manufacturers only rarely introduced a

new flavor. After Clare's entry, Al's and Benny's introduced new flavors to match Clare's flavors that became popular. The investigation identified several such responses but did not identify overlapping future flavor-development projects among Clare's, Benny's, and Al's. Clare's says that it will bring its spirit of innovation to the management of Benny's. The investigation, however, did not produce a reliable quantitative estimate of the merger's likely effect on the number, timing, quality, or commercial success of new flavors.

4. The merged firm can save \$60 million in annually recurring overhead costs by consolidating management, back office, and sales operations and eliminating almost all of Benny's corresponding operations. The staff does not dispute the amount or that these savings could not be achieved through a practical alternative with less anticompetitive effects than the proposed acquisition. This consolidation will not change the per-gallon marginal cost of either premium or regular ice cream.
5. The merged firm can save another \$30 million in operating costs by consolidating production. Clare's smallest plant makes 200 million gallons of regular ice cream and currently makes no premium ice cream. The merged firm can close this plant and move the production into Benny's single plant, which is new and currently has 350 million gallons of excess capacity. The staff does not dispute the amount or that these savings could not be achieved through a practical alternative with less anticompetitive effects than the proposed acquisition. This consolidation will not change the per-gallon marginal cost of either premium or regular ice cream. Clare's does not have sufficient excess capacity in its remaining plants to obtain these production savings without the acquisition.

Clare's antitrust arguments:

1. The relevant market in which to analyze the transaction is the manufacture and sale of all ice cream in the United States.⁴ The characteristics, interchangeability of use, and supply-side substitutability are sufficient under judicial precedent to make all ice cream the relevant market. This market also satisfies the hypothetical monopolist test under the Merger Guidelines. Within this relevant market, the merger is too small to create a competitive problem.
2. Even if the market is technically defined as premium ice cream, the HHIs based on actual sales are not all that high. The shares are even lower when, under the Merger Guidelines, regular ice cream manufacturers are considered participants in the market even if they do not currently make premium ice cream. When the participation of these manufacturers is properly attributed with market shares of premium ice cream due to the ease of supply-side switching, the transaction does not trigger the *PNB* presumption under either judicial precedent or the Merger Guidelines.
3. Dino's, which entered four years ago and today has the same share as Clare's in premium ice cream, has also been trying to grow in premium ice cream (primarily by investing in advertising). The staff has confirmed this. Moreover, in an interview with the staff, Dino's said it would continue to aggressively invest in its brand name reputation whether or not Clare's and Benny's merge. Clare's submits that Dino's

⁴ The staff agrees that the relevant geographic market is the United States.

continuing efforts to grow will ensure that the market remains competitive postmerger.

4. In addition to its innovation in new flavors, Clare's has successfully built its premium ice cream market share by holding the line on price increases when other manufacturers were attempting to institute price increases. Clare's says that it will bring the same philosophy of holding the line on price increases and innovating to the management of the merged firm. The staff confirmed that Al's has sought to lead a price increase for premium ice cream on many occasions, including before Clare's entry. All of the other premium ice cream manufacturers followed Al's lead. When Clare's entered, however, Clare's resisted following some of Al's price increases. Al's continued to raise prices periodically, but at a much lower magnitude than before Clare's entered into the premium ice cream business, and all of the other premium ice cream manufacturers except Clare's followed all of Al's price increases. Clare's resistance has kept the price of premium ice cream lower than it would have been had Clare's followed all of Al's increases. It is also undisputed that Clare's is a leader in creating new flavors of premium ice cream and that Al's and Benny's both responded to Clare's successful innovations with matching innovations of their own. Nationwide manufacturer price changes are publicly announced and readily observable to rivals.
5. The merger will produce substantial efficiencies that will offset any possible anticompetitive effect of the transaction.

INSTRUCTOR'S ANSWER

To: Melissa Brown

From: Dale Collins

Clare's/Benny's Ice Cream Merger

You asked me to assess whether the FTC should sue in federal district court to permanently enjoin Clare's pending acquisition of Benny's, two ice cream manufacturers, with the merits tried in that court rather than in an administrative proceeding. In particular, you have asked me to assess how strong the FTC's prima facie case of a Section 7 violation is likely to be and whether the FTC can defeat defenses the merging parties have advanced in the investigation. You have also asked me to address whether the FTC could obtain a permanent injunction and, if Clare's and Benny's will not agree to defer closing until the court decides the merits, a preliminary injunction under Section 13(b) of the FTC Act pending trial.

For the reasons explained below, the Commission should prevail on the merits and obtain a permanent injunction blocking the acquisition. If necessary, it also should be able to obtain a preliminary injunction under Section 13(b) of the FTC Act pending trial.

On the merits, the Commission has a strong case. On the facts found in the investigation, the Commission has a strong likelihood of proving that Clare's proposed acquisition of Benny's would violate Section 7 in two relevant markets: (1) the nationwide manufacture and sale of premium ice cream, and (2) the nationwide manufacture and sale of all ice cream. The *Philadelphia National Bank (PNB)* presumption is easily satisfied in premium ice cream. Although the structural case is more borderline for all ice cream, the likely coordinated price effects and unilateral innovation and product variety effects in the premium segment also support the all-ice cream claim. These theories explain how the merger is likely to harm consumers through higher premium ice cream prices, slower innovation, and reduced product variety. The merging parties' defenses—an all-ice cream market, supply-side entry, Dino's expansion, Clare's promise to keep pricing and innovating aggressively, and cost efficiencies—either fail to address these harms or are not timely, verifiable, or substantial enough to rebut them.

Because the acquisition has not closed, a permanent injunction barring its consummation is the appropriate remedy if the Commission proves a Section 7 violation. The Commission therefore should obtain that relief.

If a preliminary injunction becomes necessary, the balance of equities strongly favors granting it. The public interest in effective antitrust enforcement and effective relief weighs heavily in favor of the preliminary injunction once the FTC shows a likelihood of success on the merits. The equities weighing against entry of the preliminary injunction are, at most, merely the delay in private monetary benefits to the merging parties and their shareholders—benefits that will never materialize if the merger is found unlawful on the merits. Clare's and Benny's say that they will abandon the transaction if an injunction issues, but that is their choice, and one they can revisit.

The injunction itself only delays the closing until the court decides the merits. Accordingly, if, as the following analysis demonstrates, the Commission has a strong likelihood of success on the merits, the court should enter a blocking preliminary injunction as being in the public interest.

The analysis that follows proceeds in six parts. Part 1 summarizes the applicable legal standards. Part 2 addresses the elements of the Commission's prima facie Section 7 case: the relevant product market, the relevant geographic market, market shares and concentration under the *PNB* presumption, and additional evidence supporting the prima facie case. Part 3 addresses the merging parties' arguments, whether they challenge an element of the prima facie case or assert a defense. Part 4 states my conclusion on the Section 7 merits. Part 5 addresses permanent injunctive relief and, if necessary, preliminary injunctive relief pending trial, including the Commission's likelihood of success and the balance of the equities. Part 6 concludes.

1. Legal standards

This Part summarizes the legal standards that govern the Commission's challenge. The first subsection addresses the substantive standard of Section 7 of the Clayton Act and the *Baker Hughes* burden-shifting framework that courts use to apply it. The second addresses Section 13(b) of the FTC Act, which authorizes both the permanent injunction the Commission will seek at trial and, if Clare's and Benny's will not defer closing, a preliminary injunction pending trial. To obtain a permanent injunction, the Commission must prove a Section 7 violation by a preponderance of the evidence; to obtain a preliminary injunction, it must show a likelihood of ultimate success and a favorable balance of the equities.

a. Section 7 of the Clayton Act

Section 7 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. Congress used the words "may be substantially to lessen competition" to indicate that "its concern was with probabilities, not certainties." *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962).⁵ The plaintiff therefore need not prove that competitive harm is certain, but it must show a reasonable probability that the merger will substantially lessen competition in a relevant market.

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

1. *Step 1.* The plaintiff must make a prima facie showing of a relevant market and a reasonably likely anticompetitive effect in that market, usually through market share and concentration evidence sufficient to trigger the *Philadelphia National Bank* presumption,

⁵ **Note to students (exam tip):** You do not have to cite cases in the graded homework assignment or the exam. However, you may find it helpful to prepare some boilerplate with case quotes and citations to address a legal principle or the use of an economic tool.

often reinforced by evidence of specific mechanisms of harm, such as unilateral or coordinated effects.⁶

2. *Step 2.* The burden of production then shifts to the defendant to show that the prima facie case inaccurately predicts the merger's probable competitive effect.
3. *Step 3.* If the defendant does so, the plaintiff retains the ultimate burden of persuasion to prove, on the record as a whole, that the merger is reasonably likely to substantially lessen competition in a relevant market.

Id. at 982-83. Courts apply this framework on a sliding scale: the stronger and more comprehensive the plaintiff's prima facie showing, including evidence beyond concentration measures, the more substantial the defendant's rebuttal evidence must be. *Id.* at 991.

b. Section 13(b) of the FTC Act

The Commission may sue in federal district court to block a merger that violates Section 7. Section 13(b) provides that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b). The Commission recently used this authority to try the merits of a merger challenge in district court rather than in an administrative proceeding. The court agreed that the provision applied and entered a permanent injunction. *See FTC v. Henkel AG & Co. KGaA*, No. 25 Civ. 10371 (KPF), 2026 WL 2676755, at *2 n.2, *36 (S.D.N.Y. Sept. 11, 2026). In such a case, the Commission, like the Department of Justice, must prove a Section 7 violation by a preponderance of the evidence under the *Baker Hughes* framework. If the Commission proves a violation, the court should enjoin the transaction. "The key to the whole question of an antitrust remedy is of course the discovery of measures effective to restore competition," *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961), and for a merger that has not yet closed, courts routinely enter blocking injunctions to prevent the merger's consummation in the absence of a negotiated consent decree. *See, e.g., United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 372 (1963) (directing entry of judgment enjoining the proposed merger); *United States v. Anthem, Inc.*, 855 F.3d 345, 349 (D.C. Cir. 2017) (affirming a permanent injunction blocking the proposed merger); *FTC v. Henkel AG & Co. KGaA*, No. 25 Civ. 10371 (KPF), 2026 WL 2676755, at *36 (S.D.N.Y. Sept. 11, 2026) (permanently enjoining the proposed acquisition); *United States v. JetBlue Airways Corp.*, 712 F. Supp. 3d 109, 164 (D. Mass. 2024) (same); *United States v. Energy Sols., Inc.*, 265 F. Supp. 3d 415, 446 (D. Del. 2017) (same); *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 92 (D.D.C. 2011) (same). In addition, because Clare's and Benny's intend to close, the threatened violation is imminent.

⁶ **Note to students (doctrine):** I have phrased Step 1 to allow the plaintiff to make out its prima facie case with evidence other than the *PNB* presumption. I know of no horizontal case in which the plaintiff did not rely on the presumption, but nonhorizontal cases have no presumption, so the plaintiff must make out its prima facie case with affirmative evidence. *See United States v. AT&T Inc.*, 310 F. Supp. 3d 161, 191 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019) (which we will examine later in the course).

If Clare’s and Benny’s will not agree to defer closing until the court decides the merits, the Commission may also seek a preliminary injunction pending trial. Section 13(b) authorizes a preliminary injunction “[u]pon 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). Section 13(b) codified case law that “removes irreparable damage as an essential element of the preliminary injunction proponent’s case.” *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1082 (D.C. Cir. 1981). Under the prevailing formulation, the Commission shows a likelihood of success if it “has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance.” *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714-15 (D.C. Cir. 2001) (quoting *FTC v. Beatrice Foods Co.*, 587 F.2d 1225, 1229 (D.C. Cir. 1978)); see *FTC v. Edwards Lifesciences Corp.*, No. 25-2569 (RC), slip op. at 26 (D.D.C. Jan. 9, 2026).

Since *Starbucks Corp. v. McKinney*, 602 U.S. 339 (2024), merger defendants have argued that this lenient formulation no longer governs, and the district courts are divided. Compare *FTC v. Kroger Co.*, No. 3:24-cv-00347-AN, 2024 WL 5053016, at *1-2 (D. Or. Dec. 10, 2024), and *FTC v. GTCR, LLC*, No. 25 C 2391, Tr. of Ruling at 12-14 (N.D. Ill. Nov. 10, 2025) (rejecting the argument), with *FTC v. Tempur Sealy Int’l, Inc.*, No. 4:24-cv-02508, slip op. at 27-29 (S.D. Tex. Jan. 31, 2025; revised Feb. 26, 2025) (requiring a “clear showing” of likely success), and *FTC v. Tapestry, Inc.*, 755 F. Supp. 3d 386, 409 (S.D.N.Y. 2024) (assuming the stricter standard without deciding). The *Heinz* formulation also presupposes that the Commission will adjudicate the merits itself, so a court that will try the merits may be less willing to rely on it.⁷ The Commission’s case in premium ice cream should satisfy any of these standards.

2. The prima facie Section 7 case

Because the acquisition and interstate commerce requirements are assumed, the Commission’s prima facie case must establish three elements: (1) the relevant product market (“line of commerce”), (2) the relevant geographic market (“section of the country”), and (3) a reasonably probable anticompetitive effect in the relevant market. Subsections a and b address the relevant product and geographic markets. Subsections c and d address anticompetitive effect: subsection c applies the *PNB* presumption to market shares and concentration, and subsection d examines additional evidence of how the merger is likely to harm competition. Subsection e summarizes.

⁷ **Note to students (doctrine):** Section 13(b)’s preliminary injunction provision is written for cases that the Commission will adjudicate itself: it authorizes an injunction “pending the issuance of a complaint by the Commission” and requires the court to dissolve the injunction if no administrative complaint is timely filed. The Commission’s position is that Section 13(b) still authorizes preliminary relief in a permanent injunction case—in *Henkel*, it asked the court “pursuant to Section 13(b)” to enter the parties’ stipulated temporary restraining order—and courts in nonmerger permanent injunction cases have applied the same standard. See, e.g., *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 346 (9th Cir. 1989). The merging parties could argue, however, that the traditional four-factor test, including irreparable harm, applies. The Commission should prevail under either standard because the harm from allowing the transaction to close would be difficult to undo.

In brief, premium ice cream and all ice cream are both relevant product markets, and the United States is the relevant geographic market. The *PNB* presumption is easily satisfied in premium ice cream; the structural case in all ice cream is closer but likely sufficient. The additional evidence shows that the merger is likely to make coordinated pricing in premium ice cream more effective and to slow flavor innovation and reduce flavor variety, although it does not support a unilateral price effect.

a. The relevant product market

We should allege two relevant product markets: premium ice cream and all ice cream. There are two complementary approaches to product market definition: the *Brown Shoe* “outer boundaries”/“practical indicia” criteria and the hypothetical monopolist test (HMT). Both proposed markets satisfy both tests.⁸ I first summarize the legal framework for each approach and then apply it to premium ice cream and to all ice cream. I then explain why, although a Clare’s-Benny’s grouping might also qualify as a relevant market under the Merger Guidelines, we should not allege it.

Legal framework

First, 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*, 370 U.S. at 325. Today, courts regard “reasonable interchangeability of use” as synonymous with cross-elasticity of demand. Moreover, “within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.” *Id.* (internal citations and footnotes omitted). But this list is not exhaustive, and courts may consider any evidence probative of cross-elasticity of demand. The original purpose of the *Brown Shoe* “practical indicia” was to enable the finding of relevant “submarkets” within larger markets defined by the “outer boundaries” test. Modern courts, however, do not view submarkets as any different from markets and regard the *Brown Shoe* “practical indicia” as factors qualitatively probative of reasonable interchangeability of use and high cross-elasticity of demand. In practice, the *Brown Shoe* test is qualitative in nature.

Second, the original “hypothetical monopolist test,” which was introduced by the Merger Guidelines in 1982 and now adopted in one form or another by the courts, deems a product grouping (“candidate market”) as a relevant market if a hypothetical monopolist of all products

⁸ **Note to students (exam tip):** The premium ice cream market provides a sufficient basis for an injunction. Clare’s, however, argues that the only relevant market is all ice cream and that the merger is harmless in that market. You therefore should address the broader market somewhere in the memorandum. I address it in the *prima facie* case because the facts support an affirmative case in both markets. You could instead address it in the defenses section, but do not repeat the complete analysis in both places.

in the product group could profitably raise the prices in the product grouping by a “small but significant and non-transitory increase in price” (SSNIP), usually taken to be 5% for a period of one year. The hypothetical monopolist test is a quantitative test. The 2010 and 2023 Merger Guidelines have modified the hypothetical monopolist test in two significant ways:

1. The 2010 Merger Guidelines state that agencies may evaluate a merger in any relevant market that satisfies the hypothetical monopolist test, although when relying on shares and concentration, they usually use the smallest qualifying market. The 2023 Merger Guidelines omit that preference and expressly recognize that multiple overlapping markets may be relevant.⁹
2. Originally, the hypothetical monopolist test required the hypothetical monopolist to increase the prices uniformly of all products in the candidate market. Under the 2010 Merger Guidelines, the hypothetical monopolist is now permitted to raise the prices of one or more products selectively while leaving the prices of the other products constant, provided that at least one of the products subject to the price increase is a product of a merging firm.¹⁰ The hypothetical monopolist test requires only that the hypothetical monopolist can profitably raise the price of a single product in the product group for the grouping to be a relevant market.¹¹

The courts have adopted these modifications. In particular, modern courts have endorsed the Guidelines’ “at least one product” formulation of the test, which permits a one-product SSNIP when products are differentiated. *See, e.g., FTC v. Kroger Co.*, No. 3:24-CV-00347-AN, 2024 WL 5053016, at *13 (D. Or. Dec. 10, 2024); *FTC v. IQVIA Holdings Inc.*, 710 F. Supp. 3d 329, 369 (S.D.N.Y. 2024); *FTC v. Meta Platforms Inc.*, 654 F. Supp. 3d 892, 919 (N.D. Cal. 2023); *FTC v. RAG-Stiftung*, 436 F. Supp. 3d 278, 293 (D.D.C. 2020); *FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 47 (D.D.C. 2018); *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 198 (D.D.C. 2017); *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 20 (D.D.C. 2017); *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 121 (D.D.C. 2016); *FTC v. Sysco*

⁹ **Note to students (doctrine):** The smallest qualifying market is a starting point, not a command to allege a product grouping divorced from commercial reality. Before relying on a narrow candidate market, ask whether market participants recognize the grouping and whether the Brown Shoe evidence supports it. In *H&R Block*, for example, the Department of Justice alleged a market for all DDIY tax-preparation software rather than one of the smaller two-product groupings that also passed the HMT.

¹⁰ **Note to students (doctrine):** The 2023 Merger Guidelines appear to eliminate the requirement that at least one of the products subject to the hypothetical price increase be a product of a merging firm. This concerns market definition, not proof of anticompetitive effects. A candidate market’s satisfaction of the HMT through a hypothetical price increase on a nonmerging firm’s product does not, by itself, establish that the merger would substantially lessen competition. That conclusion requires a separate analysis of how the acquisition would change competitive constraints and incentives.

¹¹ **Note to students (doctrine):** I could have added a third change—the arguable shift from a profitability interpretation of the HMT to a profit-maximization interpretation. As we discussed in class, however, the agencies in practice continue to use a profitability test in their investigations and, in court, the majority of courts have continued to use the profitability test, and the instances in which the two tests diverge will be rare. Accordingly, there is no need to discuss the profit-maximization test, although there would be no harm in dropping a footnote to it.

Corp., 113 F. Supp. 3d 1, 33 (D.D.C. 2015); *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 51-52 (D.D.C. 2011).

Premium ice cream

Premium ice cream is a relevant product market under both approaches. It satisfies the *Brown Shoe* outer boundaries and practical indicia criteria and meets the critical loss implementation of the HMT.¹² I address each in turn.

Brown Shoe. Premium ice cream satisfies the *Brown Shoe* “outer boundaries” and “practical indicia” criteria. Although the investigation did not determine the numerical value of the cross-elasticities between products within premium ice cream, it did reveal that the cross-elasticities between premium ice cream products are high. The investigation showed that if one premium ice cream manufacturer were to increase its price while the other premium ice cream manufacturers held their prices constant, the higher-priced manufacturer would lose one-sixth (about 16.7%) of its volume to its premium brand rivals, indicating a high cross-elasticity between premium ice cream brands. Conversely, under these circumstances, the higher-priced manufacturer would lose no volume to regular ice cream, indicating low cross-elasticity at the individual-firm level between premium ice cream and regular ice cream. Moreover, premium ice cream satisfies several *Brown Shoe* practical indicia: industry recognition as a distinct product; differentiating characteristics, including greater butterfat content, less overrun, and more calories; higher manufacturing cost (\$2.80 v. \$2.40 per gallon); and, probably most importantly, a significantly higher wholesale price (\$4.00 v. \$3.00 per gallon) and a 50% higher percentage margin ($30\% = \$1.20/\4.00 v. $20\% = \$0.60/\3.00). The judicial precedent, then, strongly supports a premium ice cream market.

Hypothetical monopolist test: uniform price increase. Premium ice cream products also satisfy the hypothetical monopolist test under a uniform SSNIP test.¹³ We can implement the uniform SSNIP test using percentage critical loss. The percentage critical loss for a product grouping with a uniform SSNIP (δ) of 5% and a uniform margin of 30% is:¹⁴

¹² **Note to students (exam tip):** Appendix A presents alternative HMT calculations and explains why the aggregate-diversion-ratio test does not establish the result on these facts. I choose to use the critical loss test. You only need to use one test in your memorandum. *You will receive no extra credit for using more than one implementation.*

¹³ **Note to students (exam tip):** As a matter of exam strategy, since the hypothetical stated that the premium ice cream market is differentiated and provided the data to perform a one-product SSNIP test, you could have started there. One-product SSNIP tests can yield narrower markets—and higher HHIs—than uniform SSNIP tests. If you found that premium ice cream satisfied the one-product SSNIP test, there was no need for you to perform a uniform SSNIP test for the purpose of market definition. I applied a uniform critical loss test here because the result also matters for the coordinated effects analysis below: if a hypothetical monopolist of premium ice cream could profitably raise all premium prices by a SSNIP, premium producers that coordinate their pricing could profit from doing so as well. For market definition, however, once you find an HMT implementation that the candidate market passes, move on.

¹⁴ **Note to students (exam tip):** It is helpful if you show your work. Students in the past have been known to make arithmetical mistakes that resulted in a mistaken antitrust outcome. If you show your work (and you can copy and paste formulas) and you make a mistake, I will be able to tell whether the mistake was arithmetical or

$$\%CL = \frac{\delta}{\delta + m} = \frac{5\%}{5\% + 30\%} = 14.3\%$$

The investigation revealed that a 5% uniform price increase across all premium ice cream brands would cause each premium brand to lose 8% of its unit sales to regular ice cream and none to other premium ice cream brands or non-ice cream products. Since the actual loss percentage is less than the critical loss percentage, premium ice cream satisfies the hypothetical monopolist test.

All ice cream

Because the merging parties defend their transaction in part on the grounds that the relevant market is not premium ice cream but rather all ice cream, we should also examine all ice cream as a potential relevant product market.¹⁵ All ice cream is also a relevant product market: it satisfies the *Brown Shoe* outer boundaries test and a uniform price implementation of the HMT.

Brown Shoe. All ice cream satisfies the *Brown Shoe* “outer boundaries” test. According to the investigation, although cross-elasticity between individual premium ice cream products and regular ice cream products is relatively low, substitution between the two categories is meaningful. The investigation revealed that a uniform 5% price increase across all premium ice cream brands would cause each premium brand to lose 8% of its unit sales to regular ice cream and none to other premium brands or non-ice cream products. Regular ice cream, then, is a significant constraint as a category on price increases by premium ice cream as a category, although not a strong enough constraint to make a uniform SSNIP on premium ice cream unprofitable. Likewise, for a 5% uniform increase in the price of all brands of regular ice cream, each regular brand would lose 7.5% of its unit sales to premium ice cream and none to other brands of regular ice cream or non-ice cream products. This indicates that premium ice cream as a category is a constraint on price increases of regular ice cream as a category.¹⁶

Moreover, the aggregate demand for all ice cream is not very elastic: the investigation revealed that a uniform 5% SSNIP across all ice cream products would cause each brand of premium ice cream to lose only 3% of its unit sales, all to non-ice cream alternatives, and each brand of regular ice cream to lose only 5% of its unit sales, all to non-ice cream alternatives. This

conceptual. That said, pay attention to your intuitions. If your intuitions (and the *Brown Shoe* tests) are telling you one thing but the HMT is reaching a different result, double check your work!

¹⁵ **Note to students (exam tip):** You will need to address whether all ice cream is a relevant market in light of the defense that the merging parties are raising. You could do it when analyzing the defenses, but the better place would be to do it here in the market definition section, especially since there is an argument that the merger is anticompetitive even in an all-ice cream market. The fact that the argument is not as strong as you might like should not deter you when you are leading with a much stronger market definition argument.

¹⁶ **Note to students (exam tip):** You could convert the data provided in the problem into cross-elasticities or diversion ratios between the two categories of products, but since we do not have numerical tests for what is “high” cross-elasticity or diversion ratio, this would not be an effective use of your time. Rather, consider this a judgment call, so just state your judgment. There are a lot of judgment calls in antitrust practice. Ms. Brown may disagree with your judgment, but she will recognize the judgment call if it is reasonably supported by the facts. I will use the same standard in grading the answer.

indicates limited substitution and the absence of reasonable interchangeability between ice cream and non-ice cream alternatives. The demand evidence provides the strongest *Brown Shoe* support for an all-ice cream market: meaningful substitution exists between premium and regular ice cream at the category level, but little substitution exists from all ice cream to products outside the category when all ice-cream prices increase together.

The *Brown Shoe* practical indicia also support an all-ice cream market. The industry recognizes premium and regular ice cream as the two types of a common ice cream category. They have the same basic use, are manufactured on the same equipment, and production can be switched gallon-for-gallon within hours at negligible cost. Premium ice cream's distinct characteristics, ingredient costs, price, and margin support treating premium ice cream as an overlapping narrower market, but they do not preclude a broader market containing both types. Taken together, these practical indicia place premium and regular ice cream within a broader all-ice cream market, even though premium ice cream also constitutes a relevant market of its own.

Hypothetical monopolist test. All ice cream also independently satisfies the hypothetical monopolist test. The Merger Guidelines and the courts permit the hypothetical monopolist to selectively price. Consequently, if a subgroup of products within a candidate market satisfies the HMT, any larger group of products containing that subgroup also satisfies the HMT by applying the SSNIP only to the products in the subgroup to which the SSNIP originally applied and hold all other prices constant.¹⁷

Other product groupings

Premium ice cream need not be the only qualifying product grouping. Using relative revenue shares as a proxy for bilateral diversion, a Clare's-Benny's grouping could pass a one-product hypothetical monopolist test because the estimated diversion from Clare's to Benny's is 42.1%, well above the 16.7% critical recapture rate.¹⁸ But the same proxy estimates 47.4% diversion from Clare's to Al's, making Al's the closer substitute and further weakening the case for a Clare's-Benny's-only market. I would not allege a two-brand market, however. The investigation found no empirical estimates of diversion between particular brands; the relative share figures are only proxies; and the premium category is an economically meaningful grouping supported by industry recognition, product characteristics, pricing, and category-wide substitution evidence. The 2010 Merger Guidelines usually use the smallest qualifying market when shares and concentration drive the analysis, but they also permit evaluating competitive effects in a larger market. The 2023 Merger Guidelines recognize that multiple overlapping markets may be

¹⁷ **Note to students (doctrine):** We called this the "supertheorem" in class. We can also apply the HMT directly to all ice cream. See Appendix B.

¹⁸ **Note to students (exam tip):** The investigation found no empirical estimates of diversion between particular brands. In that situation, you may estimate diversion ratios from relative shares: the diversion ratio from product i to product j is j 's share divided by the combined share of all of i 's rivals, that is, by 1 minus i 's share. Here, for example, the diversion ratio from Clare's to Benny's is 40% divided by 95%, or 42.1%. The method assumes that the customers i loses are distributed among its rivals in proportion to their shares, so say that you are making that assumption when you use it.

relevant. We should allege premium ice cream and all ice cream as relevant product markets. The premium market presents the stronger structural case, while the all-ice cream market soundly preempts Clare’s argument that the transaction is harmless in the broader market.

b. The relevant geographic market

The second element of the prima facie Section 7 case is the relevant geographic market. In *Philadelphia National Bank*, the Supreme Court has defined the relevant geographic market to be “the area of effective competition . . . in which the seller operates, and to which the purchaser can practically turn for supplies.” *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 359 (1963) (emphasis removed). The relevant geographic market may also be assessed using the hypothetical monopolist test.

Clare’s defines the relevant market as nationwide, and the staff agrees, so the geographic market should not be contested.

The investigation found that brand-name ice cream is sold nationwide. There are no store brands of premium ice cream and store brands account for only 6.7% of revenues in regular ice cream. Each manufacturer of premium ice cream and regular ice cream (taken separately) sells its product at a uniform price throughout the country. Courts have held that when companies in the relevant product market sell nationwide at uniform prices, the United States is a relevant geographic market in pure horizontal mergers. The Merger Guidelines recognize this principle as well. Moreover, the hypothetical monopolist test supports a nationwide geographic market. A nationwide monopolist of premium ice cream could profitably impose a one-product SSNIP on at least one premium brand, and a nationwide monopolist of all ice cream could profitably impose a uniform 5% price increase. The calculations are the same as in the product-market analysis above. These facts confirm that the relevant geographic market is the United States.

This analysis is sufficient to establish the national market as the relevant geographic market even if the issue was contested. While smaller geographic markets may exist within the nationwide market, the facts in the investigation record do not allow us to analyze them. Moreover, because, as shown below, the merger violates Section 7 in both a nationwide premium ice cream market and an all-ice cream market, we need not examine competitive effects in any smaller markets to establish a Section 7 violation.

c. Market shares, concentration, and the *PNB* presumption

The transaction triggers the *PNB* presumption in premium ice cream under the case law and the 2010 Merger Guidelines, and therefore under the lower 2023 thresholds as well: the merged firm would have a 45% share, and the postmerger Herfindahl-Hirschman Index (HHI) would be 4080, an increase of 400. The structural case in all-ice cream is closer. There, the merged firm would have a 34.2% share, and the postmerger HHI would be 2329, an increase of 399, which triggers the *PNB* presumption under the 2023 Guidelines but not the 2010 Guidelines. I first summarize the legal thresholds, then apply them to the premium ice cream and all-ice cream markets.

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. 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.

The 2010 Guidelines provide that mergers in markets with a postmerger HHI above 2500 and a delta of more than 200 “will be presumed to be likely to enhance market power” and be sufficient to predicate the *PNB* presumption. Although the Guidelines are not binding on courts, courts frequently cited the then-current 2010 Guidelines as supporting authority when finding that mergers that increase the HHI by more than 200 points and result in a postmerger HHI above 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 postmerger 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.” The 2023 Guidelines reduce these thresholds and treat mergers that increase the HHI by more than 100 points and result in a postmerger HHI above 1800 as satisfying the predicates for the *PNB* presumption. In February 2025, the FTC and DOJ confirmed that the 2023 Guidelines remain in effect. It remains to be seen whether courts will adopt these lower thresholds, although two courts have found them persuasive. *See FTC v. Henkel AG & Co. KGaA*, No. 25 CIV. 10371 (KPF), 2026 WL 2676755, at *26 (S.D.N.Y. Sept. 11, 2026); *FTC v. Tapestry, Inc.*, 755 F. Supp. 3d 386, 458-59 & n.35 (S.D.N.Y. 2024) (describing the 2010 thresholds as “an outlier”). However, the HHIs in both *Henkel* and *Tapestry* also exceed the 2010 thresholds, so neither case holds that the lower thresholds alone suffice.

Premium ice cream. In premium ice cream, the transaction combines Benny’s, the number 2 firm with a 40% share, with Clare’s, a firm tied for number 3 with a 5% share, giving the combined firm a 45% share. The transaction would increase the HHI by 400 points to 4080:

Premium Ice Cream			
	Revenues		
	(\$millions)	Share	HHI
Al's	\$1,575	45.00%	2025
Benny's	\$1,400	40.00%	1600
Clare's	\$175	5.00%	25
Dino's	\$175	5.00%	25
Eddy's	\$35	1.00%	1
Breyers	\$35	1.00%	1
Blue Bell	\$35	1.00%	1
Izzy's	\$35	1.00%	1
Wells	\$35	1.00%	1
	\$3,500	100.0%	3680
Combined share		45.0%	
Delta			400
Postmerger HHI			4080

The resulting combined market share (45%), market concentration, HHIs, and delta would exceed what courts have previously accepted as sufficient to trigger the *PNB* presumption. The combined firm's 45% share significantly exceeds the 30% threshold in *Philadelphia National Bank*, and the transaction would substantially increase concentration by eliminating one of the four top firms and raising the 2-firm concentration ratio from 85% to 90%. Measured by the 2-firm concentration ratio, *Philadelphia National Bank*'s market concentration increased by 15 percentage points. Here, while the increase is only 5 points, the *PNB* market was much less concentrated both premerger (44%) and postmerger (59%). By contrast, here the market premerger was already highly concentrated (85%). Given the extremely high premerger market concentration, the 5-percentage point increase to 90% should be seen as entrenching a duopoly and as sufficient to indicate as much, if not more, of a competitive problem than in *PNB* itself.¹⁹

The transaction also exceeds the structural thresholds in the 2010 Merger Guidelines and is therefore presumptively anticompetitive under those Guidelines, which courts regard as informative although not binding. The postmerger market is "highly concentrated," with a postmerger HHI of 4080 (above the 2500-point threshold), and the transaction increases the HHI by 400 points (above the 200-point threshold), making the merger presumptively anticompetitive. The closest litigated precedent is *H&R Block*, where the court blocked a merger that increased the HHI by about 400 points to 4,691, gave the

¹⁹ **Note to students (exam tip):** I have absolutely no authority for this. Remember, this is an argument that the concentration statistics in this merger are worse from a competition perspective than the concentration statistics in *PNB* and therefore *PNB* itself is authority for predicating the presumption. It is not a coordinated effects argument (that will come later in additional evidence of anticompetitive effect). But since this is a memorandum to the section chief, I am entitled—if not expected—to make an argument of this type. Ms. Brown may reject it, but on the other hand she may think it is both creative and compelling.

merged firm a combined share of about 28%, and eliminated a maverick. See *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 72, 79–80 (D.D.C. 2011).

All ice cream. In an all-ice cream market, the transaction combines Clare’s, the number 1 firm with a 26.7% share, with Benny’s, the number 4 with a 7.5% share, giving the combined firm a 34.2% share. The transaction would increase the HHI by 399 points to 2329:

All Ice Cream			
	Revenues		
	(\$millions)	Share	HHI
Clare’s	\$5,000	26.7%	713
Breyers	\$4,800	25.6%	657
Al’s	\$4,000	21.4%	456
Benny’s	\$1,400	7.5%	56
Turkey Hill	\$900	4.8%	23
Blue Bell	\$650	3.5%	12
Izzy’s	\$450	2.4%	6
Wells	\$300	1.6%	3
Dino’s	\$175	0.9%	1
Eddy’s	\$35	0.2%	0
Store brands (10)	\$1,015	5.4%	3
	\$18,725	100.0%	1,930
Combined share		34.2%	
Premerger HHI			1,930
Delta			399
Postmerger HHI			2329

Although the FTC has not recently challenged a transaction in this range, the combined share of 34.2% and the increase in the 2-firm concentration ratio from 52.3% to 59.8% arguably could satisfy the PNB presumption under the *Philadelphia National Bank* facts.²⁰ Moreover, the change in the HHI of 399 and the resulting postmerger HHI of 2329, while not presumptively unlawful under the 2010 Merger Guidelines, is high enough to trigger the *PNB* presumption under the revised 2023 Merger Guidelines. The 2023 Guidelines’ separate share-based presumption also applies: the merged firm’s 34.2% share exceeds 30%, and the HHI increase exceeds 100 points. These figures use revenue shares; measured in gallons, the combined share is 33.6%, the HHI increases by 327 points, and the postmerger HHI is 2312, which still exceeds the 2023 thresholds.

While most modern complaints filed by the FTC and DOJ have larger HHI statistics, especially in postmerger concentration, courts have found Section 7 violations with combined shares and

²⁰ **Note to students (exam tip):** This is much more of a stretch than the last argument. The postmerger two-firm concentration ratio is essentially the same as in *PNB* (59.8% v. 59%), but the change here is only 7.5 percentage points as opposed to the 15 in *PNB*. If I were Ms. Brown, I probably would not find this argument very compelling, but I would give you credit for taking the shot. Same for the grading.

HHI increases in the same range as here, although the postmerger HHIs in those cases were higher. *See, e.g., United States v. UPM-Kymmene OYJ*, No. 03 C 2528, 2003 WL 21781902 (N.D. Ill. July 25, 2003) (complaint alleging, in the prime labelstock market, combined market share of 20%, delta of 190, and postmerger HHI of 2990); *see also In re Evanston Northwestern Healthcare Corp.*, No. 9315, 2007 WL 2286195, at *4 (FTC Aug. 6, 2007) (combined market share of 35%, delta of 384, and postmerger HHI of 2739).²¹ The Commission’s liability finding in *Evanston*, however, rested heavily on direct evidence of postmerger price increases in a consummated merger.

But even if the court were not willing to find that the Commission had established the predicates of the *PNB* presumption in an all-ice cream market on these structural numbers alone, when the court considers the additional evidence discussed below, it should find that the Commission has established a *prima facie* case of anticompetitive effect in the all-ice cream market.

d. Additional evidence supporting the *prima facie* case

Modern courts and the Merger Guidelines recognize that mergers are anticompetitive under Section 7 when they have a reasonable probability of increasing prices, reducing market output, reducing product or service quality, or reducing the rate of technological innovation or product improvement in the market compared to what would have happened in the market on a going-forward basis in the absence of the transaction.

Here, the Commission can provide additional evidence that the transaction is reasonably likely to increase premium ice cream prices, reduce innovation, and reduce product variety. The strongest price theory is coordinated effects: the acquisition is likely to weaken Clare’s role as the firm that resisted Al’s price leadership. A recapture-based unilateral price theory is not persuasive if, as Clare’s maintained throughout the investigation, it will discontinue its premium brand, given that the two merging premium brands have equal dollar margins premerger. Better unilateral theories focus on innovation and product variety.

Coordinated effects (price). The theory applies when the merger is likely to increase the likelihood, stability, or effectiveness of coordinated interaction among rivals. The theory depends on tacit coordination and accommodating conduct, not an express agreement. The theory has two elements: (1) the market is susceptible to coordination and (2) the merger is likely to make coordination more likely or more effective.

The premium ice cream market is susceptible to coordinated pricing. Al’s and Benny’s account for 85% of premium sales before the merger, nationwide price changes are publicly announced and readily observable, and the market has a history of price leadership. Before Clare’s entry, every other premium producer followed Al’s increases. After Clare’s entered, the other firms continued to follow, but Clare’s resisted some of them, and Al’s responded with smaller

²¹ **Note to students (exam tip):** It is important to cite judicial precedent here. The *Evanston Northwestern* statistics are great, but they are from an FTC administrative decision and not strictly precedent in a federal district court proceeding, which is why I put them behind a “see also” signal.

increases. The demand evidence also shows that coordination would pay. Because premium ice cream passes the uniform SSNIP critical loss test, a 5% increase in all premium prices would raise the premium producers' combined profits.

The acquisition is likely to make that coordination more effective by changing Clare's incentives. Before the merger, Clare's had only a 5% premium share and built its position by holding the line on some of Al's price increases and by introducing new flavors. Its resistance to Al's price leadership limited price increases and kept the market price lower than it would have been if Clare's had followed Al's lead. After acquiring Benny's, Clare's will control 45% of premium sales and will no longer be a small entrant seeking to establish an independent premium brand. Because Clare's is the acquirer rather than the target, the theory is not that the maverick disappears as a corporate entity; rather, the acquisition changes the maverick's incentives and eliminates its independent premium brand.

Postmerger, the combined firm and Al's will each have a 45% premium share, leaving only a 10% fringe. Given the two leaders' shares and the small fringe, aggressive price competition by either leader would likely take a substantial volume from the other, making a competitive response predictable and potentially costly. By contrast, accommodating Al's publicly observable price leadership would preserve higher margins across the combined firm's much larger sales base. The inference is not certain, but the concentration, observability, history of price following, and merger-induced change in Clare's incentives together support a reasonable probability that Clare's will be less likely to resist Al's price increases. Accordingly, coordinated effects are strongest as a price theory.

Coordinated effects (flavor innovation). The merger is also likely to facilitate accommodation on innovation between the combined Clare's/Benny's firm and Al's. Before the merger, Clare's was the innovation leader: it introduced successful new flavors, and both Benny's and Al's responded with matching products. On this record, Benny's and Al's were followers of Clare's successful innovations rather than independent instigators of comparable flavor competition. The merger combines the innovation leader with one follower and leaves the other follower, Al's, as the only remaining major independent competitor. The combined firm and Al's will each have 45% of premium sales, with only a 10% fringe that has not been shown to impose a comparable innovation constraint. If the combined firm slows its introduction of new flavors, Al's prior conduct suggests that it may accommodate the slowdown rather than replace Clare's as the innovation leader. The firms need not agree on a particular rate of innovation; each need only recognize that it can introduce new flavors less aggressively if the other behaves similarly. The merger therefore creates a reasonable probability of slower flavor innovation and reduced product variety.

Recapture unilateral effects (price). Both the courts and the Merger Guidelines recognize the theory of a unilateral effect. This theory of recapture unilateral effects focuses on eliminating significant "local" competition between the merging firms so the merged firm can raise prices independently of how other incumbent firms react. The 2010 Merger Guidelines explain:

A merger between firms selling differentiated products may diminish competition by enabling the merged firm to profit by unilaterally raising the price of one or both products above the premerger level. Some of the sales lost due to the price rise will merely be diverted to the product of the merger partner and, depending on relative margins, capturing such sales loss through merger may make the price increase profitable even though it would not have been profitable prior to the merger.

2010 DOJ/FTC Horizontal Merger Guidelines § 6.1.

To show unilateral effects, the 1992 Merger Guidelines were widely read to require (1) that a significant share of one merging firm's customers regard the other's product as their second choice and (2) that the merging firms' combined market share be at least 35%. The 2010 and 2023 Merger Guidelines made explicit that the merging firms need only be close competitors (though not necessarily the closest) and eliminated the 35% combined-share requirement.

A recapture-based unilateral effects theory on price is not persuasive on the facts revealed in the investigation. Using relative revenue shares as a proxy for bilateral diversion, the estimated diversion from Clare's to Benny's is Benny's 40% share divided by the 95% of premium sales made by Clare's rivals, or 42.1%; the estimated diversion from Benny's to Clare's is Clare's 5% share divided by the 60% made by Benny's rivals, or 8.3%. Those estimates would support conventional upward pricing pressure analysis *if* the merged firm planned to retain and price both premium brands separately. It does not. Clare's plans to discontinue its premium brand and consolidate under Benny's. On a recapture theory, eliminating Clare's would be profitable only if the diversion ratio multiplied by Benny's dollar margin exceeded Clare's dollar margin. Both margins are \$1.20 per gallon, so even 100% diversion would only break even. At the 42.1% diversion estimate, elimination would forfeit approximately \$52.6 million in Clare's contribution margin and recapture only approximately \$22.1 million through Benny's. Once the merged firm sells premium ice cream only under Benny's, a price increase on that brand produces no intrafirm recapture because the hypothetical states that lost sales go to other premium manufacturers, not to Clare's regular ice cream. This conclusion depends on the equal dollar margins and the planned brand consolidation. If Benny's had the higher dollar margin, elimination of Clare's could be profitable if the margin on sales diverted to Benny's exceeded the margin lost on discontinued Clare's sales.

Unilateral effects (innovation). Before the merger, a successful new Clare's flavor could attract sales from Benny's and other premium rivals, and all of those sales were gains to Clare's. After the merger, the combined firm will take account of the profits lost on existing Benny's products when a new flavor developed by Clare's management attracts those customers. The record does not provide innovation-specific diversion data, but the relative share proxy suggests that Benny's accounts for approximately 42.1% of Clare's rival sales. Internalizing those lost Benny's sales therefore could materially reduce the incremental return from an individual new-flavor introduction.

The more important unilateral effect, however, concerns Clare's overall incentive to pursue innovation-driven growth. Before the merger, Clare's had only a 5% premium share, lacked the reputation of an established premium brand, and used new flavors to build its position. Because Clare's had a small existing premium portfolio, it had relatively little to protect and much to gain by introducing products that disrupted the established firms. The acquisition gives Clare's a 45% share and Benny's established premium brand without requiring Clare's to achieve that growth through continued innovation. The combined firm will evaluate new flavors in light of their effect on its entire 45% portfolio, including the possibility that they will cannibalize profitable existing Benny's products. Clare's plan to discontinue its own premium brand and consolidate its premium operations under Benny's further eliminates an independent source of experimentation and new-product introductions.

The merger therefore may reduce not only the expected return from particular new flavors but also the combined firm's willingness to invest in the pace, breadth, and aggressiveness of flavor development. That unilateral change in incentives does not depend on Al's accommodating the reduction. Even if Al's innovation behavior remained unchanged, the loss of Clare's independent innovation effort could produce fewer new flavors and less product variety than would exist if Clare's and Benny's remained separate. Any accommodation by Al's would magnify that harm, but it is not necessary to establish the unilateral effect. The record does not permit the Commission to quantify the reduction, but Clare's demonstrated role as the innovation leader provides concrete evidence that the loss could be competitively significant.

e. The prima facie case: Summary

Applying the *Brown Shoe* outer boundary and practical indicia factors, along with the hypothetical monopolist test, shows two relevant product markets: premium ice cream and all ice cream. The relevant geographic market is the United States. The *PNB* presumption establishes a strong prima facie case in premium ice cream and likely supports the case in all ice cream as well. The additional evidence strengthens that showing. The acquisition is likely to weaken Clare's resistance to Al's price leadership. Moreover, the acquisition is likely to reduce Clare's incentive to introduce new premium flavors, and thereby reduce the variety of premium flavors available to consumers unilaterally. Finally, Benny's is likely to accommodate Clare's reduction in innovation, resulting in even fewer new flavor introductions postmerger than what would have occurred in the absence of the merger. These effects provide concrete mechanisms by which the merger may substantially lessen competition.

3. The defendants' arguments

The defendants make five arguments in defense of the transaction: (1) the only relevant market is all ice cream and in this market the merger is too small to create a competitive problem; (2) even if premium ice cream is the relevant market, the HHIs based on actual sales, which are not that high, should be further downgraded in their probative value of anticompetitive effect given the supply-side substitutability between regular ice cream and premium ice cream; (3) Dino's, which

entered four years ago and today has the same share in premium ice cream as Clare's, will continue to grow its business aggressively and its efforts will ensure that the premium ice cream market remains competitive postmerger; (4) Clare's, which will control the merged firm, will continue its philosophy of growing market share through competitive pricing and product innovation in premium ice cream and so benefit consumers; and (5) the merger will produce substantial efficiencies that will offset any possible anticompetitive effect of the transaction. None of these arguments should defeat the Commission's prima facie case.²² I address them in the order presented. I answer the first argument in two steps, showing that the transaction is anticompetitive in premium ice cream and that it is anticompetitive in all ice cream as well.

a. The evidence shows that premium ice cream is a relevant market and that the transaction is anticompetitive in that market

The nationwide manufacture and sale of premium ice cream satisfies both the *Brown Shoe* factors and the hypothetical monopolist test. The *PNB* presumption is easily satisfied, and the additional evidence supports likely coordinated price effects and unilateral innovation and product-variety effects. If a merger has the requisite anticompetitive effect in any one relevant market, it violates Section 7. See Clayton Act § 7, 15 U.S.C. § 18 (stating that a violation may occur “in any line of commerce . . . in any section of the country”) (emphasis added).

b. The evidence shows the transaction is anticompetitive in an all-ice cream market

The merging parties argue that they compete in a relevant all-ice cream market. They will likely note that the merger would combine the number 1 and a distant number 4 ice cream manufacturers, reduce the number of leading national brands from ten to nine, and leave a merged firm with only a 34.2% share in a moderately concentrated market.

We need not contest the all-ice cream market. It independently satisfies the *Brown Shoe* analysis and a uniform SSNIP hypothetical monopolist test. The 2010 Merger Guidelines generally apply the smallest-market principle when shares and concentration are central, while permitting analysis in a larger qualifying market; the 2023 Merger Guidelines expressly recognize overlapping relevant markets. In either event, the transaction is anticompetitive in all ice cream because it threatens higher prices, slower innovation, and less variety in the substantial premium segment, which accounts for \$3.5 billion, or about 18.7%, of all-ice cream revenue. A Section 7 violation does not require that the harm affect every product in a broader relevant market.

²² **Note to students (exam tip):** I have addressed these arguments in the order in which the hypothetical presented them. You could reorganize them to put related arguments together, but I suspect that, given the time limits, thinking about a more logical organization is not worth the investment of time, and organizing the section around the arguments in the order they were presented ensures that all of the arguments will be covered.

c. Rapid entrants and entry

Clare's argues that supply-side substitutability from regular ice cream will protect a premium ice cream market after the merger. Neither the rapid entrant concept nor the entry defense supports that argument.

The rapid entrant concept determines which firms should be treated as market participants and assigned shares. A firm outside the market may be counted when it can begin supplying the relevant product rapidly in response to a small price increase without incurring significant sunk costs. This differs from the ordinary entry defense, which asks whether future entry will be timely, likely, and sufficient to deter or counteract the merger's competitive harm.

Regular ice cream manufacturers are not rapid entrants here. Although they can switch production equipment within hours at negligible cost, establishing a premium brand requires sunk reputation costs and at least three years to gain meaningful consumer acceptance. Clare's experience—reaching only a 5% premium share after three or four years—confirms that production flexibility does not translate into rapid competitive significance. The higher premium price and margin despite the technical ease of switching reinforce that conclusion. Regular manufacturers therefore should not be assigned premium market shares under a rapid entry theory.

Nor does ordinary entry rebut the *prima facie* case. No firm has concrete plans to enter premium ice cream; material consumer acceptance would require at least three years, and the record shows no entry sufficient to replace Clare's pricing, innovation, or product-variety constraint.

d. Dino's expansion

Clare's argues that Dino's continued growth will protect the market from the merger's competitive effects. Expansion, like entry, must be timely, likely, and sufficient to deter or counteract the competitive harms of concern. 2010 Horizontal Merger Guidelines § 9. The parties have not made that showing.

Dino's has capacity and intends to keep investing in its reputation, but it has no specific expansion schedule or sales projections beyond its but-for growth. After four years, it has only a 5% premium share. Even if its historical average growth of about 1.25 share points per year continues, its share would be only about 7.5% after another two years. That general growth projection does not show that Dino's will become large enough, soon enough, to replace the competitive constraint lost through the merger.

Dino's expected baseline growth belongs in the but-for market condition and should not be ignored. But baseline growth rebuts the Commission's case only if it shows that the market will remain competitive notwithstanding the merger. If the parties rely on additional, merger-induced expansion, they must identify and support that increment. The record contains no such evidence.

The theory also must address the mechanism of harm. The price concern is that the merger will weaken Clare's resistance to AI's price leadership, not merely create an abstract amount of

upward pricing pressure. The record shows that Dino's, like every premium producer other than Clare's, followed all of Al's price increases, and there is no evidence that it could destabilize postmerger coordination or replace Clare's role within a relevant period.

The nonprice concerns are independent. The record does not show that Dino's has been, or is likely to become, a comparable innovator, and its expansion would not replace the flavor rivalry Clare's has driven.

e. Clare's will continue postmerger to price and innovate aggressively

Clare's says that it will invest the merger savings in premium ice cream, aggressively challenge Al's, and grow the merged firm's volume and share. This assertion is relevant evidence of management's present intentions, but it is not a binding commitment. More importantly, it must be evaluated against the objective changes in pricing and innovation incentives that the acquisition will create.

As explained in the coordinated effects analysis, the principal price concern is accommodation between the combined Clare's/Benny's firm and Al's. Before the merger, Clare's had only a 5% premium share and sought to expand by resisting some of Al's price increases. After the merger, the combined firm and Al's will each have 45% of premium sales, leaving only a 10% fringe. Nationwide price changes are publicly announced and readily observable, the market has a history of Al's leading price increases and other firms following, and the uniform-SSNIP analysis shows that an increase in premium prices would be profitable. The combined firm would obtain a much larger benefit from accommodating higher industry prices than Clare's did as a 5% entrant, while aggressive price competition could threaten margins across its much larger sales base and provoke a response from Al's. Clare's promise to challenge Al's does not rebut this merger-induced change in incentives.

The merger also will weaken the combined firm's unilateral incentive to innovate. Before the merger, sales that a successful new Clare's flavor attracted from Benny's were gains to Clare's. After the merger, some sales generated by a new flavor developed by Clare's management would merely be transferred from existing Benny's products within the combined firm. Because the merged firm would take account of the profits lost on those Benny's sales, the incremental return from introducing the new flavor would be lower. Clare's plan to discontinue its premium brand and consolidate its premium operations under the Benny's brand reinforces the conclusion that the acquisition will eliminate the independent flavor rivalry between Clare's and Benny's.

More importantly, as explained in the coordinated effects analysis, the acquisition also may facilitate accommodation on innovation between the combined Clare's/Benny's firm and Al's. Before the merger, Clare's was the innovation leader: it introduced successful new flavors, and both Benny's and Al's responded with matching products. On this record, Benny's and Al's were followers of Clare's successful innovations rather than independent instigators of comparable flavor competition. The merger combines the innovation leader with one of those followers and leaves the other follower, Al's, as the only remaining major independent competitor. If the

combined firm slows its introduction of new flavors, Al's prior conduct suggests that it may accommodate the slowdown rather than replace Clare's as the innovation leader. The two firms need not agree on a particular rate of innovation. Each need only recognize that it can introduce new flavors less aggressively without losing substantial sales if the other behaves similarly. The likely result is slower innovation and less product variety.

Finally, Clare's promise to invest the merger savings does not eliminate these concerns. The promise is neither binding nor quantified, and the identified efficiencies are fixed-cost savings that do not themselves lower marginal costs or restore the independent pricing and innovation incentives eliminated by the merger. Clare's prediction of aggressive postmerger conduct therefore does not rebut the coordinated price effects or the coordinated and unilateral innovation and product-variety effects established in the *prima facie* case.

f. Cost efficiencies defense

The claimed savings are verifiable and merger-specific, but they are fixed-cost savings that neither create downward pricing pressure nor otherwise prevent the likely harms, so they do not rebut the *prima facie* case. Merger efficiencies may rebut the claim if they are merger-specific, verifiable, and sufficient to prevent the competitive harm otherwise shown. Earlier Supreme Court language makes the status of a standalone efficiencies defense uncertain. Still, most modern courts assume that cognizable efficiencies can rebut a *prima facie* case, but they apply demanding proof requirements. The ultimate question is whether the proven efficiencies, given the market's competitive conditions, are sufficient to prevent a substantial lessening of competition.

The stated facts make the \$60 million overhead savings and the \$30 million production savings verifiable and merger-specific: staff does not dispute the amounts, and neither category of savings could be achieved through a practical alternative with fewer anticompetitive effects. Neither consolidation, however, changes per-gallon marginal cost, so both categories are, in effect, fixed-cost savings. Those savings do not create downward pressure on the merged firm's profit-maximizing price. Fixed-cost savings can sometimes support longer-run investment or other consumer benefits, but the investigation record lacks any evidence from the merging parties or otherwise of any mechanism or commitment by which these savings would prevent the likely price, innovation, or product-variety harms that otherwise are likely to result from the merger. Clare's stated intention to reinvest the savings is not binding and does not overcome the postmerger incentives described above. The efficiencies therefore do not rebut the Commission's *prima facie* case.

4. Conclusion on the Section 7 merits

Under the standards used by the courts and the Merger Guidelines, the FTC should be able to establish a *prima facie* case that the merger may substantially lessen competition in nationwide markets for premium ice cream and all ice cream. The structural evidence is reinforced by a

likely weakening of Clare's resistance to Al's price leadership, reduced incentives for premium-flavor innovation, and a resulting loss of flavor variety. The rapid entry, ordinary entry, Dino's expansion, management incentive, and efficiencies arguments do not rebut that showing. The Commission therefore should prevail on the merits. For the same reasons, it has a strong likelihood of success for purposes of obtaining a preliminary injunction.

5. Injunctive relief

The Commission should seek a permanent injunction enjoining consummation of the acquisition and, if necessary, preliminary relief preserving the status quo until the court decides the merits. The permanent injunction depends on proof of a Section 7 violation. Preliminary relief requires a separate assessment of the Commission's likelihood of success and the balance of the equities under Section 13(b). Given the facts of the investigation, the Commission should prevail in obtaining both types of relief.

a. Permanent injunctive relief

Because the acquisition has not closed, a permanent injunction barring its consummation is the appropriate remedy if the Commission proves a Section 7 violation. Courts routinely enter blocking injunctions to prevent the merger's consummation in the absence of a negotiated consent decree. *See, e.g., United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 372 (1963) (directing entry of judgment enjoining the proposed merger); *United States v. Anthem, Inc.*, 855 F.3d 345, 349 (D.C. Cir. 2017) (affirming a permanent injunction blocking the proposed merger); *FTC v. Henkel AG & Co. KGaA*, No. 25 Civ. 10371 (KPF), 2026 WL 2676755, at *36 (S.D.N.Y. Sept. 11, 2026) (permanently enjoining the proposed acquisition); *United States v. JetBlue Airways Corp.*, 712 F. Supp. 3d 109, 164 (D. Mass. 2024) (same); *United States v. Energy Sols., Inc.*, 265 F. Supp. 3d 415, 446 (D. Del. 2017) (same); *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 92 (D.D.C. 2011) (same). The Commission therefore should obtain that relief.

b. Preliminary injunctive relief

If Clare's and Benny's will not agree to defer closing until the court decides the merits, the Commission should seek a temporary restraining order and a preliminary injunction under Section 13(b) pending trial. A motion for a preliminary injunction may not be necessary. Merging parties often agree to a schedule for the merits trial and a stipulated temporary restraining order that bars closing until the court rules, as the parties did in *Henkel*. Because the staff has not yet negotiated with Clare's and Benny's, we do not know whether they will agree.

In addition to assessing the Commission's likelihood of success at trial on the merits of its Section 7 claim, Section 13(b) of the FTC Act also requires the court to weigh the equities to determine whether preliminary injunctive relief would be in the public interest. 15 U.S.C. § 53(b). In this weighing, the court must 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 the litigation of the merits or alternatively preventing the closing until the end of that proceeding on the merits. 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). Here, as in virtually every case where the court has found the requisite likelihood of success on the merits, the balance of the equities weighs in favor of granting the injunction.²³

In applying Section 13(b), courts balance equities and likelihood of success, recognizing that a blocking preliminary injunction in a merger case often functions as case-dispositive. *See Heinz*, 246 F.3d at 714–16 (describing the Section 13(b) standard and equities-likelihood framework); *Sysco*, 113 F. Supp. 3d at 22–24. Our assessment of likelihood of success should reflect that courts understand such relief typically functions as a permanent injunction. That is especially likely here because Clare’s and Benny’s have said that they will terminate their transaction if the court enters a preliminary injunction. Below, I address the public equities, the private equities, and how the court is likely to weigh them.

The public equities. The FTC’s showing of a likelihood of success creates a presumption in favor of granting preliminary injunctive relief. *See FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 352 (3d Cir. 2016); *Heinz*, 246 F.3d at 726; *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1507 (D.C. Cir. 1986); *FTC v. Hackensack Meridian Health, Inc.*, No. CV 20-18140, 2021 WL 4145062, at *30 (D.N.J. Aug. 4, 2021), *aff’d*, 30 F.4th 160 (3d Cir. 2022); *FTC v. Peabody Energy Corp.*, 492 F. Supp. 3d 865, 918 (E.D. Mo. 2020); *FTC v. RAG-Stiftung*, 436 F. Supp. 3d 278, 291 (D.D.C. 2020).

In addition, where the FTC can show a likelihood that the proposed transaction will substantially lessen competition, there is a strong public interest in ensuring that the court can order effective relief if the FTC succeeds on the merits at trial. *Sysco*, 113 F. Supp. 3d at 86. Courts have long held that the only way to ensure that effective relief—often a blocking permanent injunction—can be ordered after trial is to prevent the companies from merging during the pendency of the litigation. The long-accepted judicial view is that relief is unlikely to be fully effective if the parties are permitted to consummate their transaction, even if subject to a hold separate order,

²³ *Weyerhaeuser* is a contrary case. It upheld a hold-separate order because strong equities favored consummation and the order would prevent interim competitive harm and preserve adequate ultimate relief. *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1088 (D.C. Cir. 1981). No subsequent federal court has followed *Weyerhaeuser* by granting a hold-separate order in lieu of a blocking injunction. In *PPG*, the only subsequent D.C. Circuit decision directly revisiting the framework, the court reversed a hold-separate order and directed entry of a blocking preliminary injunction. *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1506–09 (D.C. Cir. 1986). *PPG* emphasized that *Weyerhaeuser* left intact the presumption favoring a blocking preliminary injunction when the FTC establishes a strong likelihood of success on the merits. Having found the acquisition almost certainly unlawful, the district court faced a difficult task in justifying lesser relief. *Id.* at 1506–07. The court also rejected the argument that likely eventual divestiture would give the parties an incentive to preserve the acquired company: the strength of the FTC’s showing weighs in favor of an injunction, not lesser relief. *Id.* at 1508. Moreover, even stringent separation requirements may fail to preserve vigorous competition, particularly where competition depends on aggressive or innovative management. *Id.* at 1508–09. Subsequent district courts have uniformly rejected requests to apply the *Weyerhaeuser* exception. *See, e.g., FTC v. Tronox Ltd.*, 332 F. Supp. 3d 187 (D.D.C. 2018); *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100 (D.D.C. 2016); *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34 (D.D.C. 2002).

and the court must unwind the transaction after the conclusion of the merits trial. *See PPG*, 798 F.2d at 1506–09. “Section 13(b) [of the FTC Act] itself embodies congressional recognition of the fact that divestiture [after a merger’s consummation] is an inadequate and unsatisfactory remedy in a merger case.” *Heinz*, 246 F.3d at 726.

The public equities weighing in favor of a preliminary injunction here are especially strong because Clare’s has told the staff that it will discontinue its premium brand and sell premium ice cream only under the Benny’s brand as well as close one of its production facilities once the merger closes. If the court does not grant a preliminary injunction and the deal is allowed to close, it may be impossible to completely roll back these changes and restore the status quo *ex ante* if the deal is ultimately found to violate Section 7 and the court orders divestiture.

The merging parties will likely argue that a blocking preliminary injunction would deny consumers the procompetitive advantages of the merger and that this public equity weighs against granting a preliminary injunction. But the parties do not argue that the merger would reduce consumer prices. At most, they argue that the public will be deprived of the increased innovation in premium ice cream products that Clare’s says it will bring to the combined company. But as demonstrated above, regardless of what Clare’s says today, it is likely to be in Clare’s profit-maximizing interest postmerger to follow Al’s price leadership, as Benny’s did premerger, and to imitate rather than lead on new flavors. Moreover, the court itself will try the merits, and it can expedite the trial, so if a preliminary injunction is entered and the merging parties ultimately prevail and consummate their merger, any benefits will only be temporarily delayed.

The private equities. The private equities are the additional profits Clare’s believes it will earn from the merger and the premium Benny’s shareholders will earn from the premium price Clare’s is willing to pay for their shares. A preliminary injunction would not take away these benefits. It would only delay them until the court decides the merits, and then only if the merging parties prevail. Moreover, if the court ultimately finds that the transaction would violate Section 7, it will permanently enjoin the transaction’s consummation, so the merging parties will never receive the claimed benefits.

The parties’ representation that they will terminate the transaction if the district court enters a preliminary injunction does not, by itself, establish a cognizable private equity. A preliminary injunction does not require the parties to abandon their transaction; it only prevents them from closing until the court decides the merits. Whether to wait for that decision or walk away is a business choice the parties can make and revisit. If they abandon the transaction, the lost benefits will result from that choice, not the injunction. Indeed, the D.C. Circuit has rejected a district court’s conclusion that an injunction would “kill this merger” because the conclusion was not supported by record evidence, observing that “[i]f the merger makes economic sense now, the appellees have offered no reason why it would not do so later.” *Heinz*, 246 F.3d at 726. The representation reflects the parties’ chosen deal terms and their decision whether to continue to a trial on the merits. Without evidence of an independent harm beyond the loss or delay of the

transaction's private benefits, the court should give the representation little weight in balancing the equities.²⁴

The weight of the equities. The public interest in effective antitrust enforcement and the ability to order effective relief strongly outweigh any potential public or private benefits in allowing the merger to occur during the pendency of the merits trial, benefits that the injunction itself would only delay until the court decides the merits.

6. Conclusion

For the reasons stated above, the Commission should sue in federal district court and should obtain a permanent injunction blocking Clare's acquisition of Benny's. If Clare's and Benny's will not agree to defer closing until the court decides the merits, the Commission also should obtain a preliminary injunction under Section 13(b) of the FTC Act pending trial.

²⁴ **Note to students (doctrine):** Do not confuse the practical effect of a preliminary injunction with its legal effect in weighing the equities. Because merging parties often abandon their transactions when a court enjoins them, a preliminary injunction is frequently case-dispositive in practice, which is why courts scrutinize the Commission's likelihood of success so closely. But the injunction itself only delays the closing; abandonment is the parties' choice. In weighing the private equities, the court therefore treats the parties' loss as a delay in receiving the transaction's benefits, not as the loss of those benefits.

Appendix A

Premium Ice Cream: Alternative HMT Implementations

Alternative 1: Brute force critical loss accounting

Rather than apply the percentage critical loss formula, you could have done a brute force accounting:

Gain on inframarginal sales

$\$SSNIP = \delta p =$	\$0.20	
$\% \Delta q =$	8%	from hypothetical
$q =$	875	from hypothetical
$\Delta q = q \times \% \Delta q =$	70	
$q_2 = q - \Delta q =$	805	
$Gain = q_2 \times \$SSNIP =$	161	

Loss on marginal sales

$p =$	4.00	from hypothetical
$mc =$	2.80	from hypothetical
$\$m = p - mc =$	1.20	
$\Delta q =$	70	from above
$Loss = \$m \times \Delta q =$	84	

Net gain to HM

$Gain - loss =$	77	PASSES CRITICAL LOSS TEST
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Alternative 2: One-product SSNIP recapture test

Hypothetical monopolist test: one-product price increase. Premium ice cream also passes a one-product SSNIP test. Consistent with the 2010 Merger Guidelines, modern courts have also held a product grouping satisfies the HMT if a hypothetical monopolist could profitably impose a SSNIP on some, or even only one, product in the grouping, provided one of those products is a product of a merging firm. Since premium ice cream products are differentiated by content and brand (and by prices in the past), we can apply a one-product SSNIP test. A one-product SSNIP δ for product i is profitable to the hypothetical monopolist if and only if:

$$R_i > R_{Critical}^i = \frac{\delta p_i}{\$m_{Ave}} \left(= \frac{\$SSNIP_i}{\$m_{Ave}} \right),$$

where R_i is the actual recapture ratio within the candidate market for product i , p_i is the price of the product subject to the SSNIP, and $\$m_{Ave}$ is the recapture share-weighted average margin of the recapturing products in the candidate market. When, as here, prices and margins in the candidate market are equal, then the above condition reduces to:

$$R_{Critical}^i = \frac{\delta}{m}$$

$$= \frac{5\%}{30\%} = 16.67\%,$$

where δ is 5% and the percentage margin for premium ice cream is 30%. The investigation revealed that if the price of only one premium ice cream brand were increased, that brand would lose one-sixth (about 16.7%) of its volume to other premium ice cream brands and none to regular ice cream or non-ice cream products. This indicates that:

$$R_i \approx 100\% > R_{Critical}^i = 16.7\%,$$

for all premium ice cream brands, including Clare's and Benny's. Since the actual recapture ratio for Clare's (or alternatively, Benny's) is greater than the critical recapture ratio for a one-product SSNIP, premium ice cream is also a relevant product market under a one-product SSNIP implementation of the hypothetical monopolist test.²⁵

²⁵ **Note to students (exam tip):** I wrote this hypothetical so that premium ice cream would pass both a percentage critical loss test and a one-product SSNIP test. Had premium ice cream failed the critical loss test, the right response would have been to try a one-product SSNIP test rather than to abandon the market: one-product SSNIP tests typically generate smaller markets than critical loss tests because they allow recapture within the candidate market.

Critical loss tests usually apply in homogeneous candidate markets that support only one price and do not support recapture with a uniform SSNIP. One-product SSNIP tests are applied to differentiated candidate markets that can support recapture. Here, the hypothetical was explicit that premium ice cream was differentiated: "Ice cream products are differentiated by content and brand. Within each segment, brands are differentiated from one another. While prices can and have varied among brands *within both premium and regular ice cream*, actual prices charged by manufacturers during the investigation have converged" (emphasis added). The second sentence says so directly, and the third confirms that prices can and have varied within premium ice cream.

Alternative 3: “Brute force” one-product SSNIP recapture test

You also could have done a one-product SSNIP recapture test through brute force accounting:

Apply SSNIP to Clare’s

Gain on inframarginal sales

	Premium	
$\$SSNIP =$	\$0.20	
$\% \Delta q =$	16.67%	From hypothetical
$q =$	43.80	from hypothetical (table)
$\Delta q =$	7.30	
$q_2 = q - \Delta q =$	36.50	
Gain =	7.30	

Loss on marginal sales

$\$m =$	1.20
$\Delta q =$	7.30
Loss =	8.76

NET Clare’s =	-1.46
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Gain on recaptured sales

$R_i =$	100.00%	from hypothetical
Recapture = $R_i \times \Delta q =$	7.30	
$\$m_o =$	\$1.20	from hypothetical
Gain =	\$8.76	

NET HM =	\$7.30
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You could have performed the same analysis for Benny’s. When you apply a one-product SSNIP test, you should apply it to a product of the merging firm. But once you have found a product where the hypothetical monopolist would find it profitable to increase that product’s price by a SSNIP, you have established that the candidate market satisfies the hypothetical monopolist test. I started with Clare’s and found the one-product SSNIP recapture test satisfied, so there was no need to apply the test to Benny’s. If you had started with Benny’s, you would also have found the test satisfied, so there would have been no need to apply the test to Clare’s.

Alternative 4: Why the uniform SSNIP aggregate diversion ratio test does not establish the market here

Some of you may have used the aggregate diversion ratio test for a uniform SSNIP à la Warren-Boulton in *H&R Block*. The critical recapture rate $R_{Critical}^U$ is:

$$R_{Critical}^U = \frac{\delta}{\delta + m} = \frac{5\%}{5\% + 30\%} = 14.3\%,$$

The test then says that if all of the actual R_i^U 's are equal to or greater than the critical recapture rate and at least one R_i^U is strictly greater than the critical recapture rate, then the candidate market satisfies the HMT. Here, the investigation revealed that increasing the price for any given brand of premium ice cream will result in 100% of its lost sales being recaptured by other premium ice cream brands (that is, each R_i is 100%). But these are one-product SSNIP recapture rates, not uniform SSNIP recapture rates. If we use one-product SSNIP recapture rates as a proxy for uniform SSNIP recapture rates, the test only provides a *presumption* that the hypothetical monopolist can profitably raise prices on all products in the candidate market by the SSNIP. Here, however, we have actual uniform SSNIP recapture rates and therefore cannot use one-product recapture rates as proxies. The evidence shows that a 5% uniform increase in all premium ice cream prices would cause each premium brand to lose 8% of its unit sales to regular ice cream and none to other premium ice cream brands or non-ice cream products. In other words, none of the sales lost in a uniform SSNIP are recaptured within premium ice cream, so the recapture test cannot establish premium ice cream as a relevant market. But because the recapture test is only a sufficiency test, that result does not mean that premium ice cream fails the HMT. When, as here, we know the actual loss from a uniform SSNIP, the percentage critical loss test applies directly, and it shows that a uniform SSNIP is profitable.²⁶

²⁶ **Note to students (doctrine):** Remember that this is only a *sufficiency* test. The test essentially says that when all of the prices in the candidate market are increased uniformly, the recapture for each product is enough to make the price increase for that product at least break even and, for at least one product, be strictly profitable. It is not a necessary test because it does not account for situations where one product loses money but the hypothetical monopolist more than makes up this loss through the net profit gains of other products. Accordingly, the failure of the test does not necessarily mean that the candidate market is not a relevant market.

Appendix B

All Ice Cream: Alternative HMT Implementations

Although not necessary, you could have performed a critical loss test to show that all ice cream is a relevant market under the Merger Guidelines:

The traditional hypothetical monopolist test with a uniform price increase shows that all ice cream is a relevant product market under a 5% SSNIP. We can test this using percentage critical loss analysis. The formula for percentage critical loss %CL is:

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

where δ is the SSNIP (here, 5%) and m is the percentage gross margin. Here, premium ice cream and regular ice cream have different margins, so we do not have a single margin to apply to an all-ice cream market. However, since all lost sales go to non-ice cream alternatives when the prices of both premium ice cream and regular ice cream are increased by 5% (i.e., there is no recapture by any ice cream product), if premium ice cream and regular ice cream each separately satisfy their respective critical loss tests, then a hypothetical monopolist will be able to raise prices by 5% across all products. The percentage critical losses for premium ice cream and regular ice cream are:

$$\begin{aligned}\%CL_{\text{premium}} &= \frac{5\%}{5\% + 30\%} = 14.3\% \\ \%CL_{\text{regular}} &= \frac{5\%}{5\% + 20\%} = 20.0\%,\end{aligned}$$

Since the actual loss for premium ice cream is 3% and the actual loss for regular ice cream is 5%, both are significantly less than their respective critical losses when the prices of all ice cream products are increased by a 5% SSNIP. Consequently, with a 5% SSNIP, the hypothetical monopolist would make money on premium ice cream products and separately on regular ice cream products. Since the hypothetical monopolist could profitably raise prices by a 5% SSNIP on each type of ice cream, all ice cream is a relevant product market.

More generally, think of the relationship between the critical loss test for a homogeneous candidate market (essentially making it a single product) and a one-product critical recapture test. The one-product critical recapture test recognizes that, in some circumstances, the hypothetical monopolist can offset the losses it sustains on the product with the SSNIP through recapture by other products in the candidate market, making the one-product SSNIP profitable. A critical loss test applied to a single profit-maximizing firm without recapture will fail because the firm is already charging its profit-maximizing price on its residual demand curve. But when, as here, the “product” (here, premium ice cream brands) is produced by multiple firms competing

with one another, the prevailing market prices will be below the profit-maximizing price of a hypothetical monopolist. In this situation, a subset of competing products within a larger candidate market can satisfy a critical loss test without the need for recapture.