ORAL ARGUMENT HELD ON APRIL 23, 2008

No. 07-5276

THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FEDERAL TRADE COMMISSION,
Appellant,

v.

WHOLE FOODS MARKET, INC.,
Appellee.

On Appeal from the United States District Court
for the District of Columbia
(Civ. No. 07-1021 (PLF), Judge Paul L. Friedman)

PETITION FOR REHEARING *EN BANC*

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August 26, 2008

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INTRODUCTION AND RULE 35 STATEMENT

For over thirty years, this Court has consistently required a party seeking preliminary injunctive relief to demonstrate a meaningful minimum threshold likelihood of success on the merits. *See Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843-44 (D.C. Cir. 1977) ("substantial case on the merits"); *accord Estate of Francisco Coll-Monge v. Inner Peace Movement*, 524 F.3d 1341, 1349 (D.C. Cir. 2008). At the very least, this threshold requires the movant, in all cases, to show the likelihood of success implied by "questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation," even in cases where the balance of equities "tips sharply" in the plaintiff's favor. *Holiday Tours*, 559 F.2d at 844 (citations omitted). Prior to the panel's decision in *FTC v. Whole Foods Market, Inc.*, ___F.3d___, No. 07-5276, 2008 WL 2890688 (D.C. Cir. July 29, 2008) ("*Whole Foods III*"), this Circuit also required the same minimum showing of the Federal Trade Commission ("FTC") when it sought preliminary relief under Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b). *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714-15 (D.C. Cir. 2001).

The panel decision is irreconcilable with this Court's long-standing precedent. In a sharp departure from the requirement that the FTC show the requisite minimum likelihood of ultimate success, the panel decision instead held that the FTC could be entitled to relief under Section 13(b) unless "the FTC *entirely failed* to show a likelihood of success." *Whole Foods III*, 2008 WL 2890688, at *4 (emphasis supplied). This holding stands in direct opposition to this Court's longstanding holding in *Holiday Tours* setting the minimum showing required for a preliminary injunction, the decision of this Court in *Heinz* applying the same minimum showing under Section 13(b), and decisions of other circuits (*see infra* at pp. 8-9).

The panel decision, if allowed to stand, would enable the Federal Trade Commission ("FTC") to obtain preliminary relief upon *any* showing above certain defeat. As Judge Kavanaugh warned in his dissent, this "allows the FTC to just snap its fingers and block a merger." *Whole Foods III*, 2008 WL 2890688, at *20 (Kavanaugh, J., *dissenting*).

The panel decision also directly contradicts precedent from this Court and other circuits regarding the appropriate methods for defining relevant markets. This Court's precedents require proper market definition analysis to consider the likely behavior of both marginal and core customers in response to a hypothetical price increase. *See Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218-19 (D.C. Cir. 1986). Market definition analysis may focus solely on the behavior of a subset of all customers only when the customers comprising that subset can be identified and can be charged different prices. *Id.* at 219; *see also United States v. Rockford Mem'l Corp.,* 898 F.2d 1278, 1284 (7th Cir. 1990); *FTC v. Tenet Healthcare Corp.*, 186 F.3d 1045, 1055 (8th Cir. 1999). The panel decision conflicts with these decisions by limiting market definition analysis to core customers, a subset of all Whole Foods Market customers, without requiring evidence that it was possible to identify core customers, much less to price distinctly to them. In fact, the record was completely devoid of such evidence.

Finally, rehearing *en banc* is necessary to remedy the conflict with the decisions of this Court and other circuits regarding the appropriate methods for assessing the competitive effects of business combinations. This Court's decisions in *Heinz* and *Baker Hughes* make clear that competitive effects analysis is the ultimate issue in merger analysis, not market definition, measurement of concentration, or the fact of competition between the merging firms. Reviewing courts must consider evidence that rebuts any inference of adverse competitive effects drawn from market concentration data. *Heinz,* 246 F.3d at 717-18; *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982-83 (D.C. Cir. 1990); *accord Tenet Healthcare,* 186 F.3d at

1053-54; *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1218-19 (11th Cir. 1991); *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1345 (4th Cir. 1976). The panel decision conflicts with those precedents by failing to apply the *Baker Hughes* framework and failing to consider the effective rebuttal of whatever inference of adverse competitive effects could be drawn assuming that the FTC could establish the narrow market alleged in its complaint, or the even narrower market suggested by the panel decision.

En banc review is necessary to secure and maintain uniformity of this Court's decisions and to eliminate needless conflict with the precedents of other circuits. The panel decision also raises issues of exceptional importance extending beyond antitrust merger analysis and across a wide variety of industries, as demonstrated by the immediate outpouring of critical commentary.[1] The conflicts created by the panel decision will add

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[1] *See, e.g.*, Posting of Geoffrey Manne to Truth on the Market, http://www.truthonthemarket.com/2008/07/29/the-unfortunate-return-of-the-strange-red-haired-bearded-one-eyed-man-with-a-limp/ (July 29, 2008 2:18 EST); Posting of Thom Lambert to Truth on the Market, http://www.truthonthemarket.com/2008/07/29/the-unfortunate-return-of-the-strange-red-haired-bearded-one-eyed-man-with-a-limp/ (July 30, 2008 8:49 EST); Posting of academics, economists, and practitioners to at-conversation@mail.abanet.org (July/August 2008); Jane E. Willis & Matthew P. Garvey, *FTC v. Whole Foods: 'Core' Approach is Incorrect*, NAT'L L.J., Aug. 18, 2008 (arguing that injunctions may become fait accompli if other courts follow "core" customer approach); Summanth Addanki and Alan J. Daskin, *Who Defines the Relevant Market –the Core Customer or the Marginal One?*, ANTITRUST INSIGHTS (Summer 2008).

considerable uncertainty to transactions that might otherwise provide significant efficiencies benefiting consumers without achieving market power that could be used to harm them.

FACTUAL BACKGROUND

Petitioner Whole Foods, an operator of 194 supermarkets in North America and the United Kingdom before the merger, entered into an agreement on February 21, 2007 to acquire Wild Oats, at that time an operator of 110 supermarkets located in United States and Canada, and filed the requisite notice with the FTC. The FTC investigated the proposed transaction for several months and then sued to enjoin the transaction on June 6, 2007. The FTC filed an administrative action against Whole Foods and Wild Oats at the same time, but stayed that proceeding while the motion for preliminary injunction was pending in the district court and during the subsequent appeal.

The district court considered live expert witness testimony, hundreds of exhibits (including ordinary course business documents), deposition testimony of lay witnesses and experts, expert reports, and written and oral arguments. On August 16, 2007, the district court denied the FTC's motion for a preliminary injunction because the FTC had not met the minimum likelihood of success standard set forth by this Court in *Heinz*. *FTC v.*

Whole Foods Market, Inc., 502 F. Supp. 2d 1 (D.D.C. 2007) ("*Whole Foods I*").

The FTC's request for an injunction pending appeal was denied by this Court because the FTC "failed to make a strong showing that it is likely to prevail on the merits of its appeal." *FTC v. Whole Foods Market, Inc.*, No. 07-5276, 2007 U.S. App. LEXIS 20539, at *3 (D.C. Cir. Aug. 23, 2007) (citations and quotations omitted) ("*Whole Foods II*"). The transaction closed on August 31, 2007.

On July 29, 2008, this Court reversed the district court's denial of injunctive relief on the ground that it was not certain that the FTC could not ultimately prevail on the merits and remanded for further proceedings consistent with the opinion of the Court.

ARGUMENT

I. The Panel Decision's Standard – An Injunction May Issue Unless the FTC "Entirely Failed" – Is Irreconcilable With This Court's Decisions and Decisions of Other Circuits.

Holiday Tours makes clear that a party seeking preliminary injunctive relief must demonstrate a meaningful minimum threshold likelihood of success on the merits. *Holiday Tours,* 559 F.2d at 843-44 (D.C. Cir. 1977). This requirement remains undisturbed today, over thirty years later. *See Estate of Coll-Monge*, 524 F.3d at 1349. Even when the equities tip decidedly in favor of the moving party, no injunction will issue unless that party presents evidence that at least raises "questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus more deliberative investigation." *Holiday Tours*, 559 F.2d at 844 (citations omitted). The minimum threshold likelihood of success sets a limit on this Circuit's flexible test for granting preliminary relief because the extraordinary relief of a preliminary injunction should not be available to a movant with only a more remote probability of success. *Id.* at 843.

Nothing in Section 13(b) relieves the FTC of the burden of establishing the same likelihood of success on the merits in order to obtain a preliminary injunction. In enacting Section 13(b), Congress codified the traditional equity standard, modifying it only to eliminate any requirement that the FTC prove irreparable harm. *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1082 (D.C. Cir. 1981). Significantly, Congress chose not to provide the FTC with the power to issue injunctions itself in advance of any determination, after a trial on the merits, that the law would, in fact, be violated. Rather, Congress intended "courts to exercise independent judgment on the propriety of issuance of a temporary restraining order or a preliminary injunction." H.R. Rep. No. 93-624 at 31 (1973) (Conf. Rep.), *reprinted in* 1973 U.S.C.C.A.N. 2523, 2533.

Consistent with that legislative directive and this Court's preliminary injunction jurisprudence, this Court has defined the FTC's burden as showing a minimum likelihood of success on the merits implied by 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 and ultimately by the Court of Appeals." *Heinz*, 246 F.3d at 714-15.[2]

But that is not the standard applied by the panel here. Rather, the panel majority held that the district court was required to consider the equities for and against issuance of the injunction unless the FTC "entirely failed" to show a likelihood of success. *Whole Foods III*, 2008 WL 2890688, at *4. This marks a dramatic departure from the well-established principle in this and at least nine other circuits that a preliminary injunction is an extraordinary intervention that requires a minimum threshold, some

2 *Accord FTC v. Tenet Healthcare Corp.*, 186 F.3d 1045, 1051 (8th Cir. 1999); *FTC v. Univ. Health, Inc.* 938 F.2d 1206, 1218 (11th Cir. 1991); *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1162-64 (9th Cir. 1984); *see also FTC v. Atlantic Richfield Co.*, 549 F.2d 289, 291 (4th Cir. 1977) (substantial likelihood of success). Like this Court, before *Whole Foods III*, none of these courts has so trivialized the required likelihood of success showing as to hold that the balance of equities might justify an injunction unless it is determined to a "certainty" that the FTC has no likelihood of success on the merits. *Whole Foods III*, 2008 WL 2890688, at *4.

substantial showing of probability of success on the merits.[3] Under the rule articulated by the panel here, all that will be required of the FTC is something greater than an abject and total failure to show any likelihood of success on the merits. This is a far cry from *Holiday Tours* and *Heinz*. This decision, as noted by the dissent, "enhance[s] the FTC's power to torpedo mergers well beyond what Congress has authorized." *Whole Foods III*, 2008 WL 2890688, at *27 n.3 (Kavanaugh, J., *dissenting*). Rehearing *en banc* is necessary to correct this result, which is plainly irreconcilable with the law of this Court and other circuits.

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[3] *See, e.g., New Comm Wireless Servs. Inc. v. Sprintcom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002) (unless plaintiff likely to succeed, remaining factors become matters of idle curiosity); *In re Arthur Treacher's Franchisee Litig.*, 689 F.2d 1137, 1143, 1147 n.14 (3d Cir. 1982) (failure to show reasonable probability of success necessarily results in a denial of preliminary injunction); *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1225-26 (11th Cir. 2005) (*per curiam*) (relief may not be granted unless plaintiff establishes substantial likelihood of success); *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 542-43 (6th Cir. 2007) (a mere possibility of success is not sufficient, plaintiff must raise serious, substantial questions); *E. & J. Gallo Winery v. Andina Licores, S.A.*, 446 F.3d 984, 990 (9th Cir. 2006) (irreducible minimum is fair chance of success or serious questions on the merits); *Aid for Women v. Foulston*, 441 F.3d 1101, 1115 (10th Cir. 2006) (serious, substantial questions <u>and</u> all remaining factors satisfied); *Almontaser v. N.Y. City Dep't of Educ.*, 519 F.3d 505, 508 (2d Cir. 2008) (serious, substantial questions <u>and</u> balance of hardships tipping decidedly in plaintiff's favor); *see also Dataphase Sys., Inc. v. C.L. Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (same); *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 195 (4th Cir. 1977) (same).

II. The Panel Decision's Product Market Analysis Conflicts With Precedent of This Court and Other Circuits

Absent evidence of price discrimination, market definition should be focused on the behavior of marginal rather than infra-marginal or "core" customers. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d, 210, 218-19 (D.C. Cir. 1986), teaches that the extent of substitution, in the event of a price increase, defines the scope of the market. Substitution, by definition, reflects the behavior of marginal rather than infra-marginal customers. The panel decision directly conflicts with *Rothery*, as well as precedents of other circuits adopting a similar approach, in citing the district court's focus on marginal customers as legal error.[4]

Exclusive focus on core customers or some other subset of customers for purposes of market definition, as the panel decision notes, can be proper "[i]n appropriate circumstances." *Whole Foods III*, 2008 WL 2890688, at *7. But the only appropriate circumstances recognized by this Court and other circuits — where there is evidence of economic price discrimination, which requires core customers to be identifiable and subject to distinct prices — are missing here. *Rothery*, 792 F.2d at 219; *see also United States v.*

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4 *See, e.g., Tenet Healthcare*, 186 F.3d at 1055; *AD/SAT v. Associated Press*, 181 F.3d 216, 228 (2d Cir. 1999); *United States v. Engelhard Corp.*, 126 F.3d 1302, 1304 (11th Cir. 1997); *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 907 (7th Cir. 1989).

Rockford Mem'l Corp., 898 F.2d 1278, 1284 (7th Cir. 1990) (individual hospital services may be separate product markets because the hospital can identify consumers with relatively inelastic demand for specific procedures and can charge different prices). Neither prong is met here; there is no evidence that core customers are identifiable, much less subject to distinct prices.

The panel decision's conclusion regarding the existence of numerous core customers, *Whole Foods III*, 2008 WL 2890688, at *8, rests entirely on the FTC's Proposed Findings, which paraphrase and completely misrepresent Whole Foods' expert's report. The expert actually found, upon reviewing dozens of market studies, that there was no identifiable "core" customer group for Whole Foods and that there was no observable characteristic that could be used *ex ante* to distinguish core customers from marginal customers. Scheffman Report, JA 3036-51. The FTC offered no evidence to contradict this. The 68% figure cited by the panel decision was merely the FTC's aggregation of shoppers in one *ex post* survey who expressed certain values. That survey neither measured nor identified which customers would not switch purchases to other supermarkets in response to noncompetitive conduct.

Even if a core group of customers could be identified, moreover, there was no evidence that it was subject to higher prices as required by *Rothery* and *Rockford Memorial*. The panel decision cites testimony purporting to establish that the presence of Wild Oats in a market affected Whole Foods' margins for perishable products but not groceries. *Whole Foods III*, 2008 WL 2890688, at *8. Even if the testimony were credited, it is immaterial to the submarket considered by the panel decision[5] — premium natural and organic supermarkets catering to "a core group of customers who 'have decided that natural and organic is important, lifestyle of health and ecological sustainability is important,'" *id.* — because the alleged margin differences run across different products, not across different groups of customers. There was absolutely no evidence that different groups of customers paid different prices for precisely the same product. Nor was there any evidence that core customers uniquely or even disproportionately purchased the perishable products supposedly carrying higher margins.

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5 The conflict with *Rothery* is exacerbated by the panel decision's reliance on submarkets as something distinct from properly defined markets. It has been the law of this Circuit for over twenty years that the "practical indicia" on which the panel decision purported to find a distinct submarket are nothing more than "evidentiary proxies for direct proof of substitutability." *Rothery*, 792 F.2d at 218.

III. The Panel Decision, in Further Conflict With This Court's Decisions and Those of Other Circuits, Fails to Address the Transaction's Likely Effect on Competition

In *Heinz*, this Court adopted the framework articulated in *Baker Hughes* for assessing a claim under Section 7 of the Clayton Act. Under this framework, "the government must show that the merger would produce a firm controlling an undue percentage share of the relevant market, and would result in a significant increase in the concentration of firms in that market" which "establishes a presumption that the merger will substantially lessen competition." *Heinz*, 246 F.3d at 715 (quotation marks and brackets omitted) (citing *Philadelphia Nat'l Bank,* 374 U.S. 321, 363 (1963) and *Baker Hughes*, 908 F.2d at 982-83).

Defendants can rebut the presumption by producing evidence that shows, even assuming plaintiff's alleged market definition, "that the market-share statistics [give] an inaccurate account of the [merger's] probable effects on competition." *Id.* (citing *United States v. Citizens & S. Nat'l Bank,* 422 U.S. 86, 120 (1975)). "If the defendant successfully rebuts the presumption [of illegality], the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times." *Id.* (quoting *Baker Hughes,* 908 F.2d at 983).

The panel decision completely ignores the issue of competitive effects and treats market definition as though it was the end of the analysis. The failure of the panel decision to follow the approach clearly set forth in *Heinz* and *Baker Hughes* is indicative of its overall failure to hold the FTC to the required standard of proof and of its unwillingness to credit the district court's analysis and weighing of all of the evidence proffered by Whole Foods.[6] Moreover, by relying solely on its acceptance of the FTC's market definition (and resulting concentration evidence) to establish likelihood of success, the panel decision contravened well-accepted law that market definition and high market shares are merely the starting point of the analysis, and that a court cannot evaluate the merits without also addressing the additional factors bearing on the probability of actual competitive effects. *Heinz,* 246 F.3d at 717-18 & n.12; *see also Tenet Healthcare*, 186

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6 The district court devoted considerable attention in its lengthy opinion to the issue of whether Whole Foods' acquisition of Wild Oats would harm competition. Assuming the FTC's proposed market definition, the district court determined that "any presumption of likely anticompetitive effects" of the transaction "[has] been overcome both by the testimony of the defendants' economic expert and by the realities of the marketplace as reflected in *credible* evidence presented in this proceeding." *Whole Foods I*, 502 F. Supp. 2d at 39 (emphasis supplied). The district court supported this conclusion with a detailed discussion of the pricing practices of Whole Foods and Wild Oats, the testimony of Dr. Scheffman, price constraining competition from supermarkets and other retailers, and repositioning efforts by other retailers (including Delhaize America, Safeway, Publix, Kroger, Supervalu, and Wegmans). *Id*. at 39-49.

F.3d at 1053-54; *FTC v. Univ. Health, Inc.*, 938 F.2d at 1218; *FTC v. Food Town Stores, Inc.*, 539 F.2d at 1345.

CONCLUSION

As shown above, the panel decision cannot be reconciled with prior decisions of this Court and those of other circuits. The panel decision, if allowed to stand, threatens to return antitrust merger analysis to "the bad old days when mergers were viewed with suspicion regardless of their economic benefits." *Whole Foods III*, 2008 WL 2890688, at *20 (Kavanaugh, J., *dissenting*). This case warrants *en banc* review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Rehearing *En Banc* was served this August 26, 2008, on the following persons by U.S. Mail and e-mail:

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CERTIFICATE OF COUNSEL AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rules 28(a)(1) and 35(c), counsel for appellee hereby certifies that:

A. Parties and *Amici*

The parties in interest in this case, before the district court and initially in this appeal, are the plaintiff, the Federal Trade Commission, and the defendants, Whole Foods Market, Inc. and Wild Oats Markets, Inc. After this Court denied the FTC's emergency motion for injunctive relief, the merger between Whole Foods and Wild Oats was consummated, and therefore, the only remaining parties are the FTC and Whole Foods Market. A number of grocery and supermarket companies intervened in the district court with respect to the protective order, on the ground that Whole Foods Market was their competitor: Delhaize America, Kroger Co., Apollo Management Holding LP, H.E. Butt Grocery Company, Publix Super Markets, Inc., Safeway Inc., Supervalu Inc., Target Corporation, Trader Joe's Company, Wal-Mart Stores, Inc., Wegmans Food Markets, Inc., and Winn-Dixie Stores, Inc. The American Antitrust Institute, Organization for Competitive Markets and Consumer Federation of America participated as *amici* in support of the FTC in both the district court and the appeal.

B. Rulings Under Review

The ruling under review in this petition is the decision by a divided panel of this Court, reversing the district court's determination that the FTC had showed no likelihood of success in an eventual Clayton Act § 7 case and remanding for further consideration.

C. Related Cases

Appellee is aware of no related case presently pending in this or any other court.

Paul T. Denis
Attorney for Whole Foods Market, Inc.

CORPORATE DISCLOSURE STATEMENT
PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 26.1 AND CIRCUIT RULE 26.1

Petitioner, Whole Foods Market, Inc., operates retail food stores nationwide. It has no parent company and no publicly held company owns 10% or more of its stock.

Paul T. Denis
Attorney for Whole Foods Market, Inc.

ADDENDUM
I

HF.T.C. v. Whole Foods Market, Inc.
C.A.D.C.,2008.
Only the Westlaw citation is currently available.
United States Court of Appeals,District of Columbia Circuit.
FEDERAL TRADE COMMISSION, Appellant
v.
WHOLE FOODS MARKET, INC., et al., Appellees.
No. 07-5276.

Argued April 23, 2008.
Decided July 29, 2008.

Background: Federal Trade Commission (FTC) brought action to enjoin, pursuant to Federal Trade Commission Act (FTCA), proposed merger of two large operators of premium natural and organic supermarkets (PNOS) while FTC conducted administrative proceeding to decide whether to block merger permanently under Clayton Act. The United States District Court for the District of Columbia, 502 F.Supp.2d 1, denied FTC's motion for preliminary injunction. FTC appealed.

Holdings: The Court of Appeals, Brown, Circuit Judge, held that:
(1) appeal was not rendered moot by consummation of merger;
(2) district court did not abuse its discretion in focusing on whether acquiring operator and competitor operated within a PNOS market;
(3) FTC demonstrated likelihood of success of proving PNOS submarket was sufficient, using sliding scale, to balance against any equities weighing against injunction; and
(4) remand to permit district court to consider the equities was warranted.

Reversed and remanded.

Tatel, Circuit Judge, filed a concurring opinion.

Kavanaugh, Circuit Judge, filed a dissenting opinion.

[1] Antitrust and Trade Regulation 29T ⚷996

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk994 Injunction
29Tk996 k. Preliminary. Most Cited Cases

Court had power to grant relief on complaint by which Federal Trade Commission (FTC), pursuant to Federal Trade Commission Act (FTCA), sought preliminary injunction to block merger of two large operators of premium natural and organic supermarkets (PNOS) while it conducted administrative proceeding to decide whether to block merger permanently under Clayton Act, and therefore appeal from district court's denial of preliminary injunction was not rendered "moot" even though merger had been accomplished and acquiring operator had already closed or sold some acquired stores and distribution facilities. Federal Trade Commission Act, § 13(b), 15 U.S.C.A. § 53(b).

[2] Antitrust and Trade Regulation 29T ⚷979

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk978 Trial, Hearing and Determination
29Tk979 k. In General. Most Cited Cases

Courts are clothed with large discretion to create remedies effective to redress antitrust violations and to restore competition.

[3] Antitrust and Trade Regulation 29T ⚷993

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk993 k. Forfeiture and Seizure of Property; Divestiture. Most Cited Cases

Antitrust violator may be required to do more than return the market to the status quo ante; courts may not only order divestiture, but may also order relief designed to give the divested firm an opportunity to establish its competitive position.

[4] Antitrust and Trade Regulation 29T ⚷983

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk982 Damages and Other Relief
29Tk983 k. In General. Most Cited Cases

Even remedies which entail harsh consequences would be appropriate to ameliorate the harm to competition from an antitrust violation.

[5] Antitrust and Trade Regulation 29T ⚷995

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk994 Injunction
29Tk995 k. In General. Most Cited Cases

At a minimum, the courts retain the power in antitrust litigation to preserve the status quo nunc, such as by means of a hold separate order, and perhaps also to restore the status quo ante.

[6] Federal Courts 170B ⚷815

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk814 Injunction
170Bk815 k. Preliminary Injunction; Temporary Restraining Order. Most Cited Cases

Court of Appeals reviews a district court order denying preliminary injunctive relief for abuse of discretion.

[7] Federal Courts 170B ⚷776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases

If district court's decision to deny motion for preliminary injunction rests on an erroneous premise as to the pertinent law, Court of Appeals will review the denial de novo in light of the legal principles that it believes to be proper and sound.

[8] Antitrust and Trade Regulation 29T ⚷996

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk994 Injunction
29Tk996 k. Preliminary. Most Cited Cases

To obtain preliminary injunction temporarily blocking a merger under Federal Trade Commission Act (FTCA), Federal Trade Commission (FTC) need not show any irreparable harm, and the private equities alone cannot override FTC's showing of likelihood of success. Federal Trade Commission Act, § 13(b), 15 U.S.C.A. § 53(b).

[9] Antitrust and Trade Regulation 29T ⚷996

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk994 Injunction
29Tk996 k. Preliminary. Most Cited Cases

In deciding request by Federal Trade Commission (FTC) for a preliminary injunction temporarily blocking a merger under Federal Trade Commission Act (FTCA), district court must balance the likelihood of FTC's success against the equities under a sliding scale. Federal Trade Commission Act, § 13(b), 15 U.S.C.A. § 53(b).

[10] Antitrust and Trade Regulation 29T ⚷996

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk994 Injunction
29Tk996 k. Preliminary. Most Cited Cases

Generally, Federal Trade Commission (FTC) will obtain a preliminary injunction temporarily blocking a merger pursuant to Federal Trade Commission Act (FTCA) by raising questions going to the merits so serious, substantial, difficult, and doubtful as to make them fair ground for thorough investigation, thereby creating a presumption in favor of preliminary injunctive relief, although merging parties may rebut this presumption, requiring FTC to demonstrate a greater likelihood of success, by showing equities weighing in favor of the merger; conversely, a greater likelihood of FTC's success will militate for a preliminary injunction unless particularly strong equities favor the merging parties. Federal Trade Commission Act, § 13(b), 15 U.S.C.A. § 53(b).

[11] Antitrust and Trade Regulation 29T ⚿996

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk994 Injunction
29Tk996 k. Preliminary. Most Cited Cases

In deciding request by Federal Trade Commission (FTC) for a preliminary injunction temporarily blocking a merger under Federal Trade Commission Act (FTCA), district court must not require FTC to prove the merits, given that, in a preliminary injunction proceeding, a court is not authorized to determine whether the antitrust laws are about to be violated; that responsibility lies with FTC. Federal Trade Commission Act, § 13(b), 15 U.S.C.A. § 53(b).

[12] Antitrust and Trade Regulation 29T ⚿996

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk994 Injunction
29Tk996 k. Preliminary. Most Cited Cases

District court deciding request by Federal Trade Commission (FTC) for preliminary injunction temporarily blocking merger under Federal Trade Commission Act (FTCA) must exercise independent judgment about questions that preliminary injunction statute commits to it, and therefore court must evaluate FTC's chance of success on the basis of all the evidence before it, from defendants as well as from FTC. Federal Trade Commission Act, § 13(b), 15 U.S.C.A. § 53(b).

[13] Antitrust and Trade Regulation 29T ⚿996

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk994 Injunction
29Tk996 k. Preliminary. Most Cited Cases

In deciding request by Federal Trade Commission (FTC) for a preliminary injunction temporarily blocking a merger under Federal Trade Commission Act (FTCA), district court should bear in mind that FTC will be entitled to presumption against merger on the merits, and therefore does not need detailed evidence of anticompetitive effect at preliminary phase; nevertheless, the merging parties are entitled to oppose preliminary injunction with their own evidence, and that evidence may force FTC to respond with a more substantial showing. Federal Trade Commission Act, § 13(b), 15 U.S.C.A. § 53(b).

[14] Antitrust and Trade Regulation 29T ⚿996

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk994 Injunction
29Tk996 k. Preliminary. Most Cited Cases

In deciding motion by Federal Trade Commission (FTC) under Federal Trade Commission Act (FTCA) for preliminary injunction to enjoin large operator of premium natural and organic supermarkets (PNOS) from acquiring competitor while FTC conducted administrative proceeding to decide whether to block merger permanently under Clayton Act, district court did not abuse its discretion in focusing on whether operator and competitor operated within a PNOS market, given that court was simply following FTC's outline of case and FTC itself made market definition a key issue. Clayton Act, § 7, 15 U.S.C.A. § 18; Federal Trade Commission Act, § 13(b), 15 U.S.C.A. § 53(b).

[15] Antitrust and Trade Regulation 29T ⚿950

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(A) In General
29Tk950 k. In General. Most Cited Cases
Core consumers can, in appropriate circumstances, be worthy of antitrust protection.

[16] Antitrust and Trade Regulation 29T ⟹645

29T Antitrust and Trade Regulation
29TVII Monopolization
29TVII(C) Market Power; Market Share
29Tk643 Relevant Market
29Tk645 k. Product Market. Most Cited Cases
In monopolization case, a market must include all products reasonably interchangeable by consumers for the same purposes, and whether one product is reasonably interchangeable for another depends not only on the ease and speed with which customers can substitute it and the desirability of doing so, but also on the cost of substitution, which depends most sensitively on the price of the products.

[17] Antitrust and Trade Regulation 29T ⟹644

29T Antitrust and Trade Regulation
29TVII Monopolization
29TVII(C) Market Power; Market Share
29Tk643 Relevant Market
29Tk644 k. In General. Most Cited Cases
In monopolization case, a broad market may contain relevant submarkets which 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.

[18] Antitrust and Trade Regulation 29T ⟹644

29T Antitrust and Trade Regulation
29TVII Monopolization
29TVII(C) Market Power; Market Share
29Tk643 Relevant Market
29Tk644 k. In General. Most Cited Cases
Core group of particularly dedicated, distinct customers, paying distinct prices, may constitute a recognizable submarket in monopolization case, whether they are dedicated because they need a complete cluster of products, because their particular circumstances dictate that a product is the only realistic choice, or because they find a particular product uniquely attractive.

[19] Antitrust and Trade Regulation 29T ⟹644

29T Antitrust and Trade Regulation
29TVII Monopolization
29TVII(C) Market Power; Market Share
29Tk643 Relevant Market
29Tk644 k. In General. Most Cited Cases
In defining a market in monopolization case, court must take into account the realities of competition.

[20] Antitrust and Trade Regulation 29T ⟹996

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk994 Injunction
29Tk996 k. Preliminary. Most Cited Cases
In seeking preliminary injunction under Federal Trade Commission Act (FTCA) to enjoin merger of two large operators of premium natural and organic supermarkets (PNOS) while it conducted administrative proceeding to decide whether to block merger permanently under Clayton Act, Federal Trade Commission (FTC) demonstrated likelihood that it could prove existence of PNOS submarket, and therefore district court was required, using sliding scale, to balance any equities weighing against injunction; FTC's evidence identified PNOS submarket catering to core group of customers finding natural and organic lifestyle important, and FTC showed how PNOS discriminated on price between core and marginal customers, thus treating core customers as distinct market. Clayton Act, § 7, 15 U.S.C.A. § 18; Federal Trade Commission Act, § 13(b), 15 U.S.C.A. § 53(b).

[21] Antitrust and Trade Regulation 29T ⟹996

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk994 Injunction
29Tk996 k. Preliminary. Most Cited Cases

District court's failure to balance the equities in deciding request by Federal Trade Commission (FTC) for preliminary injunction, pursuant to Federal Trade Commission Act (FTCA), to enjoin merger of two large operators of premium natural and organic supermarkets (PNOS) while it conducted administrative proceeding to decide whether to block merger permanently under Clayton Act warranted remand by Court of Appeals on appeal from denial of FTC's request, which stemmed from district court's erroneous determination that FTC showed no likelihood of success in eventual action under Clayton Act, so as to permit district court to independently exercise its discretion in considering circumstances of case to determine whether preliminary injunction was warranted, including fact that merger had taken place. Clayton Act, § 7, 15 U.S.C.A. § 18; Federal Trade Commission Act, § 13(b), 15 U.S.C.A. § 53(b).

Appeal from the United States District Court for the District of Columbia (No. 07cv01021).

Marilyn E. Kerst, Attorney, Federal Trade Commission, argued the cause for appellant. With her on the briefs were John F. Daly, Deputy General Counsel, and Richard B. Dagen and Thomas H. Brock, Attorneys.

Paul T. Denis argued the cause for appellees. With him on the brief were Paul H. Friedman, Nory Miller and Rebecca Dick. Clifford H. Aronson and Alden L. Atkins entered appearances.

David A. Balto was on the brief for amici curiae American Antitrust Institute, et al. in support of appellant.

Albert A. Foer was on the brief for amicus curiae American Antitrust Institute in support of appellant.

Before: TATEL, BROWN and KAVANAUGH, Circuit Judges.

Opinion for the court filed by Circuit Judge BROWN.FN*

Concurring opinion filed by Circuit Judge TATEL.

Dissenting opinion filed by Circuit Judge KAVANAUGH.

BROWN, Circuit Judge:

*1 The FTC sought a preliminary injunction, under 15 U.S.C. § 53(b), to block the merger of Whole Foods and Wild Oats. It appeals the district court's denial of the injunction, which we reverse. We do so reluctantly, admiring the thoughtful opinion the district court produced under trying circumstances in which the defendants were rushing to a financing deadline and the FTC presented, at best, poorly explained evidence. Nevertheless, the district court committed legal error in assuming market definition must depend on marginal consumers; consequently, it underestimated the FTC's likelihood of success on the merits.

I

Whole Foods Market, Inc. ("Whole Foods") and Wild Oats Markets, Inc. ("Wild Oats") operate 194 and 110 grocery stores, respectively, primarily in the United States. In February 2007, they announced that Whole Foods would acquire Wild Oats in a transaction closing before August 31, 2007. They notified the FTC, as the Hart-Scott-Rodino Act required for the $565 million merger, and the FTC investigated the merger through a series of hearings and document requests. On June 6, 2007, the FTC sought a temporary restraining order and preliminary injunction to block the merger temporarily while the FTC conducted an administrative proceeding to decide whether to block it permanently under § 7 of the Clayton Act. The parties conducted expedited discovery, and the district court held a hearing on July 31 and August 1, 2007.

The FTC contended Whole Foods and Wild Oats are the two largest operators of what it called premium, natural, and organic supermarkets ("PNOS"). Such stores "focus on high-quality perishables, specialty and natural organic produce, prepared foods, meat, fish[,] and bakery goods; generally have high levels of customer services; generally target affluent and well educated customers [and] ... are mission driven with an emphasis on social and environmental responsibility."*FTC v. Whole Foods Market, Inc.,* 502 F.Supp.2d 1, 28 (D.D.C.2007). In eighteen cities, asserted the FTC, the merger would create monopolies because Whole Foods and Wild Oats are the only PNOS. To support this claim, the FTC relied on emails Whole Foods's CEO John Mackey sent to other Whole Foods executives and directors, suggesting the purpose of the merger was to eliminate a competitor. In addition the FTC produced pseudonymous blog postings in which Mr. Mackey touted Whole Foods and denigrated other supermarkets as unable to compete. The FTC's expert economist, Dr. Kevin Murphy, analyzed sales data from the companies to show how entry by various supermarkets into a local market affected sales at a Whole Foods or Wild Oats store.

On the other hand, the defendants' expert, Dr. David Scheffman, focused on whether a hypothetical monopolist owning both Whole Foods and Wild Oats would actually have power over a distinct market. He used various third-party market studies to predict that such an owner could not raise prices without driving customers to other supermarkets. In addition, deposition testimony from other supermarkets indicated they regarded Whole Foods and Wild Oats as critical competition. Internal documents from the two defendants reflected their extensive monitoring of other supermarkets' prices as well as each other's.

*2 The district court concluded that PNOS was not a distinct market and that Whole Foods and Wild Oats compete within the broader market of grocery stores and supermarkets. Believing such a basic failure doomed any chance of the FTC's success, the court denied the preliminary injunction without considering the balance of the equities.

On August 17, the FTC filed an emergency motion for an injunction pending appeal, which this court denied on August 23. *FTC v. Whole Foods Market, Inc.*, No. 07-5276 (D.C.Cir. Aug. 23, 2007). Freed to proceed, Whole Foods and Wild Oats consummated their merger on August 28. The dissent argues that our holding today contradicts this earlier decision, but our standard of review then was very different, requiring the FTC to show "such a substantial indication of probable success" that there would be "justification for the court's intrusion into the ordinary processes of ... judicial review."*Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C.Cir.1977). It is hardly remarkable that the FTC could fail to meet such a stringent standard and yet persuade us the district court erred in applying the much less demanding § 53(b) preliminary injunction standard.

II

[1] At the threshold, Whole Foods questions our jurisdiction to hear this appeal. The merger is a *fait accompli*, and Whole Foods has already closed some Wild Oats stores and sold others. In addition, Whole Foods has sold two complete lines of stores, Sun Harvest and Harvey's, as well as some unspecified distribution facilities. Therefore, argues Whole Foods, the transaction is irreversible and the FTC's request for an injunction blocking it is moot.

[2][3][4] Only in a rare case would we agree a transaction is truly irreversible, for the courts are "clothed with large discretion" to create remedies "effective to redress [antitrust] violations and to restore competition."*Ford Motor Co. v. United States*, 405 U.S. 562, 573, 92 S.Ct. 1142, 31 L.Ed.2d 492 (1972). Indeed, "divestiture is a common form of relief" from unlawful mergers. *United States v. Microsoft Corp.*, 253 F.3d 34, 105 (D.C.Cir.2001) (en banc). Further, an antitrust violator "may ... be required to do more than return the market to the *status quo ante*."*Ford Motor*, 405 U.S. at 573 n. 8, 92 S.Ct. 1142.Courts may not only order divestiture but may also order relief "designed to give the divested [firm] an opportunity to establish its competitive position."*Id.* at 575, 92 S.Ct. 1142.Even remedies which "entail harsh consequences" would be appropriate to ameliorate the harm to competition from an antitrust violation. *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 327, 81 S.Ct. 1243, 6 L.Ed.2d 318 (1961).

[5] Of course, neither court nor agency has found Whole Foods's acquisition of Wild Oats to be unlawful. Therefore, the FTC may not yet claim the right to have any remedy necessary to undo the effects of the merger, as it could after such a determination, *du Pont*, 366 U.S. at 334, 81 S.Ct. 1243.But the whole point of a preliminary injunction is to avoid the need for intrusive relief later, since even with the considerable flexibility of equitable relief, the difficulty of "unscrambl[ing] merged assets" often precludes "an effective order of divestiture," *FTC v. Dean Foods Co.*, 384 U.S. 597, 607 n. 5, 86 S.Ct. 1738, 16 L.Ed.2d 802

(1966). Section 53(b), codifying the ability of the FTC to obtain preliminary relief, *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1082 (D.C.Cir.1981), preserves the "flexibility" of traditional "equity practice," *id.* at 1084. At a minimum, the courts retain the power to preserve the *status quo nunc*, for example by means of a hold separate order, *id.*, and perhaps also to restore the *status quo ante*.

*3 Thus, the courts have the power to grant relief on the FTC's complaint, despite the merger's having taken place, and this case is therefore not moot. *See* *Byrd v. U.S. EPA*, 174 F.3d 239, 244 (D.C.Cir.1999) ("The availability of a partial remedy is sufficient to prevent [a] case from being moot."). The fact that Whole Foods has sold some of Wild Oats's assets does not change our conclusion. To be sure, we have no "authority to command return to the status quo," *Weyerhaeuser*, 665 F.2d at 1077, in a literal way by forcing absent parties to sell those assets back to Whole Foods, but there is no reason to think that inability prevents us from mitigating the merger's alleged harm to competition. The stores Whole Foods has sold are only those under the Harvey's and Sun Harvest labels, which were never relevant to the anticompetitive harm the FTC fears. Our inability to command their return does not limit the relief available to the FTC. As to the distribution facilities, neither party has described what they are, suggested Wild Oats would not be a viable competitor without them, or explained why the district court could not order some provisional substitute. Moreover, the FTC is concerned about eighteen different local markets. If, as appears to be the situation, it remains possible to reopen or preserve a Wild Oats store in just one of those markets, such a result would at least give the FTC a chance to prevent a § 7 violation in that market.

III

[6][7] "We review a district court order denying preliminary injunctive relief for abuse of discretion." *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C.Cir.2001). However, if the district court's decision "rests on an erroneous premise as to the pertinent law," we will review the denial *de novo* "in light of the legal principles we believe proper and sound." *Id.*

[8] Despite some ambiguity, the district court applied the correct legal standard to the FTC's request for a preliminary injunction. The FTC sought relief under 15 U.S.C. § 53(b), which allows a district court to grant preliminary relief "[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." The relief is temporary and must dissolve if more than twenty days pass without an FTC complaint. *Id.* Congress recognized the traditional four-part equity standard for obtaining an injunction was "not appropriate for the implementation of a Federal statute by an independent regulatory agency." *Heinz*, 246 F.3d at 714. Therefore, to obtain a § 53(b) preliminary injunction, the FTC need not show any irreparable harm, and the "private equities" alone cannot override the FTC's showing of likelihood of success. *Weyerhaeuser*, 665 F.2d at 1082-83.

[9][10] In deciding the FTC's request for a preliminary injunction blocking a merger under § 53(b), a district court must balance the likelihood of the FTC's success against the equities, under a sliding scale. *See* *Heinz*, 246 F.3d at 727; *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 903 (7th Cir.1989). The equities will often weigh in favor of the FTC, since "the public interest in effective enforcement of the antitrust laws" was Congress's specific "public equity consideration" in enacting the provision. *Heinz*, 246 F.3d at 726. Therefore, the FTC will usually be able to obtain a preliminary injunction blocking a merger by "rais[ing] questions going to the merits so serious, substantial, difficult[,] and doubtful as to make them fair ground for thorough investigation." *Heinz*, 246 F.3d at 714-15. By meeting this standard, the FTC "creates a presumption in favor of preliminary injunctive relief," *id.* at 726; but the merging parties may rebut that presumption, requiring the FTC to demonstrate a greater likelihood of success, by showing equities weighing in favor of the merger, *Weyerhaeuser*, 665 F.2d at 1087. Conversely, a greater likelihood of the FTC's success will militate for a preliminary injunction unless particularly strong equities favor the merging parties. *See* *Heinz*, 246 F.3d at 727; *Elders Grain*, 868 F.2d at 903.

*4 [11][12][13] In any case, a district court must not require the FTC to prove the merits, because, in a § 53(b) preliminary injunction proceeding, a court "is not authorized to determine whether the antitrust laws ... are about to be violated." *FTC v. Food Town*

Stores, Inc., 539 F.2d 1339, 1342 (4th Cir.1976). That responsibility lies with the FTC. Id.Not that the court may simply rubber-stamp an injunction whenever the FTC provides some threshold evidence; it must "exercise independent judgment" about the questions § 53(b) commits to it. Weyerhaeuser, 665 F.2d at 1082.Thus, the district court must evaluate the FTC's chance of success on the basis of all the evidence before it, from the defendants as well as from the FTC. *See* FTC v. Beatrice Foods Co., 587 F.2d 1225, 1229-30 (D.C.Cir.1978) (App'x to Stmt. of MacKinnon & Robb, JJ.) ("[W]e are also required to consider the inroads that the appellees' extensive showing has made ... [S]everal basic contentions of the FTC are called into serious question."). The district court should bear in mind the FTC will be entitled to a presumption against the merger on the merits, *see* Elders Grain, 868 F.2d at 906, and therefore does not need detailed evidence of anticompetitive effect at this preliminary phase. Nevertheless, the merging parties are entitled to oppose a § 53(b) preliminary injunction with their own evidence, and that evidence may force the FTC to respond with a more substantial showing.

The district court did not apply the sliding scale, instead declining to consider the equities. To be consistent with the § 53(b) standard, this decision must have rested on a conviction the FTC entirely failed to show a likelihood of success. Indeed, the court concluded "the relevant product market in this case is not premium natural and organic supermarkets ... as argued by the FTC but ... at least all supermarkets."Whole Foods, 502 F.Supp.2d at 34.It also observed that several supermarkets "have already repositioned themselves to compete vigorously with Whole Foods and Wild Oats for the consumers' premium natural and organic food business."Id. at 48.Thus, considering the defendants' evidence as well as the FTC's, as it was obligated to do, the court was in no doubt that this merger would not substantially lessen competition, because it found the evidence proved Whole Foods and Wild Oats compete among supermarkets generally. If, and only if, the district court's certainty was justified, it was appropriate for the court not to balance the likelihood of the FTC's success against the equities.

IV

However, the court's conclusion was in error. The FTC contends the district court abused its discretion in two ways: first, by treating market definition as a threshold issue; and second, by ignoring the FTC's main evidence. We conclude the district court acted reasonably in focusing on the market definition, but it analyzed the product market incorrectly.

A

*5 [14] First, the FTC complains the district court improperly focused on whether Whole Foods and Wild Oats operate within a PNOS market. However, this was not an abuse of discretion given that the district court was simply following the FTC's outline of the case.

Inexplicably, the FTC now asserts a market definition is not necessary in a § 7 case, Appellant's Br. 37-38, in contravention of the statute itself, *see*15 U.S.C. § 18 (barring an acquisition "where in any line of commerce ... the effect of such acquisition may be substantially to lessen competition"); *see also* Brown Shoe Co. v. United States, 370 U.S. 294, 324, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962) (interpreting "any line of commerce" to require a "determination of the relevant market" to find "a violation of the Clayton Act"); Elders Grain, 868 F.2d at 906 ("[A]ll this assumes a properly defined market."). The FTC suggests "market definition ... is a means to an end-to enable some measurement of market power-not an end in itself."Appellant's Br. 38 n. 26. But measuring market power is not the only purpose of a market definition; only "examination of the particular market-its structure, history [,] and probable future-can provide the appropriate setting for judging the probable anticompetitive effect of the merger."Brown Shoe, 370 U.S. at 322 n. 38, 82 S.Ct. 1502.

That is not to say market definition will always be crucial to the FTC's likelihood of success on the merits. Nor does the FTC necessarily need to settle on a market definition at this preliminary stage. Although the framework we have developed for a *prima facie* § 7 case rests on defining a market and showing undue concentration in that market, United States v. Baker Hughes Inc., 908 F.2d 981, 982-83 (D.C.Cir.1990), this analytical structure does not exhaust the possible ways to prove a § 7 violation on the merits, *see, e.g.*, United States v. El Paso Natural Gas Co., 376 U.S. 651, 660, 84 S.Ct. 1044, 12 L.Ed.2d 12 (1964), much less the ways to demonstrate a likelihood of success on the merits in a preliminary proceeding. Section 53(b) preliminary injunctions are meant to be readily available to preserve the status quo while the FTC develops its ultimate case, and it is quite conceivable that the FTC might need to seek such relief before it has settled on the scope of the product or geographic markets implicated by a merger. For example, the FTC may have alternate theories of the merger's anticompetitive harm, depending on inconsistent market definitions. While on the merits, the FTC would have to proceed with only one of those theories, at this preliminary phase it just has to raise substantial doubts about a transaction. One may have such doubts without knowing exactly what arguments will eventually prevail.[FN1] Therefore, a district court's assessment of the FTC's chances will not depend, in every case, on a threshold matter of market definition.

In this case, however, the FTC itself made market definition key. It claimed "[t]he operation of premium natural and organic supermarkets is a distinct 'line of commerce' within the meaning of Section 7," and its theory of anticompetitive effect was that the merger would "substantially increase concentration in the operation of [PNOS]." Compl. ¶¶ 34, 43. Throughout its briefs, the FTC presented a straightforward § 7 case in which "whether the transaction creates an appreciable danger of anticompetitive effects ... depends upon ... [the] relevant product ... [and] geographic market ... and the transaction's probable effect on competition in the product and geographic markets."FTC's Br. Mot. Prelim. Inj. 11-12. It purported to show "undue concentration in the relevant market," as the mainstay of its case. *Id.* at 12. Because of the concentration in the supposed PNOS market, the FTC urged the district court to hold the merger "presumptively unlawful," and this was its sole reason for blocking the merger. FTC's Proposed Conclusions of Law ¶¶ 57-63, 99-108. At oral argument, the FTC's counsel suggested it had other ideas about the anticompetitive effect of the merger even if its PNOS market definition is wrong; but the FTC never offered those ideas to the district court. It is incumbent on the parties to shape a case, and it was hardly an abuse of discretion for the district court to focus on the questions as the FTC presented them.

B

***6** [15] Thus, the FTC assumed the burden of raising some question of whether PNOS is a well-defined market. As the FTC presented its case, success turned on whether there exist core customers, committed to PNOS, for whom one should consider PNOS a relevant market. The district court assumed "the 'marginal' consumer, not the so-called 'core' or 'committed' consumer, must be the focus of any antitrust analysis."*Whole Foods,* 502 F.Supp.2d at 17 (citing Horizontal Merger Guidelines, 57 Fed.Reg. 41,552 (1992)). To the contrary, core consumers can, in appropriate circumstances, be worthy of antitrust protection. *See*Horizontal Merger Guidelines § 1.12, 57 Fed.Reg. at 41,555 (explaining the possibility of price discrimination for "targeted buyers"). The district court's error of law led it to ignore FTC evidence that strongly suggested Whole Foods and Wild Oats compete for core consumers within a PNOS market, even if they also compete on individual products for marginal consumers in the broader market. *See, e.g.,* Appellant's Br. 50, 53.

[16][17] A market "must include all products reasonably interchangeable by consumers for the same purposes."*Microsoft,* 253 F.3d at 52. Whether one product is reasonably interchangeable for another depends not only on the ease and speed with which customers can substitute it and the desirability of doing so, *see id.* at 53-54, but also on the cost of substitution, which depends most sensitively on the price of the products. A broad market may also contain relevant submarkets which themselves "constitute product markets for antitrust purposes."*Brown Shoe,* 370 U.S. at 325, 82 S.Ct. 1502. "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.*

To facilitate this analysis, the Department of Justice and the FTC developed a technique called the SSNIP ("small but significant non-transitory increase in price") test, which both Dr. Murphy and Dr. Scheffman used. In the SSNIP method, one asks whether a hypothetical monopolist controlling all suppliers in the proposed market could profit from a small price increase. Horizontal Merger Guidelines §

1.11, 57 Fed.Reg. at 41, 560-61. If a small price increase would drive consumers to an alternative product, then that product must be reasonably substitutable for those in the proposed market and must therefore be part of the market, properly defined. *Id.*

Experts for the two sides disagreed about how to do the SSNIP of the proposed PNOS market. Dr. Scheffman used a method called critical loss analysis, in which he predicted the loss that would result when marginal customers shifted purchases to conventional supermarkets in response to a SSNIP.[FN2] *Whole Foods,* 502 F.Supp.2d at 18. He concluded a hypothetical monopolist could not profit from a SSNIP, so that conventional supermarkets must be within the same market as PNOS. In contrast, Dr. Murphy disapproved of critical loss analysis generally, preferring a method called critical diversion that asked how many customers would be diverted to Whole Foods and how many to conventional supermarkets if a nearby Wild Oats closed. Whole Foods's internal planning documents indicated at least a majority of these customers would switch to Whole Foods, thus making the closure profitable for a hypothetical PNOS monopolist. One crucial difference between these approaches was that Dr. Scheffman's analysis depended only on the *marginal* loss of sales, while Dr. Murphy's used the *average* loss of customers. Dr. Murphy explained that focusing on the average behavior of customers was appropriate because a core of committed customers would continue to shop at PNOS stores despite a SSNIP.

*7 In appropriate circumstances, core customers can be a proper subject of antitrust concern. In particular, when one or a few firms differentiate themselves by offering a particular package of goods or services, it is quite possible for there to be a central group of customers for whom "only [that package] will do." *United States v. Grinnell Corp.,* 384 U.S. 563, 574, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966); *see also* *United States v. Phillipsburg Nat'l Bank & Trust Co.,* 399 U.S. 350, 360, 90 S.Ct. 2035, 26 L.Ed.2d 658 (1970) ("[I]t is the *cluster* of products and services ... that as a matter of trade reality makes commercial banking a distinct" market.). What motivates antitrust concern for such customers is the possibility that "fringe competition" for individual products within a package may not protect customers who need the whole package from market power exercised by a sole supplier of the package. *Grinnell,* 384 U.S. at 574, 86 S.Ct. 1698.

Such customers may be captive to the sole supplier, which can then, by means of price discrimination, extract monopoly profits from them while competing for the business of marginal customers. *Cf. Md. People's Counsel v. FERC,* 761 F.2d 780, 786-87 (D.C.Cir.1985) (allowing natural gas pipelines to charge higher prices to captive customers would be anticompetitive). Not that prices that segregate core from marginal consumers are in themselves anticompetitive; such pricing simply indicates the existence of a submarket of core customers, operating in parallel with the broader market but featuring a different demand curve. *See United States v. Rockford Mem'l Corp.,* 898 F.2d 1278, 1284 (7th Cir.1990). Sometimes, for some customers a package provides "access to certain products or services that would otherwise be unavailable to them." *Phillipsburg Nat'l Bank & Trust,* 399 U.S. at 360, 90 S.Ct. 2035. Because the core customers require the whole package, they respond differently to price increases from marginal customers who may obtain portions of the package elsewhere. Of course, core customers may constitute a submarket even without such an extreme difference in demand elasticity. After all, market definition focuses on what products are *reasonably* substitutable; what is reasonable must ultimately be determined by "settled consumer preference." *United States v. Phila. Nat'l Bank,* 374 U.S. 321, 357, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963).

[18][19] In short, a core group of particularly dedicated, "distinct customers," paying "distinct prices," may constitute a recognizable submarket, *Brown Shoe,* 370 U.S. at 325, 82 S.Ct. 1502, whether they are dedicated because they need a complete "cluster of products," *Phila. Nat'l Bank,* 374 U.S. at 356, 83 S.Ct. 1715, because their particular circumstances dictate that a product "is the only realistic choice," *SuperTurf, Inc. v. Monsanto Co.,* 660 F.2d 1275, 1278 (8th Cir.1981), or because they find a particular product "uniquely attractive," *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.,* 468 U.S. 85, 112, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984). For example, the existence of core customers dedicated to office supply superstores, with their "unique combination of size,

selection, depth[,] and breadth of inventory," was an important factor distinguishing that submarket. FTC v. Staples, Inc., 970 F.Supp. 1066, 1078-79 (D.D.C.1997). As always in defining a market, we must "take into account the realities of competition." Weiss v. York Hosp., 745 F.2d 786, 826 (3d Cir.1984). We look to the *Brown Shoe* indicia, among which the economic criteria are primary, *see* *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 219 n. 4 (D.C.Cir.1986).

***8** [20] The FTC's evidence delineated a PNOS submarket catering to a core group of customers who "have decided that natural and organic is important, lifestyle of health and ecological sustainability is important." *Whole Foods*, 502 F.Supp.2d at 23 (citing Hr'g Tr. 43-44, Aug. 1, 2007). It was undisputed that Whole Foods and Wild Oats provide higher levels of customer service than conventional supermarkets, a "unique environment," and a particular focus on the "core values" these customers espoused. *Id.* The FTC connected these intangible properties with concrete aspects of the PNOS model, such as a much larger selection of natural and organic products, FTC's Proposed Findings of Fact 13-14 & ¶ 66 (noting Earth Fare, a PNOS, carries "more than 45,000 natural and organic SKUs") and a much greater concentration of perishables than conventional supermarkets, *id.* 14-15 & ¶ 69-70 ("Over 60% of Wild Oats' revenues" and "[n]early 70% of Whole Foods sales are natural or organic perishables."). *See also* *Whole Foods*, 502 F.Supp.2d at 22-23 (citing defendants' depositions as evidence of Whole Foods's and Wild Oats's focus on "high-quality perishables" and a large variety of products).

Further, the FTC documented exactly the kind of price discrimination that enables a firm to profit from core customers for whom it is the sole supplier. Dr. Murphy compared the margins of Whole Foods stores in cities where they competed with Wild Oats. He found the presence of a Wild Oats depressed Whole Foods's margins significantly. Notably, while there was no effect on Whole Foods's margins in the product category of "groceries," where Whole Foods and Wild Oats compete on the margins with conventional supermarkets, the effect on margins for perishables was substantial. Confirming this price discrimination, Whole Foods's documents indicated that when it price-checked conventional supermarkets, the focus was overwhelmingly on "dry grocery," rather than on the perishables that were 70% of Whole Foods's business. Thus, in the high-quality perishables on which both Whole Foods and Wild Oats made most of their money, they competed directly with each other, and they competed with supermarkets only on the dry grocery items that were the fringes of their business.

Additionally, the FTC provided direct evidence that PNOS competition had a greater effect than conventional supermarkets on PNOS prices. Dr. Murphy showed the opening of a new Whole Foods in the vicinity of a Wild Oats caused Wild Oats's prices to drop, while entry by non-PNOS stores had no such effect. Similarly, the opening of Earth Fare stores (another PNOS) near Whole Foods stores caused Whole Foods's prices to drop immediately. The price effect continued, while decreasing, until the Earth Fare stores were forced to close.

Finally, evidence of consumer behavior supported the conclusion that PNOS serve a core consumer base. Whole Foods's internal projections, based on market experience, suggested that if a Wild Oats near a Whole Foods were to close, the majority (in some cases nearly all) of its customers would switch to the Whole Foods rather than to conventional supermarkets. Since Whole Foods's prices for perishables are higher than those of conventional supermarkets, such customers must not find shopping at the latter interchangeable with PNOS shopping. They are the core customers. Moreover, market research, including Dr. Scheffman's own studies, indicated 68% of Whole Foods customers are core customers who share the Whole Foods "core values." FTC Proposed Findings of Fact ¶ 135.

***9** Against this conclusion the defendants posed evidence that customers "cross-shop" between PNOS and other stores and that Whole Foods and Wild Oats check the prices of conventional supermarkets. *Whole Foods*, 502 F.Supp.2d at 30-32. But the fact that PNOS and ordinary supermarkets "are direct competitors in some submarkets ... is not the end of the inquiry," *United States v. Conn. Nat'l Bank*, 418 U.S. 656, 664 n. 3, 94 S.Ct. 2788, 41 L.Ed.2d 1016 (1974). Of course customers cross-shop; PNOS carry comprehensive inventories. The fact that a customer might buy a stick of gum at a supermarket or at a convenience store does not mean there is no definable groceries market. Here, cross-shopping is entirely consistent with the existence of a core group of PNOS customers. Indeed, Dr. Murphy explained that Whole Foods competes actively with conventional supermarkets for dry groceries sales, even though it ignores their prices for high-quality perishables.

In addition, the defendants relied on Dr. Scheffman's conclusion that there is no "clearly definable" core customer. *Whole Foods*, 502 F.Supp.2d at 28.However, this conclusion was inconsistent with Dr. Scheffman's own report and testimony. Market research had found that customers who shop at Whole Foods because they share the core values it champions constituted at least a majority of its customers. Scheffman Expert Report 56-57. Moreover, Dr. Scheffman acknowledged "there are core shoppers [who] will only buy organic and natural" and for that reason go to Whole Foods or Wild Oats. Hr'g Tr. 31, July 31, 2007. He contended they could be ignored because the numbers are not "substantial." *Id.* Again, Dr. Scheffman's own market data undermined this assertion.

In sum, the district court believed the antitrust laws are addressed only to marginal consumers. This was an error of law, because in some situations core consumers, demanding exclusively a particular product or package of products, distinguish a submarket. The FTC described the core PNOS customers, explained how PNOS cater to these customers, and showed these customers provided the bulk of PNOS's business. The FTC put forward economic evidence-which the district court ignored-showing directly how PNOS discriminate on price between their core and marginal customers, thus treating the former as a distinct market. Therefore, we cannot agree with the district court that the FTC would never be able to prove a PNOS submarket. We do not say the FTC has in fact proved such a market, which is not necessary at this point. To obtain a preliminary injunction under § 53(b), the FTC need only show a likelihood of success sufficient, using the sliding scale, to balance any equities that might weigh against the injunction.

V

[21] It remains to address the equities, which the district court did not reach, and see whether for some reason there is a balance against the FTC that would require a greater likelihood of success. The FTC urges us to carry out the rest of this determination, but "[w]e believe the proper course of action at this point is to remand to the district court,"*Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 304 (D.C.Cir.2006). Since the district court "expressly withheld consideration," *id.* at 305, of the equities, we have not had the benefit of its findings. Although the equities in a § 53(b) preliminary injunction proceeding will usually favor the FTC, *Heinz*, 246 F.3d at 726, the district court must independently exercise its discretion considering the circumstances of this case, including the fact that the merger has taken place. We remind the district court that a "risk that the transaction will not occur at all," by itself, is a private consideration that cannot alone defeat the preliminary injunction. *See id.*;*Weyerhaeuser*, 665 F.2d at 1082-83.

***10** We appreciate that the district court expedited the proceeding as a courtesy to the defendants, who wanted to consummate their merger just thirty days after the hearing, *Whole Foods*, 502 F.Supp.2d at 4, but the court should have taken whatever time it needed to consider the FTC's evidence fully. For the reasons stated above, we reverse the district court's conclusion that the FTC showed no likelihood of success in an eventual § 7 case, and we remand for proceedings consistent with this opinion.

So ordered.

TATEL, Circuit Judge, concurring:

I agree with my colleagues that the district court produced a thoughtful opinion under incredibly difficult circumstances, that this case presents a live controversy, and that the district court generally applied the correct standard in reviewing the Federal Trade Commission's request for a preliminary injunction. I also agree with Judge Brown that the district court nonetheless erred in concluding that the FTC failed to "raise[ ] 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 and ultimately by the Court of Appeals."*FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714-15 (D.C.Cir.2001). I write separately because although I agree with Judge Brown that the district court erred in focusing only on marginal customers, I believe the district court also overlooked or mistakenly rejected evidence supporting the FTC's view that Whole Foods and Wild Oats occupy a separate market of "premium natural and organic supermarkets." Also, given the complicated posture of this case, I hope to clarify the district court's task on remand.

I.

"Section 7 of the Clayton Act prohibits acquisitions, including mergers, '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.'"Id. at 713 (quoting 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, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962).

When the FTC believes an acquisition violates section 7 and that enjoining the acquisition pending an investigation "would be in the interest of the public," section 13(b) of the Federal Trade Commission Act authorizes the Commission to ask a federal district court to block the acquisition. 15 U.S.C. § 53(b); Heinz, 246 F.3d at 714.Because Congress concluded that the FTC-an expert agency acting on the public's behalf-should be able to obtain injunctive relief more readily than private parties, it "incorporat[ed] a unique 'public interest' standard in 15 U.S.C. § 53(b), rather than the more stringent, traditional 'equity' standard for injunctive relief."FTC v. Exxon Corp., 636 F.2d 1336, 1343 (D.C.Cir.1980) (citing H.R.REP. NO. 93-624, at 31 (1973), 1973U.S.Code Cong. & Admin.News. 2523). Under this more lenient rule, a district court may grant the FTC's requested 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). In this circuit, "the standard for likelihood of success on the merits is met if the FTC '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 and ultimately by the Court of Appeals.'"Heinz, 246 F.3d at 714-15 (quoting FTC v. Beatrice Foods Co., 587 F.2d 1225, 1229 (D.C.Cir.1978) (Appendix to Joint Statement of Judges MacKinnon & Robb)); *accord* FTC v. Freeman Hosp., 69 F.3d 260, 267 (8th Cir.1995); FTC v. Warner Commc'ns, Inc., 742 F.2d 1156, 1162 (9th Cir.1984).

***11** Critically, the district court's task is not "to determine whether the antitrust laws have been or are about to be violated. That adjudicatory function is vested in the FTC in the first instance."Heinz, 246 F.3d at 714 (quoting FTC v. Food Town Stores, Inc., 539 F.2d 1339, 1342 (4th Cir.1976)). As Judge Posner has explained:

> One of the main reasons for creating the Federal Trade Commission and giving it concurrent jurisdiction to enforce the Clayton Act was that Congress distrusted judicial determination of antitrust questions. It thought the assistance of an administrative body would be helpful in resolving such questions and indeed expected the FTC to take the leading role in enforcing the Clayton Act....

Hosp. Corp. of Am. v. FTC, 807 F.2d 1381, 1386 (7th Cir.1986). Thus, though the dissent never acknowledges as much, the district court's task-as well as ours on review-is limited to determining whether the FTC has raised "serious, substantial" questions meriting further investigation. Heinz, 246 F.3d at 714.If it has, the district court should proceed to weigh the equities.

II.

In this case the district court concluded that the FTC had failed to raise the "serious, substantial" questions necessary to show a likelihood of success on the merits. FTC v. Whole Foods Market, Inc., 502 F.Supp.2d 1, 49 (D.D.C.2007). Following the FTC's lead, the court focused on defining the product market in which Whole Foods and Wild Oats operate, saying:

> [I]f the relevant product market is, as the FTC alleges, a product market of "premium natural and organic supermarkets" ..., there can be little doubt that the acquisition of the second largest firm in the market by the largest firm in the market will tend to harm competition in that market. If, on the other hand, the defendants are merely differentiated firms operating within the larger relevant product market of "supermarkets," the proposed merger

will not tend to harm competition.

Whole Foods, 502 F.Supp.2d at 8. Thus, the " 'case hinge[d]'-almost entirely-'on the proper definition of the relevant product market.' " Id. (quoting FTC v. Staples, Inc., 970 F.Supp. 1066, 1073 (D.D.C.1997)). And after reviewing the evidence, the district court concluded that "[t]here is no substantial likelihood that the FTC can prove its asserted product market and thus no likelihood that it can prove that the proposed merger may substantially lessen competition or tend to create a monopoly."Id. at 49-50.

I agree with the district court that this " 'case hinges'-almost entirely-'on the proper definition of the relevant product market,' " for if a separate natural and organic market exists, "there can be little doubt that the acquisition of the second largest firm in the market by the largest firm in the market will tend to harm competition in that market."Id. at 8 (quoting Staples, 970 F.Supp. at 1073). But I respectfully part ways with the district court when it comes to assessing the FTC's evidence in support of its contention that Whole Foods and Wild Oats occupy a distinct market. As the Supreme Court explained in Brown Shoe Co. v. United States:"The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."370 U.S. at 325, 82 S.Ct. 1502.In this case the FTC presented a great deal of credible evidence-either unmentioned or rejected by the district court-suggesting that Whole Foods and Wild Oats are not "reasonabl[y] interchangeab[le]" with conventional supermarkets and do not compete directly with them.

***12** To begin with, the FTC's expert prepared a study showing that when a Whole Foods opened near an existing Wild Oats, it reduced sales at the Wild Oats store dramatically. *See* Expert Report of Kevin M. Murphy ¶¶ 48-49 & exhibit 3 (July 9, 2007) ("Murphy Report"). By contrast, when a conventional supermarket opened near a Wild Oats store, Wild Oats's sales were virtually unaffected. *See id.*This strongly suggests that although Wild Oats customers consider Whole Foods an adequate substitute, they do not feel the same way about conventional supermarkets. Rejecting this study, the district court explained that it was "unwilling to accept the assumption that the effects on Wild Oats from Whole Foods' entries provide a mirror from which predictions can reliably be made about the effects on Whole Foods from Wild Oats' future exits if this transaction occurs."Whole Foods, 502 F.Supp.2d at 21.But even if exit and entry events differ, this evidence suggests that consumers do not consider Whole Foods and Wild Oats "reasonabl[y] interchangeab[le]" with conventional supermarkets. Brown Shoe, 370 U.S. at 325, 82 S.Ct. 1502.

The FTC also highlighted Whole Foods's own study-called "Project Goldmine"-showing what Wild Oats customers would likely do after the proposed merger in cities where Whole Foods planned to close Wild Oats stores. According to the study, the average Whole Foods store would capture most of the revenue from the closed Wild Oats store, even though virtually every city contained multiple conventional retailers closer to the shuttered Wild Oats store. *See* Murphy Report ¶ 70 & app. C; Rebuttal Expert Report of Kevin M. Murphy ¶¶ 31-32 (July 13, 2007) ("Murphy Rebuttal"). This high diversion ratio further suggests that many consumers consider conventional supermarkets inadequate substitutes for Wild Oats and Whole Foods. The district court cited the Project Goldmine study for the opposite conclusion, pointing only to cities in which Whole Foods expected to receive a low percentage of Wild Oats's business. *Whole Foods,* 502 F.Supp.2d at 34.These examples, however, do not undermine the study's broader conclusion that Whole Foods would capture most of the revenue from the closed Wild Oats, and the district court never mentioned the FTC expert's testimony that the diversion ratio estimated here "is at least {**Sealed**}*times* the diversion ratio[ ] needed to make a price increase of 5% profitable for a joint owner of the two stores."Murphy Rebuttal ¶ 32. The dissent also ignores this testimony, saying incorrectly that the Project Goldmine study "says nothing about whether Whole Foods could impose a five percent or more price increase."Dissenting Op. at ----.

Several industry studies predating the merger also suggest that Whole Foods and Wild Oats never truly competed with conventional supermarkets. For example, a study prepared for Whole Foods by an outside consultant concludes that {**Sealed material redacted**} Tinderbox Consulting, Exploring Private Label Organic Brands 4. Another study concludes that "[w]hile th[e] same consumer shops" at both "mainstream grocers such as Safeway" and "large-format natural foods store[s] such as Wild Oats or Whole Foods Market,""they tend to shop at each for different things (e.g., Wild Oats for fresh and specialty items, Safeway for canned and packaged goods)."THE HARTMAN GROUP, ORGANIC 2006, at ch. 8, p. 1 (May 1, 2006). In addition, Wild Oats's former CEO, Perry Odak, explained in a deposition why conventional stores have difficulty competing with Whole Foods and Wild Oats: if conventional stores offer a lot of organic products, they don't sell enough to their existing customer base, leaving the stores with spoiled products and reduced profits. But if conventional stores offer only a narrow range of organic products, customers with a high demand for organic items refuse to shop there. Thus, "the conventionals have a very difficult time getting into this business."Investigational Hearing of Perry Odak 77-78 (quoted in Murphy Report ¶ 77) ("Odak Hearing"). The district court mentioned none of this.

*13 In addition to all this direct evidence that Whole Foods and Wild Oats occupy a separate market from conventional supermarkets, the FTC presented an enormous amount of evidence of "industry or public recognition" of the natural and organic market "as a separate economic entity"-one of the "practical indicia" the Supreme Court has said can be used to determine the boundaries of a distinct market. *Brown Shoe*, 370 U.S. at 325, 82 S.Ct. 1502.For example, dozens of record studies about the grocery store industry-including many prepared for Whole Foods or Wild Oats-distinguish between "traditional" or "conventional" grocery stores on the one hand and "natural food" or "organic" stores on the other. *See, e.g.,*FOOD MKTG. INST., U.S. GROCERY SHOPPER TRENDS 2007, at 20-22 (2007). Moreover, record evidence indicates that the Whole Foods and Wild Oats CEOs both believed that their companies occupied a market separate from the conventional grocery store industry. In an email to his company's board, Whole Foods CEO John Mackey explained that "[Wild Oats] is the only existing company that has the brand and number of stores to be a meaningful springboard for another player to get into this space. Eliminating them means eliminating this threat forever, or almost forever."Email from John Mackey to John Elstrott et al. (Feb. 15, 2007). Echoing this point, former Wild Oats CEO Perry Odak said that "there's really only two players of any substance in the organic and all natural [market], and that's Whole Foods and Wild Oats.... [T]here's really nobody else in that particular space."Odak Hearing 58. Executives from several conventional retailers agreed, explaining that Whole Foods and Wild Oats are not {**Sealed material redacted**} Dep. of Rojon Diane Hasker 128-29 (July 10, 2007) ("Hasker Dep."). As Judge Bork explained, this evidence of " 'industry or public recognition of the submarket as a separate economic' unit matters because we assume that economic actors usually have accurate perceptions of economic realities."*Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 n. 4 (D.C.Cir.1986).

The FTC also presented strong evidence that Whole Foods and Wild Oats have "peculiar characteristics" distinguishing them from traditional supermarkets, another of the "practical indicia" the Supreme Court has said can be used to determine the boundaries of a distinct market. *Brown Shoe*, 370 U.S. at 325, 82 S.Ct. 1502.Most important, unlike traditional grocery stores, both Whole Foods and Wild Oats carry only natural or organic products. *See* http:// www.wholefoodsmarket.com/products/index.html ("We carry natural and organic products ... unadulterated by artificial additives, sweeteners, colorings, and preservatives...."). Glossing over this distinction, the dissent says "the dividing line between 'organic' and conventional supermarkets has been blurred" because "[m]ost products that Whole Foods sells are not organic" while "conventional supermarkets" have begun selling more organic products. Dissenting Op. at ----. But the FTC never defined its proposed market as "organic supermarkets," it defined it as "premium natural and organic supermarkets." And everything Whole Foods sells is natural and/or organic, while many of the things sold by traditional grocery stores are not. *See, e.g.,* Hasker Dep. 130-34; http://www.wholefoodsmarket.com/products/ unacceptablefoodingredients.html (explaining that Whole Foods refuses to carry any food item containing one of dozens of "unacceptable food ingredients," ingredients that can be found in countless products at traditional grocery stores).

*14 Insisting that all this evidence of a separate market is irrelevant, Whole Foods and the dissent argue that the FTC's case must fail because the record contains no evidence that Whole Foods or Wild Oats charged higher prices in cities where the other was absent-i.e., where one had a local monopoly on the asserted natural and organic market-than they did in cities where the other was present. This argument is both legally and factually incorrect.

As a legal matter, although evidence that a company charges more when other companies in the alleged market are absent certainly indicates that the companies operate in a distinct market, *see, e.g., Staples*, 970 F.Supp. at 1075-77, that is not the *only* way to prove a separate market. Indeed, *Brown Shoe* lists "distinct prices" as only one of a non-exhaustive list of seven "practical indicia" that may be examined to determine whether a separate market exists. 370 U.S. at 325, 82 S.Ct. 1502.Furthermore, even if the FTC could *prove* a section 7 violation only by showing evidence of higher prices in areas where a company had a local monopoly in an alleged market, the FTC need not *prove* a section 7 violation to obtain a preliminary injunction; rather, it need only raise "serious, substantial" questions as to the merger's legality.*Heinz*, 246 F.3d at 714.Thus, the dissent misses the mark when it cites the FTC's Horizontal Merger Guidelines to assert that the Commission may obtain a preliminary injunction only by presenting "solid evidence that the post-merger company could profitably impose a significant nontransitory price increase of 5% or more."Dissenting Op. at ----. Such evidence in a case like this, which turns entirely on market definition, would be enough *to prove* a section 7 violation in the FTC's administrative proceeding. *See Hosp. Corp.*, 807 F.2d at 1389 (stating that "[a]ll that is necessary" to prove a section 7 case "is that the merger create an appreciable danger of [higher prices] in the future"). Yet our precedent clearly holds that to obtain a preliminary injunction "[t]he FTC is not required to *establish* that the proposed merger would in fact violate section 7 of the Clayton Act."*Heinz*, 246 F.3d at 714.Moreover, the Merger Guidelines-which "are by no means to be considered binding on the court,"*FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1503 n. 4 (D.C.Cir.1986)-specify how the FTC decides which cases to bring, "*not*... how the Agency will conduct the litigation of cases that it decides to bring," Horizontal Merger Guidelines § 0.1 (emphasis added); *see also id.*("[T]he Guidelines do not attempt to assign the burden of proof, or the burden of coming forward with evidence, on any particular issue.").

In any event, the FTC did present evidence indicating that Whole Foods and Wild Oats charged more when they were the only natural and organic supermarket present. The FTC's expert looked at prices Whole Foods charged in several of its North Carolina stores before and after entry of a regional natural food chain called Earth Fare. Before any Earth Fare stores opened, Whole Foods charged essentially the same prices at its five North Carolina stores, but when an Earth Fare opened near the Whole Foods in Chapel Hill, that store's prices dropped 5% below those at the other North Carolina Whole Foods. *See* Tr. of Mots. Hr'g, Morning Session 125-30 (July 31, 2007); Supplemental Rebuttal Expert Report of Kevin M. Murphy ¶¶ 2-6 (July 16, 2007) ("Murphy Supp."). Prices at that store remained lower than at the other Whole Foods in North Carolina for {**Sealed material redacted**} *See* Murphy Supp. ¶¶ 4-5. Whole Foods followed essentially the same pattern when an Earth Fare opened near its stores in Raleigh and Durham-the company dropped prices at those stores but nowhere else in North Carolina. *See id.;*Tr. of Mots. Hr'g, Morning Session 127 (July 31, 2007). The FTC's expert presented similar evidence regarding Whole Foods's impact on Wild Oats's prices, showing that a new Whole Foods store opening near a Wild Oats caused immediate and lasting reductions in prices at that Wild Oats store compared to prices at other Wild Oats stores. *See* Tr. of Mots. Hr'g, Morning Session 132 (July 31, 2007); Murphy Report ¶¶ 57-59 & exhibit 5. In addition to this quantitative evidence, the FTC pointed to Whole Foods CEO John Mackey's statement explaining to the company's board why the merger made sense: "By buying [Wild Oats] we will ... avoid nasty price wars in [several cities where both companies have stores]." Email from John Mackey to John Elstrott et al. (Feb. 15, 2007).

***15** The dissent raises two primary arguments against this pricing evidence. First, it relies on a study by Whole Foods's expert to conclude that "Whole Foods prices did not differ based on the presence or absence of a Wild Oats in the area," Dissenting Op. at ----, calling this "all-but-dispositive price evidence," *id.* at ----.In fact, this study is all-but-meaningless price evidence because it examined Whole Foods's pricing on a single day several months *after* the company announced its intent to acquire Wild Oats; this gave the company every incentive to eliminate any price differences that may have previously existed between its stores based on the presence of a nearby Wild

Oats, not only to avoid antitrust liability, but also because the company was no longer competing with Wild Oats. *See* Hosp. Corp., 807 F.2d at 1384 ("[E]vidence that is subject to manipulation by the party seeking to use it is entitled to little or no weight."). Second, the dissent asserts that all Mackey's statements are irrelevant because-it claims-anticompetitive "intent is not an element of a § 7 claim."Dissenting Op. at ----. But the Supreme Court has clearly said that "evidence indicating the purpose of the merging parties, where available, *is an aid* in predicting the probable future conduct of the parties and thus the probable effects of the merger."*Brown Shoe*, 370 U.S. at 329 n. 48, 82 S.Ct. 1502 (emphasis added); *see also* 4A PHILLIP E. AREEDA ET AL., ANTITRUST LAW ¶ 964a (2d ed. 2006) ("[E]vidence of anticompetitive intent cannot be disregarded.").

To be sure, the pricing evidence here is unquestionably less compelling than the pricing evidence in some other cases, and perhaps this will make a difference in the Commission's ultimate evaluation of this merger. *Cf.* *Staples*, 970 F.Supp. at 1075-77 (showing price differences of up to 13% where competitors were absent). But at this preliminary, pre-hearing stage, the pricing evidence here, together with the other evidence described above, is certainly enough to raise "serious, substantial" questions that are "fair ground for thorough investigation, study, deliberation, and determination by the FTC."*Heinz*, 246 F.3d at 714-15.

Attempting to make these serious questions disappear, Whole Foods points to evidence the district court cited in concluding that the FTC could never prove a separate natural and organic market. That evidence, however, fails to overcome the "serious, substantial" questions the FTC's evidence raises.

To begin with, the district court relied on a study by a Whole Foods expert concluding that the post-merger company would be unable to impose a statistically significant non-transitory increase in price because the "actual loss" from such an increase would exceed the "critical loss"-the point at which the revenue gained from raising prices equals the revenue lost from reduced sales. As the majority opinion explains, however, that study ignores core customers. Maj. Op. at ---- - ----. Moreover, using a slightly different methodology, the FTC's expert reached the exact opposite conclusion, finding that the combined company could impose a statistically significant non-transitory increase in price. Murphy Report ¶ 147. He also raised a number of criticisms of the Whole Foods expert's study. Most important, he pointed out that the Whole Foods expert "provide[d] literally no quantitative evidence for the magnitude of the Actual Loss ... and no methodology for calculating the Actual Loss."Murphy Rebuttal ¶ 11. He further argued that the Whole Foods expert's study embodied a widely recognized flaw in critical loss analysis, namely that such analysis often overestimates actual loss when a company has high margins-which Whole Foods does. *See id.* ¶¶ 6-16 (explaining that when a company has high margins the critical loss is small, so one might predict an "Actual Loss greater than the Critical Loss," but "this story is very incomplete because a high margin tends to imply a small Actual Loss" given that high margins suggest customers are price insensitive (quoting Michael L. Katz & Carl Shapiro, *Further Thoughts on Critical Loss,*ANTITRUST SOURCE, March 2004, at 1, 2)); *see also* Daniel P. O'Brien & Abraham L. Wickelgren, *A Critical Analysis of Critical Loss Analysis*, 71 ANTITRUST L.J. 161, 162 (2003). In light of these cogent criticisms-which neither Whole Foods's expert nor the district court ever addressed-this study cannot eliminate the "serious, substantial" questions the FTC's evidence raises. Although courts certainly must evaluate the evidence in section 13(b) proceedings and may safely reject expert testimony they find unsupported, they trench on the FTC's role when they choose between plausible, well-supported expert studies.

***16** The district court next emphasized that when a new Whole Foods store opens, it takes business from conventional grocery stores, and even when an existing Wild Oats is nearby, most of the new Whole Foods store's revenue comes from customers who previously shopped at conventional stores. According to the district court, this led "to the inevitable conclusion that Whole Foods' and Wild Oats' main competitors are other supermarkets, not just each other."*Whole Foods*, 502 F.Supp.2d at 21.As the FTC points out, however, "an innovative [product] can create a new product market for antitrust purposes" by "satisfy[ing] a previously-unsatisfied consumer demand."Appellant's Opening Br. 50. To use the Commission's example, when the automobile was first invented, competing auto manufacturers obviously took customers primarily from companies selling horses and buggies, not from other auto manufacturers, but that hardly shows that cars and horse-drawn carriages should be treated as the same product market. That Whole Foods and Wild Oats have attracted many customers away from conventional grocery stores by offering extensive selections of natural and organic products thus tells us nothing about whether Whole Foods and Wild Oats should be treated as operating in the same market as conventional grocery stores. Indeed, courts have often found that sufficiently innovative retailers can constitute a distinct product market even when they take customers from existing retailers. *See, e.g., Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 712-14 (7th Cir.1979) (finding a distinct market of drive-up photo-processing companies even though such companies took photo-processing customers from drugstores, camera stores, and supermarkets); *Staples*, 970 F.Supp. at 1077 (finding a distinct market of office supply superstores even though such stores took sales primarily from mail-order catalogues and stores carrying a broader range of merchandise).

The district court also cited evidence that Whole Foods compares its prices to those at conventional stores, not just natural foods stores. But nearly all of the items on which Whole Foods checks prices are dry grocery items, even though nearly 70% of Whole Foods's revenue comes from perishables. Murphy Report ¶ 77. As the majority opinion explains, this suggests that any competition between Whole Foods and conventional retailers may be limited to a narrow range of products that play a minor role in Whole Foods's profitability. Maj. Op. at ----.

Finally, the district court observed that more and more conventional stores are carrying natural and organic products, and that consumers who shop at Whole Foods and Wild Oats also shop at conventional stores. But as noted above, other record evidence suggests that although some conventional retailers are beginning to offer a limited range of popular organic products, they have difficulty competing with Whole Foods and Wild Oats. *See* Murphy Report ¶ 77. As Whole Foods CEO John Mackey put it: "[Wild Oats] is the *only existing company* that has the brand and number of stores to be a meaningful springboard for another player to get into this space. Eliminating them means *eliminating this threat forever, or almost forever.*" Email from John Mackey to John Elstrott et al. (Feb. 15, 2007) (emphasis added). Other studies show that "[w]hile th[e] same consumer shops" at both "mainstream grocers such as Safeway" and "large-format natural foods store[s] such as Wild Oats or Whole Foods,""they tend to shop at each for different things."THE HARTMAN GROUP, ORGANIC 2006, at ch. 8, p. 1 (May 1, 2006); *see also Photovest*, 606 F.2d at 714 ("The law does not require an exclusive class of customers for each relevant submarket.").

*17 In sum, much of the evidence Whole Foods points to is either entirely unpersuasive or rebutted by credible evidence offered by the FTC. Of course, this is not to say that the FTC will necessarily be able to prove its asserted product market in an administrative proceeding: as the district court recognized, Whole Foods has a great deal of evidence on its side, evidence that may ultimately convince the Commission that no separate market exists. But at this preliminary stage, the FTC's evidence plainly establishes a reasonable probability that it will be able to prove its asserted market, and given that this " 'case hinges'-almost entirely-'on the proper definition of the relevant product market,' "*Whole Foods*, 502 F.Supp.2d at 8 (quoting *Staples*, 970 F.Supp. at 1073), this is enough to raise "serious, substantial" questions meriting further investigation by the FTC, *Heinz*, 246 F.3d at 714.

III.

Because we have decided that the FTC showed the requisite likelihood of success by raising serious and substantial questions about the merger's legality, all that remains is to "weigh the equities in order to decide whether enjoining the merger would be in the public interest."*Id.* at 726.Although in some cases we have conducted this weighing ourselves, *see, e.g., id.* at 726-27, three factors lead me to agree with Judge Brown that the better course here is to remand to the district court for it to undertake this task. First, in cases in which we have weighed the equities, the district court had already done so, giving us the benefit of its factfinding and reasoning. *See, e.g., id.*Here, by contrast, the district court never reached the equities and the parties have not briefed the issue, leaving us without the evidence needed to decide this question. *See Whole Foods*, 502 F.Supp.2d at

50.Second, this case stands in a unique posture, for in cases where we reversed a district court's denial of a section 13(b) injunction, either the district court or this court had enjoined the merger pending appeal. *See* Heinz, 246 F.3d at 713;*PPG Indus.*, 798 F.2d at 1501 n. 1. Here, by contrast, the companies have already merged, and although this doesn't moot the case, it may well affect the balance of the equities, likely requiring the district court to take additional evidence. Finally, given this case's unique posture, the usual remedy in section 13(b) cases-blocking the merger-is no longer an option. Therefore, if the district court concludes that the equities tilt in the FTC's favor, it will need to craft an alternative, fact-bound remedy sufficient to achieve section 13(b)'s purpose, namely allowing the FTC to review the transaction in an administrative proceeding and reestablish the premerger status quo if it finds a section 7 violation. To accomplish this, the district court could choose anything from issuing a hold separate order, *see FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1083-84 (D.C.Cir.1981), to enjoining further integration of the companies, to ordering the transaction partially or entirely rescinded, *see FTC v. Elders Grain*, 868 F.2d 901, 907-08 (7th Cir.1989) (Posner, J.). Without more facts, however, we are in no position to suggest which remedy is most appropriate.

***18** Given the novel and significant task the district court faces on remand, I think it important to emphasize the principles that should guide its weighing of the equities. To begin with, as this court has held, "a likelihood of success finding weighs heavily in favor of a preliminary injunction blocking the acquisition,"*Weyerhaeuser*, 665 F.2d at 1085,"creat[ing] a presumption in favor of preliminary injunctive relief,"*Heinz*, 246 F.3d at 726.That said, the district court must still weigh the public and private equities "to decide whether enjoining the merger would be in the public interest."*Id.*"The principal public equity weighing in favor of issuance of preliminary injunctive relief is the public interest in effective enforcement of the antitrust laws."*Id.* That is, because "[a]dministrative experience shows that the Commission's inability to unscramble merged assets frequently prevents entry of an effective order of divestiture" after administrative proceedings, *FTC v. Dean Foods Co.*, 384 U.S. 597, 607 n. 5, 86 S.Ct. 1738, 16 L.Ed.2d 802 (1966), the court must place great weight on the public interest in blocking a possibly anticompetitive merger before it is complete. Here, of course, the merger has already been consummated, although as the FTC points out, the process of combining the two companies is far from complete. Thus, the district court must consider the extent to which any of the remedial options mentioned above would make it easier for the FTC to separate Wild Oats and Whole Foods after the Commission's administrative proceeding (should it find a section 7 violation) than it would be if the court did nothing. The court must then weigh this and any other equities opposing the merger against any public and private equities that support allowing the merger to proceed immediately.

In conducting this weighing, if Whole Foods can show no public equities in favor of allowing the merger to proceed immediately-such as increased employment or reduced prices-the district court should go no further, for "[w]hen the Commission demonstrates a likelihood of ultimate success, a countershowing of private equities alone [does] not suffice to justify denial of a preliminary injunction barring the merger."*Weyerhaeuser*, 665 F.2d at 1083.But if Whole Foods can show some public equity favoring the merger, then the court should also consider private equities on Whole Foods's side of the ledger, such as whether it would allow an otherwise failing firm to survive. That said, "[w]hile it is proper to consider private equities in deciding whether to enjoin a particular transaction, we must afford such concerns little weight, lest we undermine section 13(b)'s purpose of protecting the public-at-large, rather than the individual private competitors."*Heinz*, 246 F.3d at 727 n. 25 (quoting *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1225 (11th Cir.1991)) (internal quotation marks omitted). Moreover, "[w]e do not rank as a private equity meriting weight a mere expectation of private gain from a transaction the FTC has shown is likely to violate the antitrust laws."*Weyerhaeuser*, 665 F.2d at 1083 n. 26.In other words, even if allowing the merger to proceed would increase Whole Foods's profits, that is irrelevant to the private equities under section 13(b).

KAVANAUGH, Circuit Judge, dissenting:
***19** The Federal Trade Commission continues to seek a preliminary injunction to block further implementation of the Whole Foods-Wild Oats merger as anticompetitive under § 7 of the Clayton Act. As in many antitrust cases, the analysis comes

down to one issue: market definition. Is the relevant product market here *all* supermarkets? Or is the relevant product market here only so-called "organic supermarkets"? If the former, as Whole Foods argues, the Whole Foods-Wild Oats merger would be lawful because it would not lessen competition in the broad market of all supermarkets: Whole Foods and Wild Oats together operate about 300 of the approximately 34,000 supermarkets in the United States. If the latter, as the FTC contends, the merger may be unlawful: Whole Foods and Wild Oats are the only significant competitors in the alleged organic-store market and their merger would substantially lessen competition in such a narrowly defined market.

A year ago, after a lengthy evidentiary hearing and in an exhaustive and careful opinion, the District Court found that the record evidence overwhelmingly supports the following conclusions: Whole Foods competes against all supermarkets and not just so-called organic stores; the relevant market for evaluating this merger for antitrust purposes is all supermarkets; and the merger of Whole Foods and Wild Oats would not substantially lessen competition in a market that includes all supermarkets. The court therefore denied the FTC's motion for a preliminary injunction.

And nearly a year ago, a three-judge panel of this Court unanimously denied the FTC's request for an injunction pending appeal, thereby allowing the Whole Foods-Wild Oats deal to close. Since then, the merged entity has shut down, sold, or converted numerous Wild Oats stores and otherwise effectuated the merger through many changes in supplier contracts, leases, distribution, and the like.

But today the panel majority seeks to unring the bell. In my judgment, this Court got it right a year ago in refusing to enjoin the merger, and there is no basis for a changed result now. To justify the different outcome, the majority opinion suggests that the standard we applied a year ago in considering the motion for an injunction pending appeal of the denied preliminary injunction was different from the standard we apply today in reviewing the denied preliminary injunction. But in this context, the two standards converge. Both a year ago and today, the same central question has been before the Court in determining whether to approve an injunction: whether the FTC demonstrated the necessary "likelihood of success" on its § 7 case. A year ago, the Court said no. Today, the Court says yes. The now-merged entity and the markets no doubt will be confused if not bewildered by this apparent judicial about-face.

In any event, putting aside what happened before, we should affirm the District Court's decision denying a preliminary injunction. As the District Court concluded, the record evidence convincingly shows that Whole Foods competes vigorously against all supermarkets, not just other so-called organic supermarkets. The record contains insufficient evidence to support the FTC's theory that so-called organic supermarkets are their own separate market and that Whole Foods therefore would be able to significantly increase prices as a result of this merger. That should end this case.

***20** In arguing otherwise, the FTC commits the basic antitrust mistake of confusing (i) product differentiation (which is how a seller such as Whole Foods competes within a market) and (ii) separate product markets. Discerning the difference in a particular case usually turns on pricing information. Here, the pricing evidence shows that Whole Foods prices did not differ based on the presence or absence of a Wild Oats in the area and that conventional supermarkets constrain Whole Foods prices. The relevant product market therefore is all supermarkets.

On a different tack, the FTC touts its own statutorily assigned role in antitrust merger enforcement, and the agency says that the District Court applied the wrong standard to the FTC's request for a preliminary injunction. With all due respect, I do not believe that the law allows the FTC to just snap its fingers and block a merger. "Merger enforcement, like other areas of antitrust, is directed at market power."FTC v. H.J. Heinz Co., 246 F.3d 708, 713 (D.C.Cir.2001) (internal quotation marks omitted). And even at the preliminary injunction stage, our precedents expressly require that the FTC show a "likelihood of success on the merits."*Id.* at 714.[FN3]At the preliminary injunction stage, therefore, the FTC needs to come forward with some solid evidence that the post-merger company could profitably impose a "small but significant and nontransitory increase in price," typically meaning a five percent or greater price increase. Horizontal Merger Guidelines § 1.11

(internal quotation marks omitted); *see*15 U.S.C. § 18. As the District Court concluded, the FTC did not come close to presenting that kind of evidence in this case; it completely failed to make the economic showing that is Antitrust 101. Unbowed by the lack of economic underpinnings to the FTC's case, the FTC's counsel actually said at oral argument that the merger should be blocked even if there is no separate organic-stores market, a rather stunning suggestion at odds with modern antitrust law. Tr. of Oral Arg. at 17. By seeking to block a merger without a plausible showing that so-called organic stores constitute a separate product market and that the merged entity could impose a significant and nontransitory price increase, the FTC's position calls to mind the bad old days when mergers were viewed with suspicion regardless of their economic benefits. *See generally*ROBERT H. BORK, THE ANTITRUST PARADOX (1978).

In short, I agree with and would affirm the District Court's excellent decision denying the FTC's motion to enjoin the merger of Whole Foods and Wild Oats. *See FTC v. Whole Foods Mkt., Inc.,* 502 F.Supp.2d 1 (D.D.C.2007). In this dissenting opinion, I will not attempt to replicate the District Court's lengthy description of the evidence and its thorough analysis; I will simply address the key points that are dispositive in what I find to be a straightforward case.

I

A

Section 7 of the Clayton Act prohibits mergers "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. The Horizontal Merger Guidelines jointly promulgated by two Executive Branch agencies (the Department of Justice and the FTC) implement that statutory directive and recognize that the key initial step in the analysis is proper product-market definition. *See*Horizontal Merger Guidelines § 1.11; *see also* 2B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 536, at 284-85 (3d ed.2007). Proper product-market analysis focuses on products' interchangeability of use or cross-elasticity of demand. A product "market can be seen as the array of producers of substitute products that could control price if united in a hypothetical cartel or as a hypothetical monopoly."*Id.* ¶ 530a, at 226.In the merger context, the inquiry therefore comes down to whether the merged entity could profitably impose a "small but significant and nontransitory increase in price" typically defined as five percent or more. *See*Horizontal Merger Guidelines § 1.11 (internal quotation marks omitted). If the merged entity could profitably impose at least a five percent price increase (because the price increase would not cause a sufficient number of consumers to switch to substitutes outside of the alleged product market), then there is a distinct product market and the proposed merger likely would substantially lessen competition in that market, in violation of § 7 of the Clayton Act.

***21** In considering whether the merged entity could increase prices, courts of course recognize that "future behavior must be inferred from historical observations."AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 530a, at 226. Therefore, the courts scrutinize existing markets to assess the probable effects of a merger.

This approach was applied sensibly by Judge Hogan in his thorough and leading opinion in *FTC v. Staples,* 970 F.Supp. 1066 (D.D.C.1997). There, Judge Hogan found that office products sold by an office superstore were functionally interchangeable with office products sold at other types of stores, but he nonetheless found that office-supply superstores constituted a distinct product market. One key fact led Judge Hogan to that conclusion: In areas where Staples was the only office superstore, it was able to set prices significantly higher than in areas where it competed with other office superstores (Office Depot and OfficeMax).*See id.* at 1075-76.For example, the FTC presented "compelling evidence" that Staples's prices were 13 percent higher in areas where no office-superstore competitors were present. *Id.* Judge Hogan ultimately concluded that "[t]his evidence all suggests that office superstore *prices* are affected primarily by other office superstores and not by non-superstore competitors."*Id.* at 1077 (emphasis added). For that reason, he enjoined the merger of Staples and Office Depot.

B

Consistent with the statute, the Executive Branch's Merger Guidelines, and Judge Hogan's convincing opinion in Staples, the District Court here carefully analyzed the economics of supermarkets, including so-called organic supermarkets. The court considered whether Whole Foods charged higher prices in areas without Wild Oats than in areas with Wild Oats. After an evidentiary hearing and based on a painstaking review of the evidence in the record, the court concluded that "Whole Foods prices are essentially the same at all of its stores in a region, regardless of whether there is a Wild Oats store nearby."*FTC v. Whole Foods Mkt., Inc.*, 502 F.Supp.2d 1, 22 (D.D.C.2007). That factual conclusion was supported by substantial evidence offered by Dr. Scheffman, Whole Foods's expert, and by the lack of any credible evidence to the contrary.

Dr. Scheffman analyzed Whole Foods's actual prices across stores and concluded that "there is no evidence that [Whole Foods] and [Wild Oats] price higher" where they face no competition from so-called organic supermarkets compared with where they do face such competition. Scheffman Expert Report ¶ 292, at 113. At a regional level, his studies revealed that only a "very small percentage" of products vary in price within a region, indicating that "prices are set across broad geographic areas."*Id.* ¶ 300, at 116.He also analyzed prices at the individual store level, examining how many products sold at a specific store have prices that differ from the most common price in the region. He found that "differences in prices across stores are generally very small (less than one half of one percent) and there is no systematic pattern as to the presence or absence of [organic-supermarket] competition."*Id.* ¶ 305, at 118.

***22** Moreover, the record evidence in this case does not show that Whole Foods changed its prices in any significant way in response to exit from an area by Wild Oats. In the four cases where Wild Oats exited and a Whole Foods store remained, there is no evidence in the record that Whole Foods then raised prices. Nor was there any evidence of price increases after Whole Foods took over two Wild Oats stores.

The facts here contrast starkly with Staples, where Staples charged significantly different prices based on the presence or absence of office-superstore competitors in a particular area. The evidence there showed that Staples charged prices 13 percent higher in markets without office-superstore competitors than in markets with such competitors. There is nothing remotely like that in this case.

In the absence of any evidence in the record that Whole Foods was able to (or did) set higher prices when Wild Oats exited or was absent, the District Court correctly concluded that Whole Foods competes in a market composed of all supermarkets, meaning that "all supermarkets" is the relevant product market and that the Whole Foods-Wild Oats merger will not lessen competition in that product market.

In addition to the all-but-dispositive price evidence,[FN4] the District Court identified other factors further demonstrating that the relevant market consists of all supermarkets.

First, the record shows that Whole Foods makes site selection decisions based on all supermarkets and checks prices against all supermarkets, not only so-called organic supermarkets. As Dr. Scheffman concluded, Whole Foods "price checks a broad set of competitors ... nationally, regionally and locally."*Id.* ¶ 224, at 86.This "demonstrates that [Whole Foods] views itself as competing with a broad range of supermarkets and that these supermarkets, in fact, constrain the prices charged by [Whole Foods]."*Id.*Those other supermarkets include conventional supermarkets such as Safeway, Albertson's, Wegman's, HEB, and Harris Teeter, as well as so-called organic supermarkets like Wild Oats. *Id.* ¶¶ 225-26, at 86-87.As Professors Areeda and Hovenkamp have explained, a "broad-market finding gains some support from long-standing documents indicating that *A* or *B* producers regard the other product as a close competitor."AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 562a, at 372. The point here is simple: Whole Foods would not examine the locations of and price check conventional grocery stores if it were not a competitor of those stores. Whole Foods does not price check Sports Authority; Whole Foods does price check Safeway.

Second, the record demonstrates that conventional supermarkets and so-called organic supermarkets are aggressively competing to attract customers from one another. After reviewing a wide variety of industry information and trade journals, Dr. Scheffman concluded that " '[o]ther' supermarkets are competing vigorously for the purchases made by shoppers at [Whole Foods] and [Wild Oats]." Scheffman Expert Report ¶ 212, at 77. Whole Foods "recognizes the fact that it has to appeal to a significantly broader group of consumers than organic and natural focused consumers."*Id.* ¶ 279, at 108.The record shows that Whole Foods has made progress: Most products that Whole Foods sells are not organic. Conversely, conventional supermarkets have shifted towards "emphasizing fresh, 'natural' and organic" products. *Id.* ¶ 215, at 80."[M]ost of the major chains and others are expanding into private label organic and natural products."*Id.* ¶ 220, at 85;*see also id.* ¶ 219, at 83-85 (listing changes in other supermarkets).

***23** So the dividing line between "organic" and conventional supermarkets has been blurred. As the District Court aptly put it, the "train has already left the station."*Whole Foods,* 502 F.Supp.2d at 48.The convergence undermines the threshold premise of the FTC's case. This is an industry in transition, and Whole Foods has pioneered a product differentiation that in turn has caused other supermarket chains to update their offerings. These are not separate product markets; this is a market where all supermarkets including so-called organic supermarkets are clawing tooth and nail to differentiate themselves, beat the competition, and make money.

The District Court's summary of the evidence warrants extensive quotation:

> In sum, while all supermarket retailers, including Whole Foods, attempt to differentiate themselves in some way in order to attract customers, they nevertheless compete, and compete vigorously, with each other. The evidence before the Court demonstrates that conventional or more traditional supermarkets today compete for the customers who shop at Whole Foods and Wild Oats, particularly the large number of cross-shopping customers-or customers at the margin-with a growing interest in natural and organic foods. Post-merger, all of these competing alternatives will remain. Based upon the evidence presented, the Court concludes that many customers could and would readily shift more of their purchases to any of the increasingly available substitute sources of natural and organic foods. The Court therefore concludes that the FTC has not met its burden to prove that "premium natural and organic supermarkets" is the relevant product market in this case for antitrust purposes.

Id. at 36.

II

In an attempt to save its merger case despite its inability to meet the test reflected in the Merger Guidelines and applied in *Staples,* the FTC cites marginally relevant evidence and advances seriously flawed arguments.

First, the FTC says that so-called organic supermarkets like Whole Foods and Wild Oats constitute their own product market because they are characterized by factors that differentiate them from conventional supermarkets. Those factors include intangible qualities such as customer service and tangible factors such as a focus on perishables.

This argument reflects the key error that permeates the FTC's flawed approach to this case. Those factors demonstrate only product differentiation, and product differentiation does not mean different product markets. "For antitrust purposes, we apply the differentiated label to products that are distinguishable in the minds of buyers but not so different as to belong in separate markets." 2B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 563a, at 385 (3d ed.2007). As the District Court noted, supermarkets including so-called organic supermarkets differentiate themselves by emphasizing specific benefits or characteristics to attract customers to their stores. *See FTC v. Whole Foods Mkt., Inc.,* 502 F.Supp.2d 1, 24-26 (D.D.C.2007). They may differentiate themselves along dimensions such as "low price, ethnic appeal, prepared foods, health and nutrition, variety within a product category, customer service, or perishables such as meats or produce."Stanton Expert Report ¶ 23, at 6.

***24** The key to distinguishing product differentiation from separate product markets lies in price information. As Professors Areeda and Hovenkamp have stated, differentiated sellers "generally compete with one another sufficiently" that the prices of one are "greatly constrained" by the prices of others.

AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 563a, at 384. To distinguish differentiation from separate product markets, courts thus must "ask whether one seller could maximize profit" by charging "more than the competitive price" without "losing too much patronage to other sellers."*Id.* ¶ 563a, at 385.Here, in other words, could so-called organic supermarkets maximize profit by charging more than a competitive price without losing too much patronage to conventional supermarkets? Based on the evidence regarding Whole Foods's pricing practices, the District Court correctly found that the answer to that question is no. So-called organic supermarkets are engaged in product differentiation; they do not constitute a product market separate from all supermarkets.

Second, the FTC points to internal Whole Foods studies and other evidence showing that if a Wild Oats near a Whole Foods were to close, most of the Wild Oats customers would shift to Whole Foods. But that says nothing about whether Whole Foods could impose a five percent or more price increase and still retain those customers (and its other customers), which is the relevant antitrust question. In other words, the fact that many Wild Oats customers would shift to Whole Foods does not mean that those customers would stay with Whole Foods, as opposed to shifting to conventional supermarkets, if Whole Foods significantly raised its prices. And even if one could infer that all of those former Wild Oats customers would so prefer Whole Foods that they would shop there even in the face of significant price increases, that would not show whether Whole Foods could raise prices without driving out a sufficient number of *other* customers as to make the price increases unprofitable. In sum, this argument is a diversion from the economic analysis that must be conducted in antitrust cases like this. The District Court properly found that the expert evidence in the record leads to the conclusion that Whole Foods could not profitably impose such a significant price increase.[FN5]

Third, the FTC points to comments by Whole Foods CEO John Mackey as evidence that Whole Foods perceived Wild Oats to be a unique competitor. Even if Mackey's comments were directed only to Wild Oats, that would not be evidence that Whole Foods and Wild Oats are in their own product market separate from all other supermarkets. It just as readily suggests that Whole Foods and Wild Oats are two supermarkets that have similarly *differentiated* themselves from the rest of the market, such that Mackey would be especially pleased to see that competitor vanish. Beating the competition from similarly differentiated competitors in a product market is ordinarily an entirely permissible competitive goal. Saying as much, as Mackey did here, does not mean that the similarly differentiated competitor is the *only* relevant competition in the marketplace. Moreover, Mackey nowhere says that the merger would allow Whole Foods to significantly raise prices, which of course is the issue here. In any event, intent is not an element of a § 7 claim, and a CEO's bravado with regard to one rival cannot alter the laws of economics: Mere boasts cannot vanquish real-world competition-here, from Safeway, Albertson's, and the like. As Judge Easterbrook has explained, "Firms need not like their competitors; they need not cheer them on to success; a desire to extinguish one's rivals is entirely consistent with, often is the motive behind, competition."*A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1402 (7th Cir.1989). And "[i]f courts use the vigorous, nasty pursuit of sales as evidence of a forbidden 'intent', they run the risk of penalizing the motive forces of competition."*Id.*"Intent does not help to separate competition from attempted monopolization...."*Id.*

***25** *Fourth,* the FTC says that a study by its expert, Dr. Murphy, demonstrates that Whole Foods's profit margins decreased in geographic areas where it competed against Wild Oats. But the relevant inquiry under the Merger Guidelines is prices. And Dr. Murphy did not determine whether Whole Foods *prices* ever differed as a result of competition from Wild Oats.

Moreover, there was only a slight difference between Whole Foods margins when Wild Oats was in the same area and when it was not. The overall difference was 0.7 percent, which Dr. Murphy himself recognized was not statistically significant. The FTC's evidence on margins is wafer-thin and does not suffice to show that organic stores constitute their own product market.

Fifth, the FTC points to evidence that Whole Foods's entry into a particular area, unlike the entry of conventional supermarkets, caused Wild Oats to lower its prices. Dr. Murphy's reliance on Wild Oats's reaction to Whole Foods's entry is questionable. Dr. Murphy based his entire analysis on a meager two events, hardly a large sample size. In addition, Dr. Murphy's analysis did not control for the reaction of conventional supermarkets to Whole Foods's entry. In other words, he *assumed* that the relevant product market was so-called organic supermarkets (the point he was trying to prove) and therefore assumed that all changes in Wild Oats's prices were directly caused by Whole Foods's entry. But if conventional supermarkets also lowered prices to compete with Whole Foods when Whole Foods entered, Wild Oats's price decreases may well have been due to the overall reduction in prices by all supermarkets in the area. If that were true, the relevant product market would obviously be all supermarkets, not just so-called organic supermarkets. Dr. Murphy's analysis never confronted that possibility or the complexity of how competition works in this market; he simply assumed the conclusion and reasoned backwards from there.

Moreover, the fact that Whole Foods and Wild Oats went toe-to-toe on occasion does not mean that they did not also go toe-to-toe with conventional supermarkets, which is the key question. And it is revealing that despite having access to the necessary data for six such events, Dr. Murphy did not analyze the effect of a Wild Oats exit on Whole Foods's prices. As Dr. Scheffman wrote: "A number of [Wild Oats] stores have closed.... [Dr. Murphy] has done no analysis to assess the effects of those store exits in the local shopping areas.... This is a curious omission, since such evidence, if reliable and reliably analyzed, would be relevant to the issue of what happens in local market areas in which a [Wild Oats] store closes."Scheffman Rebuttal ¶ 63, at 21.

The bottom line is that, as the District Court found, there is no evidence in the record suggesting that Whole Foods priced differently based on the presence or absence of a Wild Oats store in the area. That is a conspicuous-and all but dispositive-omission in Dr. Murphy's analysis and in the FTC's case.

***26** *Sixth,* the FTC cites the openings of three Earth Fare stores near Whole Foods stores in North Carolina, which caused decreases in Whole Foods's prices in those areas. But soon after those entries, Whole Foods's prices returned to normal levels. So the record hardly shows the sort of "nontransitory" price changes that are the touchstone of product-market definition. *See*Merger Guidelines § 1.11. A price increase ordinarily must last "for the foreseeable future," *id.,* considered by some to be more than a year, to qualify as "nontransitory." *See*AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 537a, at 290. Moreover, the entry of a Safeway store in Boulder, Colorado, had a similar short-term impact on Whole Foods, indicating that whatever inference should be drawn from the Earth Fare entries cannot be limited to so-called organic supermarkets but rather applies to conventional supermarkets.

The FTC's reference to Earth Fare mistakenly focuses on a few isolated trees instead of the very large forest indicating a competitive market consisting of all supermarkets. In short, I fail to see how Whole Foods's *temporary* price changes to compete against three Earth Fare stores in North Carolina could possibly be a hook to block this nationwide merger of Whole Foods and Wild Oats.[FN6]

III

There are many surprising aspects of today's decision. But perhaps most startling is that the majority opinion reverses the District Court based primarily on an argument that the FTC has not made to this Court. In reaching its decision, the majority opinion relies on a distinction between marginal consumers and core consumers. But the FTC never once referred to, much less relied on, the distinction between marginal and core consumers in 86 pages of briefing or at oral argument. The terms "marginal consumer" and "core consumer" are nowhere to be found in its briefs. It's of course not our usual role to gin up new arguments that the appellant did not make on appeal. But perhaps this is no-harm, no-foul: After all, the core-consumer theory advanced by the majority opinion appears to be just a warmed-over version of the FTC's theory discussed above that most Wild Oats customers would switch from Wild Oats to Whole Foods in the wake of a merger. Again, however, the question for antitrust purposes is whether the merged entity could impose a five percent or greater price increase for the foreseeable future without losing so many customers as to make the price increase unprofitable. The majority's focus on marginal versus core consumers elides that key question. Sure, there may be consumers who are so wedded to Whole Foods that they'll pay much higher prices. But are there enough such that Whole Foods can profitably impose a significant and nontransitory price increase? That's the question, and as explained above and as found by the District Court, the record convincingly demonstrates that the answer is no.

IV

In the end, the FTC's case is weak and seems a relic of a bygone era when antitrust law was divorced from basic economic principles. The record does not show that Whole Foods priced differently based on the presence or absence of Wild Oats in the same area. The reason for that and the conclusion that follows from that are the same: Whole Foods competes in an extraordinarily competitive market that includes all supermarkets, not just so-called organic supermarkets. There is no good legal basis to block further implementation of this merger.

3

***27** I respectfully dissent.

FN* Sealed material has been redacted from the publicly released copy of this opinion; redactions are denoted by brackets. The parties have full access to the sealed opinion.

FN1. For example, a merger between two close competitors can sometimes raise antitrust concerns due to unilateral effects in highly differentiated markets. *See generally*Horizontal Merger Guidelines, 57 Fed.Reg. 41,552, 41,560-61, § 2.2 (1992). In such a situation, it might not be necessary to understand the market definition to conclude a preliminary injunction should issue. The FTC alludes to this theory on appeal, but to the district court it argued simply that the merger would result in a highly concentrated PNOS market.

FN2. Dr. Scheffman did not actually calculate the amount of this loss. He simply predicted that because many Whole Foods and Wild Oats customers also shop at conventional supermarkets, the loss would at any rate be too large.

FN3. My colleagues, and especially the concurrence, hint that the FTC need not demonstrate a likelihood of success to obtain a preliminary injunction in a § 7 case. But consistent with the text of the governing statute, § 13 of the FTC Act, we have always held that the FTC must show a likelihood of success to obtain a preliminary injunction in a § 7 case. To conclude otherwise would be to enhance the FTC's power to torpedo mergers well beyond what Congress has authorized.

FN4. The concurrence disparages the evidence about Whole Foods's prices, calling it "all-but-meaningless" and implicitly suggesting that Whole Foods manipulated its prices just for the expert study. Concurring Op. at ----. But the concurrence offers no evidence for that suggestion.

FN5. According to the concurrence, the FTC's expert purported to say that Whole Foods could impose a five percent or greater price increase because of the number of Wild Oats customers who would switch to Whole Foods rather than conventional supermarkets. Concurring Op. at ----. But that bare assertion was unsupported and was premised on the notion that organic supermarkets are a separate product market. That premise is of course the issue in dispute. That no doubt explains why the FTC never even mentioned this aspect of its expert's report in the argument section of its opening brief.

FN6. As two antitrust commentators perceptively stated:

> The basic problem with the FTC's position in *Whole Foods* was that it lacked the pricing evidence it had in *Staples,* which showed that customers did not go elsewhere if the office superstores increased their prices. *Whole Foods* is an attempt by the FTC to persuade a court that if you take a CEO's statements about

a merger and stir it in with evidence showing the existence of several "practical indicia" from *Brown Shoe,* the resulting mixture should trump objective evidence about how customers would react in the event of a price increase. It was not successful, and the court's decision underscores the dominant influence of economic evidence in merger cases today.

Carlton Varner & Heather Cooper, *Product Markets in Merger Cases: The* Whole Foods *Decision* (Oct.2007), www.antitrustsource.com.

C.A.D.C.,2008.
F.T.C. v. Whole Foods Market, Inc.
--- F.3d ----, 2008 WL 2890688 (C.A.D.C.)

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ADDENDUM

II

F.T.C. v. Whole Foods Market, Inc.
D.D.C.,2007.

United States District Court,District of Columbia.
FEDERAL TRADE COMMISSION, Plaintiff,
v.
WHOLE FOODS MARKET, INC., and Wild Oats Markets, Inc., Defendants.
Civil Action No. 07-1021(PLF).

Aug. 16, 2007.

Background: Federal Trade Commission (FTC) filed lawsuit seeking to enjoin largest operator of premium natural and organic supermarkets (PNOS) from acquiring closest competitor during the pendency of an administrative proceeding to be commenced by the FTC pursuant to Clayton Act and the Federal Trade Commission Act (FTCA). FTC moved for a preliminary injunction.

Holdings: The District Court, Paul L. Friedman, J., held that:
(1) relevant product market was not the PNOS supermarkets, but rather, all supermarkets, and
(2) FTC failed to show likelihood that it could prove that proposed acquisition could substantially lessen competition or tend to create a monopoly.

Motion denied.

West Headnotes

[1] Antitrust and Trade Regulation 29T 995

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk994 Injunction
29Tk995 k. In General. Most Cited Cases
Temporary restraining order or a preliminary injunction may be granted under Federal Trade Commission Act (FTCA) if Federal Trade Commission (FTC) shows that it is "likely" to succeed in showing under Clayton Act that proposed merger may substantially lessen competition or tend to create a monopoly; FTC must show a reasonable probability that the proposed merger may substantially lessen competition in the future, and to meet its burden to establish its likelihood of success on the merits, the FTC may raise 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 and ultimately by the Court of Appeals. Federal Trade Commission Act, § 13(b), 15 U.S.C.A. § 53(b); Clayton Act, § 7, 15 U.S.C.A. § 18.

[2] Antitrust and Trade Regulation 29T 765

29T Antitrust and Trade Regulation
29TIX Mergers and Acquisitions
29TIX(A) In General
29Tk765 k. Relevant Market in General. Most Cited Cases
Analysis of the likely competitive effects of a merger requires determinations of (1) the relevant product market in which to assess the transaction, (2) the geographic market in which to assess the transaction, and (3) the transaction's probable effect on competition in the relevant product and geographic markets. Federal Trade Commission Act, § 13(b), 15 U.S.C.A. § 53(b); Clayton Act, § 7, 15 U.S.C.A. § 18.

[3] Antitrust and Trade Regulation 29T 557

29T Antitrust and Trade Regulation
29TVI Antitrust Regulation in General
29TVI(C) Market Power; Market Share
29Tk555 Relevant Market
29Tk557 k. Product Market. Most Cited Cases

Antitrust and Trade Regulation 29T 645

29T Antitrust and Trade Regulation
29TVII Monopolization
29TVII(C) Market Power; Market Share
29Tk643 Relevant Market
29Tk645 k. Product Market. Most Cited

Cases

Antitrust and Trade Regulation 29T ⚷767

29T Antitrust and Trade Regulation
29TIX Mergers and Acquisitions
29TIX(A) In General
29Tk767 k. Product Market; Line of Commerce. Most Cited Cases

Generally, outer boundaries of a product market are determined for antitrust purposes by the reasonable interchangeability of use by consumers or the cross-elasticity of demand between the product itself and substitutes for it; in addition to cross-elasticity of demand, courts also consider practical indicia such as industry or public recognition of the market 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 when defining the relevant market. Clayton Act, § 7, 15 U.S.C.A. § 18.

[4] Antitrust and Trade Regulation 29T ⚷766

29T Antitrust and Trade Regulation
29TIX Mergers and Acquisitions
29TIX(A) In General
29Tk766 k. Geographical Market; Section of Country. Most Cited Cases

Relevant geographic market, for purposes of antitrust analysis of proposed acquisition, is that geographic area to which consumers can practically turn for alternative sources of the product and in which the antitrust defendant faces competition; relevant geographic market is the geographic area that would be adversely affected by the proposed acquisition. Clayton Act, § 7, 15 U.S.C.A. § 18.

[5] Antitrust and Trade Regulation 29T ⚷976

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk973 Evidence
29Tk976 k. Presumptions and Burden of Proof. Most Cited Cases

Federal Trade Commission (FTC) generally can establish a prima facie case of anticompetitive effect under Clayton Act by showing that the merged entity will have a significant percentage of the relevant market and defendants can then rebut the presumption of anticompetitive effect by showing that the statistical data does not reflect reality in the relevant market. Clayton Act, § 7, 15 U.S.C.A. § 18.

[6] Antitrust and Trade Regulation 29T ⚷765

29T Antitrust and Trade Regulation
29TIX Mergers and Acquisitions
29TIX(A) In General
29Tk765 k. Relevant Market in General. Most Cited Cases

In addition to market share, courts determining anticompetitive effect of proposed acquisition must examine market concentration and its increase as a result of the proposed acquisition. Clayton Act, § 7, 15 U.S.C.A. § 18.

[7] Antitrust and Trade Regulation 29T ⚷782

29T Antitrust and Trade Regulation
29TIX Mergers and Acquisitions
29TIX(B) Particular Industries or Businesses
29Tk782 k. Food and Beverages; Restaurants. Most Cited Cases

For purposes of analysis of anticompetitive effect of proposed acquisition of closest competitor's premium natural and organic supermarkets (PNOS) by largest nationwide PNOS chain, relevant product market was not the premium natural and organic supermarkets, but rather, all supermarkets; there were many alternatives to which PNOS customers could readily take their business if PNOSs merged and acquirer imposed small but significant and nontransitory price increases since customers viewed natural and organic food products at many stores other than acquirer as adequate substitutes for those they could obtain at competitor's stores, and PNOSs viewed other, more conventional supermarkets as their primary competitors, and they planned their strategies accordingly. Federal Trade Commission Act, § 13(b), 15 U.S.C.A. § 53(b); Clayton Act, § 7, 15 U.S.C.A. § 18.

[8] Antitrust and Trade Regulation 29T ⚷782

29T Antitrust and Trade Regulation
29TIX Mergers and Acquisitions
29TIX(B) Particular Industries or Businesses

29Tk782 k. Food and Beverages; Restaurants. Most Cited Cases
For purposes of analysis anticompetitive effect of proposed acquisition of closest competitor's premium natural and organic supermarkets (PNOS) by largest nationwide PNOS chain, reasonable way to define the relevant geographic market was by reference only to distance and driving time in the context of the case and the evidence presented. Federal Trade Commission Act, § 13(b), 15 U.S.C.A. § 53(b); Clayton Act, § 7, 15 U.S.C.A. § 18.

[9] Antitrust and Trade Regulation 29T 765

29T Antitrust and Trade Regulation
29TIX Mergers and Acquisitions
29TIX(A) In General
29Tk765 k. Relevant Market in General. Most Cited Cases
Mergers that significantly increase market concentration are presumptively unlawful because the fewer the competitors and the larger the respective market shares, the greater the likelihood that a single firm or group of firms could raise prices above competitive levels; where the pre-acquisition Herfindahl-Hirschman Index (HHI) exceeds 1800 points, it is presumed that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise. Clayton Act, § 7, 15 U.S.C.A. § 18.

[10] Antitrust and Trade Regulation 29T 782

29T Antitrust and Trade Regulation
29TIX Mergers and Acquisitions
29TIX(B) Particular Industries or Businesses
29Tk782 k. Food and Beverages; Restaurants. Most Cited Cases
Federal Trade Commission (FTC) failed to show likelihood that it could prove that proposed acquisition of second largest chain of premium natural and organic supermarkets (PNOSs) by largest nationwide PNOS chain could substantially lessen competition or tend to create a monopoly so as to warrant preliminary injunction under Clayton Act and the Federal Trade Commission Act (FTCA); pricing practices of competing PNOS chains did not differ based on the presence or absence of the other in the area, existence of proposed acquiree did not force acquirer's prices down because acquiree's prices were consistently higher, and conventional supermarket retailers had already been repositioning their formats, services and product selection in order to respond to the growing consumer demand for natural and organic foods and to better compete against acquirer. Federal Trade Commission Act, § 13(b), 15 U.S.C.A. § 53(b); Clayton Act, § 7, 15 U.S.C.A. § 18.

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PUBLIC VERSION

PAUL L. FRIEDMAN, District Judge.

OPINION

This matter is before the Court on plaintiff's motion for a preliminary injunction.[FN1] Plaintiff, the Federal Trade Commission ("FTC"), filed this lawsuit on June 6, 2007 seeking to enjoin defendant Whole Foods Market, Inc. from acquiring defendant Wild Oats Markets, Inc. during the pendency of an administrative proceeding to be commenced by the FTC pursuant to Sections 7 and 11 of the Clayton Act, 15 U.S.C. §§ 18, 21, and Section 5(b) of the Federal Trade Commission Act ("FTCA"), 15 U.S.C. § 45(b). *See* Complaint at 2, 6.[FN2] The FTC believes that the acquisition of Wild Oats by Whole Foods "would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act because*4 [it] may substantially lessen competition and/or tend to create a monopoly in the operation of premium natural and organic supermarkets across the United States." Complaint ¶ 15.

FN1. The papers submitted to the Court in connection with this proceeding include: plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction ("Mot."); plaintiff's Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction ("TRO Mem."); Plaintiff's Corrected Brief on its Motion for Preliminary Injunction ("PI Mem."); Joint Memorandum of Points and Authorities of Whole Foods Market, Inc. and Wild Oats Markets, Inc. in Opposition to Motion for Preliminary Injunction ("Opp."); Plaintiff's Response Brief ("Pl's Reply"); Joint Reply Memorandum of Points and Authorities [of defendants] in Opposition to Motion for Preliminary Injunction ("Defs' Reply"); Defendants' Joint Proposed Findings of Fact and Conclusions of Law ("Defs' FOF"); and Plaintiff's Proposed Findings of Fact and Proposed Conclusions of Law ("Pl's FOF" and "Pl's COL").

FN2. The parties reached an agreement with respect to the issuance of a temporary restraining order during the pendency of this preliminary injunction proceeding, and the Court signed and entered the stipulated temporary restraining order on June 7, 2007.

This lawsuit has been litigated on a very fast track. Fact discovery took place in the space of 30 days, expert reports were exchanged three days after the close of fact discovery, and rebuttal expert reports and expert depositions took place within nine days thereafter. Initial briefs were filed two days later and reply briefs five days after that. The Court held a two-day hearing six days later. The parties' respective economists, Dr. Kevin M. Murphy and Dr. David T. Scheffman, Jr., were examined by counsel and by the Court on July 31, 2007, and counsel presented their final arguments on the record in Court on August 1, 2007.

The evidence presented by the parties consists of: (1) transcripts of the testimony of 13 lay witnesses taken by the FTC at investigational hearings before it filed suit; (2) transcripts of the deposition testimony of 22 lay witnesses and five expert witnesses taken after suit was filed; [FN3] (3) the declarations of 16 lay witnesses submitted by defendants and of one lay witness submitted by plaintiff; [FN4] (4) the expert reports (and exhibits thereto) of five expert witnesses; (5) 19 volumes of exhibits submitted by plaintiff, consisting of approximately a total of 700 exhibits; (6) 27 volumes of exhibits submitted by defendants, consisting of 811 exhibits; and (7) the examination and cross-examination of two of the expert witnesses in Court-Dr. Kevin M. Murphy and Dr. David T. Scheffman, Jr. The Court has also considered the written and oral arguments presented by counsel and the exhibits and demonstrative exhibits used in connection with their arguments.

FN3. Some of the lay witnesses were examined both at investigational hearings and at depositions.

FN4. All but two of the declarations submitted by defendants were of officers or employees of Whole Foods or Wild Oats. The Court agrees with plaintiff that these declarations, prepared for the purpose of litigation by defendants, should be viewed with caution and should be given less probative force than depositions taken of the same persons who were then subject to cross-examination. Such declarations are entitled to little weight to the extent they are "in conflict with contemporaneous documents." *United States v. U.S. Gypsum Co.,* 333 U.S. 364, 396, 68 S.Ct. 525, 92 L.Ed. 746 (1948).

The fast track on which this litigation has proceeded has put immense pressure on counsel for the parties and their teams who, despite these pressures, have all acted professionally, civilly, effectively, and in a timely manner in presenting their evidence and argument. Unfortunately, the Court, too, has had to act under severe time constraints (and with fewer resources than counsel has had) in evaluating the evidence and arguments, reaching its decision and attempting quickly to articulate that decision in a reasonably thorough and comprehensible opinion-so as to provide the losing side (as the Court promised it would) sufficient time to proceed promptly to the court of appeals for a decision before the consummation of the proposed merger, scheduled for August 31, 2007.

For the reasons set forth in this Opinion, the Court will deny plaintiff's motion for a preliminary injunction.

I. BACKGROUND

Defendant Whole Foods Market, Inc. ("Whole Foods") is a Texas corporation which opened its first store in 1980. Whole Foods operates approximately 194 stores in North America and the United Kingdom. Defendant Wild Oats Markets, *5 Inc. ("Wild Oats") is a Delaware corporation founded in 1987 and headquartered in Colorado. Wild Oats operates approximately 110 stores in the United States and Canada. Both firms are engaged in the business of selling grocery products, with an emphasis on natural and organic foods. In February 2007, the defendants announced that Whole Foods planned to acquire Wild Oats, and the two companies entered into a formal merger agreement on February 21, 2007.

The FTC alleges that the "operation of premium natural and organic supermarkets is a distinct 'line of commerce' within the meaning of Section 7 of the Clayton Act."Complaint ¶ 34. The FTC further alleges that Whole Foods and Wild Oats are "the only two nationwide operators of premium natural and organic supermarkets in the United States[,]" and "are one another's closest competitor in twenty-one geographic markets." *Id.* ¶¶ 37-38. According to the FTC, "[c]onsumers in those markets have reaped price and non-price benefits of competition between Whole Foods and Wild Oats."*Id.* ¶ 38. "[T]hose benefits will be lost if the acquisition occurs in the markets where the two currently compete and they will not occur in those markets where each is planning to expand." *Id.* ¶ 42.

II. LEGAL FRAMEWORK

[1] Section 13(b) of the Federal Trade Commission Act provides:

Whenever the Commission has reason to believe ... that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and ... that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public ... the Commission ... may bring suit in a district court of the United States to enjoin any such act or practice.

15 U.S.C. § 53(b). "Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted...."*Id.; see also* *FTC v. Libbey, Inc.*, 211 F.Supp.2d 34, 43 (D.D.C.2002). In contrast to the four-part equity standard for the granting of a preliminary injunction in other contexts, "[i]n deciding whether to grant preliminary injunctive relief under section 13(b), the court evaluates whether it is in the public interest to enjoin the proposed merger." *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C.Cir.2001). "This standard is broader than the traditional equity standard that is normally applicable to requests for injunctive relief and is consistent with Congress' intention that injunctive relief be broadly available to the FTC."*FTC v. Libbey, Inc.*, 211 F.Supp.2d at 44 (quoting and citing *FTC v. Weyerhaeuser*, 665 F.2d 1072, 1080-81 (D.C.Cir.1981)) (internal quotations omitted).

"The FTC is not required to *establish* that the proposed merger would in fact violate section 7 of the Clayton Act."*FTC v. H.J. Heinz Co.*, 246 F.3d at 713 (emphasis in original) (citing *FTC v. Staples, Inc.*, 970 F.Supp. 1066, 1071 (D.D.C.1997) and *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1342 (4th Cir.1976) ("The district court is not authorized to determine whether the antitrust laws have been or are about to be violated. That adjudicatory function is vested in the FTC in the first instance.")); *see also* *6*FTC v. Swedish Match*, 131 F.Supp.2d 151, 155 (D.D.C.2000). It is required only to show that it is "likely" to succeed in showing under Section 7 of the Clayton Act that the proposed merger "may substantially lessen competition" or "tend to create a monopoly." 15 U.S.C. § 18; *see also* *FTC v. H.J. Heinz Co.*, 246 F.3d at 714; *FTC v. Libbey, Inc.*, 211 F.Supp.2d at 44; *FTC v. Staples, Inc.*, 970 F.Supp. at 1071 (citing cases). The FTC must show a "reasonable probability" that the proposed merger may substantially lessen competition in the future. *See* *FTC v. Arch Coal, Inc.*, 329 F.Supp.2d 109, 116 (D.D.C.2004); *FTC v. Swedish Match*, 131 F.Supp.2d at 156; *FTC v. Staples, Inc.*, 970 F.Supp. at 1072 (citing cases). "[T]he FTC's burden is not insubstantial, and '[a] showing of fair or tenable chance of success on the merits will not suffice for injunctive relief.' " FTC v. Arch Coal, Inc., 329 F.Supp.2d at 116 (quoting FTC v. Tenet Health Care Corp., 186 F.3d 1045, 1051 (8th Cir.1999)).

To meet its burden to establish its likelihood of success on the merits, the FTC may raise 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 and ultimately by the Court of Appeals." FTC v. H.J. Heinz Co., 246 F.3d at 714-15 (citing, *inter alia*, FTC v. Beatrice Foods Co., 587 F.2d 1225, 1229 (D.C.Cir.1978); FTC v. Staples, Inc., 970 F.Supp. at 1071; FTC v. Warner Communications, Inc., 742 F.2d 1156, 1162 (9th Cir.1984)) (internal quotations omitted). "[T]he FTC does not have to prove ... that the proposed merger will in fact violate Section 7 of the Clayton Act because the Congress used the words *may* be substantially to lessen competition ... to indicate that its concern was with probabilities, not certainties." FTC v. Libbey, Inc., 211 F.Supp.2d at 44 (internal quotations and citations omitted); *see also* FTC v. Staples, Inc., 970 F.Supp. at 1071 ("The FTC is not required to prove, nor is the Court required to find, that the proposed merger would in fact violate Section 7 of the Clayton Act.... The determination of whether the acquisition actually violates the antitrust laws is reserved for the Commission and is, therefore, not before this Court.").

"Merger enforcement, like other areas of antitrust, is directed at market power. It shares with the law of monopolization a degree of schizophrenia: an aversion to potent power that heightens risk of abuse; and tolerance of that degree of power required to attain economic benefits." FTC v. H.J. Heinz Co., 246 F.3d at 713 (internal citations omitted). The Congress therefore has empowered the FTC "to weed out those mergers whose effect 'may be substantially to lessen competition from those that enhance competition.' " *Id.* (internal citations omitted). With respect to Section 7 of the Clayton Act, the D.C. Circuit has explained:

Section 7 of the Clayton Act prohibits 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; *see* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 355, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963) ("The statutory test is whether the effect of the merger 'may be substantially to lessen competition' 'in any line of commerce in any section of the country.' "). The "Congress used the words '*may* be substantially to lessen competition' (emphasis supplied), to indicate that its concern was with probabilities, not certainties." *7Brown Shoe Co. v. United States, 370 U.S. 294, 323, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962) (emphasis original); *see*S.Rep. No. 1775, at 6 (1950), U.S.Code Cong. & Admin. News [1950] at 4293, 4298 ("The use of these words ["may be"] means that the bill, if enacted, would not apply to the mere possibility but only to the reasonable probability of the pr[o]scribed effect....").

FTC v. H.J. Heinz Co., 246 F.3d at 713 (parallel citations omitted) (brackets in original).

[2] To reiterate, Section 7 deals "in probabilities, not ephemeral possibilities." FTC v. Arch Coal, Inc., 329 F.Supp.2d at 115; *see also* United States v. Sungard Data Systems, 172 F.Supp.2d 172, 180 (D.D.C.2001). "To determine whether the FTC has met its burden of establishing a prima facie case that the proposed acquisition in this matter may violate the antitrust laws, this court must initially analyze the likely anti-competitive effects the merger would have." FTC v. Libbey, Inc., 211 F.Supp.2d at 44-45 (internal quotations and citations omitted) (citing FTC v. Staples, Inc., 970 F.Supp. at 1072-73); *see also* FTC v. Swedish Match, 131 F.Supp.2d at 156. "Analysis of the likely competitive effects of a merger requires determinations of (1) the relevant product market in which to assess the transaction, (2) the geographic market in which to assess the transaction, and (3) the transaction's probable effect on competition in the relevant product and geographic markets." FTC v. Arch Coal, Inc., 329 F.Supp.2d at 117.

[3] As Chief Judge Hogan has noted, "[a]s with many antitrust cases, the definition of the relevant product market in this case is crucial. In fact, to a great extent, this case hinges on the proper definition of the relevant product market." FTC v. Staples, Inc., 970 F.Supp. at 1073; *see also* FTC v. Swedish Match,

131 F.Supp.2d at 156. The general rule when determining a relevant product market is that "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use [by consumers] or the cross-elasticity of demand between the product itself and substitutes for it." Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962).

Interchangeability of use and cross-elasticity of demand look to the availability of substitute commodities, i.e. whether there are other products offered to consumers which are similar in character or use to the product or products in question, as well as how far buyers will go to substitute one commodity for another. *E.I. du Pont de Nemours*, 351 U.S. [377, 393, 76 S.Ct. 994, 100 L.Ed. 1264 (1956)]. In other words, the general question is "whether two products can be used for the same purpose, and if so, whether and to what extent purchasers are willing to substitute one for the other." *Hayden Pub. Co. v. Cox Broadcasting Corp.*, 730 F.2d 64, 70 n. 8 (2d Cir.1984).

FTC v. Staples, Inc., 970 F.Supp. at 1074 (parallel citations omitted); *see also* United States v. Sungard Data Systems, 172 F.Supp.2d at 182; FTC v. Swedish Match, 131 F.Supp.2d at 157.

In addition to cross-elasticity of demand, courts also consider "practical indicia" such as "industry or public recognition of the [ ] market 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" when defining the relevant market. *Brown Shoe Co. v. United States*, 370 U.S. at 325, 82 S.Ct. 1502.[FN5] Courts do not ***8** apply these factors rigidly or exclusively, but rather use them as "practical aids" to ensure that the market definition comports with business reality. *FTC v. Swedish Match*, 131 F.Supp.2d at 159. Judge Bates has explained:

> FN5. As Judge Bork, himself a renowned antitrust expert, has pointed out, these practical indicia "seem to be evidentiary proxies for direct proof of substitutability." *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 (D.C.Cir.1986).

"[O]nly examination of the particular market-its structure, history, and probable future-can provide the appropriate setting for judging the probable anticompetitive effects of the merger." Hence, antitrust theory and speculation cannot trump facts, and even Section 13(b) cases must be resolved on the basis of the record evidence relating to the market and its probable future.
FTC v. Arch Coal, Inc., 329 F.Supp.2d at 116-17 (internal citations omitted).

In this case, if the relevant product market is, as the FTC alleges, a product market of "premium natural and organic supermarkets" consisting only of the two defendants and two other non-national firms, there can be little doubt that the acquisition of the second largest firm in the market by the largest firm in the market will tend to harm competition in that market. If, on the other hand, the defendants are merely differentiated firms operating within the larger relevant product market of "supermarkets," the proposed merger will not tend to harm competition. As in *Staples*, "this case hinges"-almost entirely-"on the proper definition of the relevant product market." *FTC v. Staples, Inc.*, 970 F.Supp. at 1073.

[4] The government also has the burden of proving the relevant geographic market. *FTC v. Tenet Health Corp.*, 186 F.3d at 1052. "A geographic market is that geographic area to which consumers can practically turn for alternative sources of the product and in which the antitrust defendant faces competition." *FTC v. Staples, Inc.*, 970 F.Supp. at 1073 (internal quotations omitted). It is the geographic area that would be adversely affected by the proposed acquisition. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 357-58, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963). As Judge Bates put it in *Arch Coal:*

The relevant geographic market in which to examine the effects of a merger is "the region in which the seller operates, and to which the purchaser can practicably turn for supplies." *FTC v. Cardinal Health, Inc.*, 12 F.Supp.2d 34, 49 (D.D.C.1998) (citing *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 81 S.Ct. 623, 5 L.Ed.2d 580 (1961)). The Supreme Court has emphasized that the relevant geographic market must both "correspond to the commercial realities of the industry and be economically significant." Brown Shoe [Co. v. United States], 370 U.S. at 336-37[, 82 S.Ct. 1502] (internal citations omitted). The *Merger Guidelines* also provide guidance for determining the relevant geographic market. The geographic market should be delineated as "a region such that a hypothetical monopolist that was the only present or future producer of the relevant product at locations in that region would profitably impose at least a 'small but significant and nontransitory' increase in price, holding constant the terms of sale for all products produced elsewhere." *Merger Guidelines* § 1.21. If buyers would respond to the SSNIP by shifting to products produced outside the proposed geographic market, and this shift were sufficient to render the SSNIP unprofitable, then the proposed geographic market would be too narrow. *Id.*

*9 FTC v. Arch Coal, Inc., 329 F.Supp.2d at 123 (parallel citations omitted). If the FTC shows that the merger may lessen competition in any one of the alleged geographic markets, it is entitled to injunctive relief. *See*15 U.S.C. § 18.

After the relevant product and geographic markets have been established, the ultimate question under Section 7 of the Clayton Act is whether the proposed merger will have anticompetitive effect within those markets-that is, whether the effect of the merger "may be substantially to lessen competition" in the relevant market. 15 U.S.C. § 18. As the Supreme Court has noted, "clearly, this is not the kind of question which is susceptible of a ready and precise answer in most cases. It requires not merely an appraisal of the immediate impact upon competition, but a prediction of its impact upon competitive conditions in the future...."*United States v. Philadelphia Nat'l Bank*, 374 U.S. at 362, 83 S.Ct. 1715; *see* *Brown Shoe Co. v. United States*, 370 U.S. at 317, 82 S.Ct. 1502 (focus is on arresting anticompetitive mergers "in their incipiency"); *id.* at 323, 82 S.Ct. 1502 (Section 7 "deals in probabilities, not certainties"). "By focusing on the future, section 7 gives a court the uncertain task of assessing probabilities." *United States v. Baker Hughes Inc.*, 908 F.2d 981, 991 (D.C.Cir.1990).

The "law allows both sides to make competing predictions about a transaction's effects." *United States v. Baker Hughes Inc.*, 908 F.2d at 991. It does so by "shifting the burden of producing evidence." *Id.* As the D.C. Circuit has explained:

In *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982-83 (D.C.Cir.1990), [the D.C. Circuit] explained the analytical approach by which the government establishes a section 7 violation. First the government must show that the merger would produce "a firm controlling an undue percentage share of the relevant market, and would result in a significant increase in the concentration of firms in that market." [*United States v.] Philadelphia Nat'l Bank*, 374 U.S. at 363[, 83 S.Ct. 1715]. Such a showing establishes a "presumption" that the merger will substantially lessen competition. *See [United States v.] Baker Hughes [Inc.]*, 908 F.2d at 982. To rebut the presumption, the defendants must produce evidence that "shows that the market-share statistics give an inaccurate account of the merger's probable effects on competition" in the relevant market. *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 120, 95 S.Ct. 2099, 45 L.Ed.2d 41 (1975). "If the defendant successfully rebuts the presumption of illegality, the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times." *Baker Hughes Inc.*, 908 F.2d at 983; *see also* *Kaiser Aluminum [and Chemical Corp. v. FTC]*, 652 F.2d [1324,] 1340 & n. 12 [(7th Cir.1981)].

FTC v. H.J. Heinz Co., 246 F.3d at 715 (brackets, footnotes and parallel citations omitted).

[5][6] The FTC generally can establish a *prima facie* case of anticompetitive effect by showing that "the merged entity will have a significant percentage of the relevant market." *FTC v. Swedish Match*, 131 F.Supp.2d at 166. In addition to market share, courts also must examine "market concentration and its increase as a result of the proposed acquisition." *Id.* As noted, the defendants can then rebut the presumption of anticompetitive effect by showing that the statistical data doesn't reflect reality in the relevant market. One factor that is an important consideration when analyzing possible anti-competitive ***10** effects is whether the acquisition "would result in the elimination of a particularly aggressive competitor in a highly concentrated market ..."*FTC v. Libbey, Inc.*, 211 F.Supp.2d at 47 (quoting *FTC v. Staples, Inc.*, 970 F.Supp. at 1083 (citation omitted)).

III. WHOLE FOODS, WILD OATS, AND THE PROPOSED MERGER

A. Whole Foods and Wild Oats

Whole Foods first opened its doors in 1980. Today it operates 194 stores in the United States, with a broad array of conventional, natural, organic, gourmet, prepared and specialty product offerings. Sud Decl. ¶¶ 14, 16, 17, 18. It also operates three stores in Canada; and six stores in the United Kingdom. PX01302 at 004; *see also* PX00011 at 003. Whole Foods currently employs over 39,000 people across its U.S. stores. DX 457 (Whole Foods 2006 10-K). Its operations in the United States are divided into eleven regions. Each region is headed by a regional president. Each regional president reports to one of the two Whole Foods' Co-Presidents and Chief Operating Officers.

Over two decades, Whole Foods has expanded by opening new stores and by acquiring several other premium natural and organic supermarkets: Blue Bonnet Natural Foods Grocery in 1984, Whole Food Company in 1988, Wellspring Grocery in 1991, Bread & Circus in 1992, Mrs. Gooch's in 1993, Bread of Life (San Francisco) in 1995, Unicorn Village in 1995, Oak Street Market in 1995, Fresh Fields in 1996, Granary Market in 1997, Bread of Life (Florida) in 1995, Merchant of Vino in 1997, Nature's Heartland in 1999, Food 4 Thought Natural Food Market and Deli in 2000, Harry's Farmers Market in 2001, and Whole Grocer in 2006. Murphy Report ¶ 25; JX 40 at 32-33:23-5 (Chamberlain Dep.).

Most competitive decisions at Whole Foods-including decisions with respect to pricing-are made at the regional level under the supervision of Whole Foods' regional presidents. Sud Decl. ¶¶ 7-9; Allshouse Decl. ¶ 5; Besancon Decl. ¶ 2; Bradley Decl. ¶¶ 1-3; Lannon Decl. ¶ 4; Megahan ¶ 23; Meyer Decl. ¶ 3; Paradise Decl. ¶ 4; JX 41 at 51-52 (Foster I.H.).

Whole Foods has articulated five "Core Values" that it emphasizes "reflect what is truly important to us as an organization." Among these is "selling the highest quality natural and organic products available." PX01302 at 006. Its stores typically stock around 30,000 stock keeping units ("SKUs") of natural and organic products. PX00182 at 004; PX01333 at 003. Whole Foods has evolved from a health food store into a supermarket. Whole Foods' new stores typically range in size between 50,000 and 60,000 square feet. DX 457 (2006 Whole Foods 10-K). Its 92 stores in development average 54,500 square feet. Sud Decl. ¶ 18. Whole Foods currently operates four stores in excess of 65,000 square feet and has an additional 17 stores of that size in development. DX 457. Whole Foods' stores now carry a wide variety of conventional products, everyday value private label items, and premium and gourmet offerings. Many of these items are not organic, including more than half of the produce Whole Foods sells and a significant portion of its prepared foods, bakery, and specialty items. Sud Decl. ¶¶ 17, 25.

Wild Oats is headquartered in Boulder, Colorado and operates 115 stores in the United States, under three different banners: Wild Oats Marketplace (nationwide), Henry's Farmers Market (in Southern California), and Sun Harvest (in Texas). DX 494 at 3 (2006 Wild Oats 10-K). It *11 also has stores in British Columbia, Canada, under the name Capers Community Market. PX00613 at 005, 027; PX2705. Wild Oats says it is committed to selling the "best variety of high-quality products made with wholesome ingredients." PX00601 at 003. Wild Oats sells a large array of natural and organic products that appeal to "health-conscious shoppers," and include "dry groceries, produce, meat, poultry, seafood, dairy, frozen, prepared foods, bakery" offered in a manner "that emphasizes customer service." PX00613 at 005.

Wild Oats has expanded over the past two decades by opening new stores and acquiring several other premium and organic supermarkets: Alfalfa's Markets in 1996, Henry's Marketplace stores in 1999, Sun Harvest stores in 1999, and Natures stores in 1999. PX04449 at 047; PX04449 at 002. The average square footage of Wild Oats' stores today are less than 25,000 square feet. DX 807 (Wild Oats Response to Spec. 2 of FTC's Second Request).

B. The Proposed Merger and the FTC's Response

On February 21, 2007, Whole Foods and Wild Oats executed an Agreement and Plan of Merger ("Agreement"), pursuant to which Whole Foods would commence a tender offer for all of Wild Oats stock at a price of $18.50 per share. DX 811 (Agreement and Plan of Merger). At this share price, the total price of the transaction would be approximately $565 million.FN6 The parties have agreed to close the transaction contemplated by the Agreement on or before August 31, 2007. Sud Decl. ¶ 45. After the merger, Whole Foods plans to close a number of Wild Oats stores. Murphy Report ¶ 22.4. It also will sell off all 35 Henry's and Sun Harvest stores (located in California and Texas) to be acquired from Wild Oats. PX00329.

FN6. The FTC asserts that with the assumed debt, the value of the transaction is approximately $700 million.

On February 26, 2007, Whole Foods filed its Premerger Notification and Report Forms with the Federal Trade Commission and the Department of Justice. On June 5, 2007, the FTC authorized its staff to seek both a temporary restraining order and a preliminary injunction to prevent Whole Foods from acquiring Wild Oats pending the outcome of an administrative trial under Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

On June 6, 2007, the FTC filed a complaint in this Court seeking a temporary restraining order and preliminary injunction to halt the transaction pending an administrative trial on the merits. On June 7, 2007, with the consent of the parties, the Court entered a temporary restraining order to delay completion of the transaction until the Court could rule on the motion for a preliminary injunction.

IV. THE EXPERT WITNESSES

The Federal Trade Commission proffered two expert witnesses: Dr. Kevin M. Murphy, an economist, and Dr. Kent Van Liere, a sociologist. The defendants proffered three expert witnesses: Dr. David T. Scheffman, Jr., an economist; Dr. John L. Stanton, an expert in food marketing; and Ms. Kellyanne Conway, a polling expert.

Dr. Murphy is the George J. Stigler Distinguished Service Professor of Economics at the University of Chicago Graduate School of Business. PX02878 at 002. Dr. Murphy has a doctorate degree in economics from the University of Chicago. His undergraduate degree from UCLA is *12 also in economics. *Id.* at 006. He teaches courses and publishes "in a variety of areas in economics." *Id.* Dr. Murphy has consulted in the area of antitrust for over 20 years. He has worked on over 50 antitrust cases. PX02878 at 007.

Dr. Murphy is a Fellow of the Econometric Society and is a member of the American Academy of Arts and Sciences. PX02878 at 007. In 1997, he was awarded the John Bates Clark medal for economics. *Id.* In 2005, Dr. Murphy received a five-year unrestricted research award from the MacArthur Foundation in recognition of his past contributions and potential future contributions to economics. *Id.*

Dr. Scheffman is an Adjunct Professor of Business Strategy and Marketing, Owen Graduate School of Management, Vanderbilt University, and a Director with LECG, LLC. Scheffman Report ¶ 1 and App. A at 1. He has twice served as Director of the Bureau of Economics at the Federal Trade Commission, most recently from 2001 to 2003. *Id.* at 1 & 3. He is an expert in the fields of economics, microeconomics, industrial organization economics, antitrust economics (including mergers), econometrics, statistics, marketing, financial analysis, and retailing. Scheffman Report ¶¶ 3-6, 13, 16.

Dr. Scheffman has experience analyzing the competitive and efficiency benefits of mergers. Scheffman Report ¶ 16. This experience, and experience from private economics consulting, includes extensive work involving the supermarket industry. JX 18 at 21-24 (Scheffman Dep.). The FTC invited Dr. Scheffman to speak at its May, 2007, conference on "Grocery Store Antitrust: Historical Retrospective & Current Developments." PX 322; Scheffman Report, Appendix A at 7; JX 18 at 38-39 (Scheffman Dep.).

Dr. Stanton is Professor of Food Marketing at Saint Joseph's University in Philadelphia, Pennsylvania. He received his Ph.D. in marketing from Syracuse University. He has been in the food industry for over 30 years. His research and consulting has been in both the retail side and the supplier side of food marketing. Stanton Report ¶ 4. Dr. Stanton previously held the first endowed chair in food marketing in the United States, entitled the C.J. McNutt chair in food marketing research, from 1985 to 1995. Stanton Report ¶ 6.

Dr. Stanton teaches a variety of food marketing courses in both the B.S. and M.S. programs including Food Marketing Strategy, Target Marketing in the Food Industry, Segmentation and Positioning, and Food Marketing Advertising. His M.S. courses include elements of both retail food marketing and food service marketing. Stanton Report ¶ 5. Dr. Stanton has authored or co-authored 57 articles in refereed journals and has published several industry books. Stanton Report Appendix A. Dr. Stanton has also been the editor of the Journal of Food Products Marketing since 1994. Stanton Report Appendix A.

Dr. Stanton testified regarding his knowledge of the store formats and operations of the following chains: Sunflower, Kroger, Supervalu, Albertson's, Shaw's, Jewel, Safeway, Wal-Mart, Target, Giant Food, Food Lion, Hannaford, Bloom, Whole Foods, Wegmans, Wild Oats, Meijer, HEB, Central Market, Publix, Shop Rite, Harris Teeter, Price Chopper, Giant Eagle, A & P, Food Emporium, Waldbaum's, Pathmark, Trader Joe's, Tesco, Byerly's/Lund's, and Andronico's. *See* JX 19 at 123-167 (Stanton Dep.).

Ms. Conway and her firm, the polling company, inc., were commissioned by defendants to conduct a survey that would support Dr. Scheffman's report and would corroborate his analysis. Scheffman Report***13** 159; PX02066 at 023; JX 20 at 7:16-20; 8:20-9:2 (Conway Dep.).

Dr. Van Liere was retained by the Federal Trade Commission to review and evaluate the survey conducted by Ms. Conway. Van Liere Report (PX02890-002) ¶ 2. Dr. Van Liere has an M.A. and a Ph.D. in Sociology from Washington State University where he specialized in social psychology and research methods and statistics, including survey research. Van Liere Report ¶ 4. From 1978 to 1985, he served as an Assistant, then Associate Professor with tenure, at the University of Tennessee, where he taught classes in attitudes and opinions, survey research, research methods and statistics. *Id.* He also regularly publishes academic research in leading journals based on data collected using surveys. *Id.* Dr. Van Liere has published papers in peer-reviewed journals and monographs on a range of topics involving surveys. Van Liere Report ¶ 8.

After reviewing Ms. Conway's report and the survey backup materials, Dr. Van Liere concluded that her survey methodology and procedures were fundamentally flawed, which rendered her data and results unreliable. Van Liere Report ¶ 3. The Court agrees with Dr. Van Liere. It therefore will not give Ms. Conway's report any weight or consideration in evaluating the evidence before it. FN7

> FN7. The Court notes that Dr. Scheffman, for whom Ms. Conway's report was intended, has not relied on it.

The FTC also maintains that the reports of Dr. Stanton, also submitted on behalf of defendants, are entitled to no weight. The Court disagrees. Plaintiff criticizes Dr. Stanton's report for not analyzing the facts of this case, but rather discussing the food retailing industry more generally. The Court notes, however, that the state of the industry itself is an important factor in a case like this. *See supra* at 7-8; *infra* at 15; *see also* FTC v. Arch Coal, Inc., 329 F.Supp.2d at 116-17, and Dr. Stanton is a recognized expert in this field. For that reason, the Court found Dr. Stanton's report to be helpful and will rely on it as appropriate. The Court also notes that plaintiff could have offered its own industry expert or rebuttal to Dr. Stanton's report, and chose not to do so.

The defendants and Dr. Scheffman criticize the methodology utilized by Dr. Murphy and the bases for his opinions and conclusions. The FTC and Dr. Murphy criticize the methodology, opinions and conclusions of Dr. Scheffman.

The defendants criticize Dr. Murphy because he has not conducted any direct test of whether Wild Oats imposes unique constraints on Whole Foods that will disappear as a result of the proposed transaction. They also criticize him for analyzing and relying upon Whole Foods' banner entries in certain markets and its impact on Wild Oats, without examining the effects of either banner entry or (the more relevant) banner exit by Wild Oats on Whole Foods, because Whole Foods will be the surviving company if this deal is consummated.

Because a central concern of the Merger Guidelines is with the impact of competition on prices, the defendants also criticize Dr. Murphy for relying on margins rather than on prices. They maintain that Dr.

Murphy's reliance on analyses of margins is not based on sound methodology in economics, accounting, and financial analysis. *See* Scheffman Rebuttal Report ¶ 15. They argue that any effects inferred from margins, however defined and estimated, are relevant only if a valid inference can be made about prices from margins. Defendants*14 and their experts maintain that in this case reliable inferences about prices cannot be made from margins alone. *See* Scheffman Rebuttal Report ¶ 16.

The defendants also argue that Dr. Murphy's analyses of the effect of Whole Foods' entry on Wild Oats net sales, margin and prices do not control for the pricing or promotional strategies of all other supermarkets in response to Whole Foods' entry. Instead, Dr. Murphy includes the responses of competitors to Whole Foods' entry, and the effects caused by those competitors, as effects caused by Whole Foods. *See* JX 26 at 233 (Murphy Dep.); *see also* Scheffman Rebuttal Report ¶ 10 ("Dr. Murphy's analysis of why competitive effects implicitly but importantly *assume* that non-PNOS competitors are not significant factors impacting the competition between [Whole Foods] and [Wild Oats]....").

Defendants criticize Dr. Murphy for inferring the price effect of a Wild Oats exit by equating that event with a Whole Foods entry in reverse-that is, Dr. Murphy's "exit" analysis assumes that the effect of a Wild Oats exit would be exactly the same as a Whole Foods entry, albeit in the opposite direction. Where multiple firms enter simultaneously, Dr. Murphy's regression analysis does not permit one to tell which of the firms is causing how much of the effect on Wild Oats' margins, net sales, and prices. *See* JX 26 at 228 (Murphy Dep.).

Fundamentally, the defendants maintain, Dr. Murphy's analyses study the wrong events. He analyzes the effects of Whole Foods' banner entry on Wild Oats when he should be looking at the price effects of Wild Oats exits. July 31 a.m. Hearing Tr. at 23-24, 26 (Scheffman); Scheffman Rebuttal Report ¶ 41. According to the defendants, the effect of Whole Foods' banner entry on Wild Oats' prices, margins or sales does not directly test whether Wild Oats imposes any constraint on Whole Foods. July 31 a.m. Hearing Tr. at 28-30 (Scheffman); *see* Murphy Report ¶ 63.

Finally, the defendants maintain that Dr. Murphy's study of five Whole Foods' entry events into Wild Oats "markets" was in fact based on only two areas (West Hartford, Connecticut and Fort Collins, Colorado), Murphy Report ¶ 58; Scheffman Rebuttal Report ¶ 56, only one of which offers sufficient post-entry "price" and volume data to discern a time-pattern of effects. Murphy Report ¶ 57; July 31 a.m. Hearing Tr. at 71-72 (Murphy). In the end, defendants maintain, Dr. Murphy's analysis of the effect of Whole Foods banner entry on Wild Oats' prices really comes down to his analysis of Hartford, Connecticut, and even there, he failed to account for all relevant variables, such as partial shrink, the idiosyncratic price observations for the salad bar, and the simultaneous entry of Trader Joe's.

The FTC has equally vigorous criticisms of Dr. Scheffman and his analysis. One of the FTC's criticisms of Dr. Scheffman is that he used a 5% standard for what constitutes a "small but significant non-transitory increase in price" ("SSNIP") under the Merger Guidelines, even though he accepts and recently publicly opined that smaller SSNIP's are more appropriate for mergers in low net margin industries like supermarkets. *See* Murphy Rebuttal Report ¶ 4; PX00322 at 132.

The FTC also criticizes Dr. Scheffman's "critical loss" analysis. It maintains that while Dr. Scheffman concludes that the actual loss for a hypothetical premium natural and organic food supermarket ("PNOS") monopolist would "greatly exceed" or "swamp" the critical loss thresholds, Dr. Scheffman actually only "assumes" what the actual loss would be and *15 provides no quantitative evidence for the magnitude of the actual loss that could be compared to these thresholds, and no methodology for calculating the actual loss. Murphy Rebuttal Report ¶¶ 10-11.

Finally, the FTC criticizes Dr. Scheffman for basing his pricing analysis on item-specific register prices at Whole Foods stores on a *single day* in June of 2007. The FTC maintains that an analysis of a single day's pricing, even if otherwise well done, cannot provide the basis for any reliable conclusions. It criticizes Dr. Scheffman for extrapolating from this single day to reach a variety of conclusions about pricing generally. The FTC also says Dr. Scheffman's conclusions about pricing are also inconsistent with econometric evidence on Whole Foods' margins, which vary across stores according to the presence or absence of local competition from Wild Oats. Murphy Rebuttal Report ¶ 47.FN8

FN8. The Court discusses this pricing analysis and the plaintiff's criticism of it *infra* at 39-40.

V. RELEVANT PRODUCT MARKET

[7] As noted above, and as was the case in Staples, "the definition of the relevant product market in this case is crucial. In fact, to a great extent, this case hinges on the proper definition of the relevant product market." FTC v. Staples, Inc., 970 F.Supp. at 1073. The FTC believes the relevant product market is premium natural and organic supermarkets ("PNOS"), of which it alleges there are four in the entire country-Whole Foods (the largest), Wild Oats (the second largest), Earth Fare (with 13 stores in only four states), and New Seasons (with eight stores, all in Oregon). Defendants Whole Foods and Wild Oats believe that the relevant product market is one that includes all supermarkets. "[O]nly examination of the particular market-its structure, history, and probable future"-how it operates in the real world-can provide the appropriate setting for determining the relevant product (and geographic) market and for judging the probable anticompetitive effects of a merger or acquisition. FTC v. Arch Coal, Inc., 329 F.Supp.2d at 116-17. Antitrust theory "cannot trump facts, and even Section 13(b) cases must be resolved on the basis of the record evidence relating to the market and its probable future." Id.

The Court looks first at the Horizontal Merger Guidelines and the testimony and reports of the economic experts and then examines what the evidence shows is really happening in the marketplace.

A. The Horizontal Merger Guidelines and the Economic Evidence

The Horizontal Merger Guidelines issued by the Department of Justice and the Federal Trade Commission in 1992, and revised in 1997 ("Merger Guidelines"), articulate the analytical framework the Justice Department and the FTC apply in determining whether a merger is "likely substantially to lessen competition." Merger Guidelines § 0.1. Under the Guidelines, as under the case law, the relevant product market is determined according to the "reasonable interchangeability of use" or cross-elasticity of demand between the product sold and "substitutes for it." Merger Guidelines §§ 1.0, 1.11; *Brown Shoe Co. v. United States*, 370 U.S. at 325, 82 S.Ct. 1502. The analytical framework set forth in the Merger Guidelines approaches the inquiry regarding the reasonable interchangeability of use or cross-elasticity of demand by asking whether a "hypothetical monopolist ...***16** would profitably impose at least a 'small but significant and nontransitory [price] increase' " ("SSNIP"). Merger Guidelines § 1.11.FN9 Reasonable interchangeability of use in effect means "substitutability"-the practical ability of a consumer to switch from one product to another. *See Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d at 218-19; *FTC v. Arch Coal, Inc.*, 329 F.Supp.2d at 119-20; *FTC v. Swedish Match*, 131 F.Supp.2d at 158. The forward-looking test of the Horizontal Merger Guidelines therefore asks where customers would turn if a hypothetical monopolist of the candidate product imposed a SSNIP. Merger Guidelines § 1.11.

FN9. The Merger Guidelines speak of a 5% SSNIP test, but recognize that in some cases it is appropriate to use a smaller percentage. Merger Guidelines § 1.11. Dr. Murphy and Dr. Scheffman agree that in some cases a hypothetical price increase as low as 1% may be appropriate.

As the FTC explained it, the issue is whether there is a group of customers for whom there are not sufficiently close substitutes that a price increase-a "small but significant nontransitory increase in price"-can be inflicted on them. Aug. 1 a.m. Hearing Tr. at 42 (Bloom). If there are alternatives to which customers could readily take their business such that the price increases would not be profitable for the hypothetical monopolist, the proposed product market is too narrow and additional alternatives must be included in the relevant product market, even if customers did not view them as substitutes at the lower price.

In order to determine which products should be included in the relevant product market, the Guidelines methodology begins with each of the products sold by the two firms in question and then performs the hypothetical monopolist test. If a hypothetical firm that was the sole seller of a given set of products would find it profitable to impose a small but significant non-transitory increase in the price of any of those products, then the given set of products satisfies the relevant product market test. If not, then the product which is the next best substitute (defined in the Guidelines as the product that gains the largest share of the revenue diverted by a price increase) is added. Merger Guidelines § 1.11. The test is then repeated. Products are added sequentially in this way until a sole seller would find it profitable to increase price by the amount deemed to be "small but significant." Murphy Report ¶ 96.[FN10]

FN10. Given the thousands of products sold by supermarkets, a product-by-product analysis was not feasible in this case. Such an analysis would also be misleading because consumers do not typically choose retailers of the goods in question on a product-by-product basis; rather, they typically purchase an array of products from a single source. Murphy Report ¶ 97.

Because the FTC contends that the relevant market is "premium and natural organic supermarkets" ("PNOS"), Dr. Scheffman applied the hypothetical monopolist test by focusing on how consumers likely would behave if the price of grocery products in PNOS rose relative to the price of grocery products in other supermarkets. JX 18 at 33-34, 49 (Scheffman Dep.); Scheffman Report ¶ 49. He stated that the economic implication of this framework is that product market definition must focus its attention on "consumers at the margin" rather than consumers who are "inframarginal." Scheffman Report ¶¶ 50, 99; *see* JX 18 at 95 (Scheffman Dep.).[FN11]

FN11. It appears that the terms "core customer," "committed customer" and "inframarginal customer" are being used by the parties interchangeably. Aug. 1 p.m. Hearing Tr. at 76 (Denis). It is these customers who are being compared to and contrasted with "consumers at the margin" or "marginal consumers." The Court will generally use the terms "core customer" and "marginal consumer."

***17** A marginal consumer is someone who would switch where he or she shops in response to a SSNIP-that is, if his supermarket of choice imposed a small but significant and nontransitory price increase. According to Dr. Scheffman, in the context of supermarkets-including premium natural and organic supermarkets-such marginal consumers can switch or divert their purchases in any of three ways. First, they can reduce the size of their shopping basket at one supermarket and substitute by buying the same or similar items at another retailer-if that other retailer offers similar products for sale. Second, from the set of supermarkets that the consumer currently frequents, the consumer can switch a particular shopping trip from one supermarket to another. Third, the consumer can change retailers by deciding to no longer frequent a particular supermarket that the consumer no longer believes offers good quality for value. Scheffman Report ¶ 51.

Dr. Scheffman concludes that firms compete to retain existing business and win new business by competing for marginal consumers. It is these consumers who are susceptible to being won or retained by offering better prices, improved service, higher quality or more diverse product offerings. Scheffman Report ¶ 52. Supermarket retailers make their pricing, quality and service decisions in ways designed to retain and attract marginal consumers. While businesses value "core" customers, they simply "cannot survive-let alone grow and remain profitable-solely by catering to this small segment of customers." Scheffman Report ¶ 55. The appropriate focus for defining the relevant product (and geographic) market therefore is those marginal consumers. Dr. Scheffman concludes that the "marginal" consumer, not the so-called "core" or "committed" consumer, must be the focus of any antitrust analysis. Aug. 1 p.m. Hearing Tr. at 74-76 (Denis). He believes that this is consistent with the analytical framework set out in the Merger Guidelines. Scheffman Report ¶ 53. The Court agrees.

Dr. Scheffman used critical loss analysis to analyze the FTC's proposed product market. As the FTC acknowledges, this is a widely accepted analytical tool in antitrust cases both to analyze market definition and competitive effects. Scheffman Report ¶ 100; JX 18 at 33-34 (Scheffman Dep.); *see also* Aug. 1 a.m. Hearing Tr. at 64 (Bloom) (FTC agrees). That is because critical loss is implicit in the hypothetical monopolist test. Scheffman Report ¶ 100. The latter tests whether a SSNIP would be profitable over a candidate product; critical loss analysis assesses how much substitution in response to a SSNIP could occur before a SSNIP becomes unprofitable. Scheffman Report ¶ 110. To put it another way, SSNIP tests at what price increase a consumer will switch where he or she shops; critical loss tests at what point a purveyor's price increases lead to a sufficient amount of lost sales (and lost customers) that the economic loss exceeds the gain from having raised prices (the "critical" loss).

Critical loss analysis stems from the recognition that for almost any product, a price increase results in some lost sales as consumers make do with less, switch to other suppliers, or substitute other products. There is a profit detriment to the price increase equal to the product of the per unit gross margin and the number of units lost. But there is also an economic gain from the increased gross margin ***18** earned from the higher price on each remaining unit sold. The "critical loss" is the amount of lost sales at which the economic detriment equals the economic gain. It is a "critical" loss because any greater loss will result in the economic detriment exceeding the economic gain, thereby rendering the price increase unprofitable. Scheffman Report ¶ 96.

The application of the critical loss technique to market definition is a three step process. The first step is to estimate the incremental margin (gross margin) and determine the volume the hypothetical monopolist (or merged entity) would have to lose to render the price increase unprofitable (*i.e.*, the critical loss). The second step is to separately estimate what the actual loss in volume is likely to be as a result of the hypothesized price increase (*i.e.*, the estimated "actual loss"). The last step is to compare the estimate of the actual loss with the critical loss. If the actual loss is greater than the critical loss, the product market definition must be expanded. Scheffman Report ¶ 112.

In calculating critical loss, Dr. Scheffman originally used a SSNIP of 5% across all products sold by "premium natural and organic supermarkets." This is the SSNIP used in most contexts under the Merger Guidelines and (according to Dr. Scheffman) traditionally used by the FTC in supermarket mergers. JX 18 at 34-37 (Scheffman Dep.). As the FTC has pointed out, however, a lower SSNIP is sometimes used. *See also* Merger Guidelines § 1.11. According to the FTC, Dr. Scheffman himself has acknowledged that a 1% SSNIP may be appropriate to analyze markets characterized by high volume sales but low profit margins. *See* PX0322 at 132 (May 2007 remarks of Dr. Scheffman at an FTC conference); Scheffman Report ¶ 114.

Whole Foods has an average gross margin at the store level of approximately [Redacted] A 5% price increase implies a critical loss for Whole Foods of about [Redacted] in volume. Wild Oats stores typically have a gross margin at the store level of about [Redacted] or less. A 5% price increase implies a critical loss for Wild Oats of about [Redacted] in volume. Scheffman Report ¶ 115. In response to Dr. Murphy's report and the FTC's criticism of his use of a 5% SSNIP, Dr. Scheffman also did exactly the same analysis again but this time calculated critical loss for a 1% SSNIP. Critical loss for Whole Foods at that price increase would be a little over [Redacted] in volume-that is, if the hypothetical monopolist lost a little over [Redacted] of its sales, then a 1% SSNIP would not be profitable. JX 18 at 41-42 (Scheffman Dep.).

Critical loss analysis next considers what the actual loss is likely to be if prices increase. Actual loss depends on how many marginal customers are likely to exist and how likely they are to shift purchases in response to a SSNIP. Scheffman Report ¶ 98. There is no evidence in the record from which to determine cross-elasticity of demand between premium natural and organic supermarkets and other supermarkets and grocery retailers. July 31 p.m. Hearing Tr. at 13-14 (Scheffman); JX 18 at 70-71 (Scheffman Dep.). Nor is there statistical evidence of actual loss, as the SSNIP is hypothetical rather than actual. July 31 p.m. Hearing Tr. at 10 (Scheffman). Therefore, Dr. Scheffman based his estimate of actual loss on weighing the evidence in the case, including the 47 market studies he reviewed. JX 18 at 91 (Scheffman Dep.).

Dr. Scheffman summarized (and then discussed in detail) what the market studies show: (1) grocery shopping is a relatively highly price sensitive category of ***19** retail; (2) Whole Foods and Wild Oats customers are shifting purchases between PNOS and other supermarkets, and can further shift purchases costlessly, *i.e.,* without having to change their shopping patterns; (3) most Whole Foods and Wild Oats shoppers shop frequently at other supermarkets and grocery retailers; (4) other supermarkets compete vigorously for the patronage of customers who also shop at Whole Foods and Wild Oats; and (5) Whole Foods (and to a lesser degree Wild Oats) regularly and extensively price check other supermarkets and food retailers in order to gauge their pricing, their assortments, and other strategies that these competitors are using to attract Whole Foods shoppers and other customers into their stores. Scheffman Report ¶¶ 122, 123, 125, 127, 204, 212, 213, 216, 127, 224-29.

Dr. Scheffman concluded that a substantial portion of Whole Foods and Wild Oats business is at the margin such that in the event of a PNOS price increase, the actual loss would substantially exceed the critical loss. Scheffman Report ¶ 128. "Where marginal customers comprise such a significant portion of the business, there is no doubt that the actual loss from a PNOS price increase would greatly exceed the [Redacted] critical loss." Scheffman Report ¶ 121 (discussing 5% SSNIP test results). Dr. Scheffman's conclusion obtains regardless if the SSNIP is 5% or 1%. JX 18 at 40, 89 (Scheffman Dep.); *see id.,* at 89-93 (the actual loss on a 1% price increase would be more than [Redacted] and is likely to be about [Redacted].

Even accepting the possibility that certain products are sold only at Whole Foods or Wild Oats, or that certain consumers perceive that the quality they want is only available at those stores, Dr. Scheffman concluded that critical loss analysis shows that, particularly with a small SSNIP, a relatively small sales loss would make a price increase unprofitable. The record evidence, including market research studies and evidence of how both consumers and retailers are actually acting in the marketplace, suggests that because so many people are cross-shopping for natural and organic foods and are marginal rather than core customers, the actual loss from a SSNIP would exceed the critical loss. July 31 p.m. Hearing Tr. at 25-27 (Scheffman). The Court agrees with Dr. Scheffman.

Dr. Scheffman's critical loss analysis demonstrates that the relevant product market must be broader than the market proposed by the FTC: "If all PNOS raised prices, there would be a substantial loss in business," and the loss necessarily would be to other supermarkets. Scheffman Report ¶ 120. "Based on this qualitative and quantitative evidence, I have concluded that the relevant product market must encompass at least all supermarkets." Scheffman Report ¶ 120. Evidence of the significant amount of sales that are "at the margin" shows that it is not plausible that a 5% increase in prices attempted by the proposed merged entity would be profitable, since the actual loss in sales arising from such a price increase is likely to far exceed the critical loss. Scheffman Report ¶¶ 117, 121. Actual loss would also defeat a 1% price increase. Scheffman Rebuttal Report ¶¶ 104-105.

Applying the product market definition framework of the case law and the Merger Guidelines, it follows that the relevant product market within which to evaluate the proposed transaction must be at least as broad as the retail sale of food and grocery items in supermarkets. Scheffman Report ¶¶ 128, 235. As a result, the FTC's proposed relevant product market of PNOS fails. *See* JX 18 at 55-56 (Scheffman Dep.) ("[T]he FTC's relevant ***20** market is not supportable as a matter of economic analysis and [ ] it would have to include non-PNOS supermarkets and other grocery retailers").

Dr. Scheffman also reviewed data regarding the sales at newly opened Whole Foods stores in certain markets where Whole Foods had no other stores, so-called "banner" entries. Scheffman Report ¶¶ 60-94.[FN12] According to Dr. Scheffman, a study of these store opening events is relevant to product market definition because it provides a natural experiment regarding how consumers react to a change in their options. Scheffman Report ¶ 61; July 31 p.m. Hearing Tr. at 21-23 (Scheffman). His analysis demonstrates that when Whole Foods enters a new local area, Whole Foods generates substantial sales that are overwhelmingly captured from the local traditional or conventional supermarkets and grocery retailers regardless of whether there are other PNOS in the area. Scheffman Report ¶ 60. Dr. Scheffman concludes from this analysis that premium natural and organic supermarkets compete directly with other supermarkets.

FN12. A "banner entry" event is the entry of the first store of a given brand into a given geographic market. Murphy Report ¶ 48.

In an area in which there are no other PNOS, all the sales for the new Whole Foods store necessarily come from other grocery retailers. Scheffman Report ¶ 62. Dr. Scheffman nevertheless found that these new Whole Foods stores succeeded even though they had to draw all of their customers from other grocery retailers and supermarkets. Scheffman Report ¶¶ 65-66; *see* July 31 p.m. Hearing Tr. at 11 (Scheffman). It is obvious that when Whole Foods opens a new store in an area with no other PNOS it does not create new demand for groceries; rather, consumers divert some of their grocery purchases from other grocery retailers to Whole Foods. Scheffman Report ¶ 65.

On the other hand, when a Whole Foods store opens in an area already served by a Wild Oats store (or other PNOS), clearly Wild Oats stores can be expected to lose sales. Scheffman Report ¶ 62. But combined Whole Foods and Wild Oats revenues after entry of the Whole Foods store average more than [Redacted] times the revenues of the Wild Oats store prior to entry. Scheffman Report ¶¶ 75-76. Reviewing Whole Foods entry events in areas where Wild Oats also operated, Dr. Scheffman found that the reduction in Wild Oats sales was only about [Redacted] in most areas-in some less than [Redacted] In other words, when a Whole Foods enters an area that has a Wild Oats store, its sales do not overwhelmingly come from Wild Oats, but primarily from other supermarkets; the main competitive interaction is between Whole Foods and "other" grocery retailers. Scheffman Report ¶¶ 83, 90.

Dr. Scheffman found that: (1) on average, the opening of a new Whole Foods store generated substantially more sales of natural and organic products than existed in the area prior to the opening, and (2) in every instance, the new Whole Foods store generated substantially more in sales than the Wild Oats store previously had. Scheffman Report ¶ 76. He observed, "[c]ontrary to the prediction implied by the FTC's product market, in all cases ... [Whole Foods'] sales are much larger than the reduction in sales of ... [Wild Oats]." Scheffman Report ¶¶ 77-79. Thus, when Whole Foods opens a new store in an area that has a Wild Oats, the data shows that Whole Foods gains a lot of sales, "and most of those sales by far did not come ***21** from Wild Oats."JX 18 at 81-82 (Scheffman Dep.). From the data, it is clear that most of the sales are coming from non-PNOS supermarkets. *Id.* at 82. Whole Foods is "overwhelmingly ... picking up its sales from non-PNOS markets and of course necessarily has to be ... competitive with those supermarkets to attract those sales and keep them." *Id.*, at 83.

Dr. Scheffman made calculations that showed that the combined revenue at a new Whole Foods store and an existing area Wild Oats store was, on average, [Redacted] times the revenue that the Wild Oats store had attracted before the Whole Foods store opened. *Id.* ¶ 79. These facts show that most of Whole Foods' sales came from non "premium natural and organic" supermarkets and other grocery retailers. It follows that most of the customers who frequent the new Whole Foods store come not from Wild Oats but from other competitors. These facts lead to the inevitable conclusion that Whole Foods' and Wild Oats' main competitors are other supermarkets, not just each other. Scheffman Report ¶¶ 74-90.

Dr. Murphy conducted a number of economic analyses. He concluded, among other things, that the estimated impact of banner entry by Whole Foods on Wild Oats' existing-store dollar sales indicates that the entry by Whole Foods into a geographic area reduces sales at nearby Wild Oats stores by [Redacted] He further concluded that the introduction of competition from Whole Foods has a larger effect on Wild Oats than does the introduction of competition from other sources. Murphy Report ¶ 49.

Dr. Murphy studied five entry events in which a Whole Foods banner store entry occurred within five miles of an existing Wild Oats store. Murphy Report ¶¶ 56, 57. Of the five entry events studied, he focused on two-West Hartford, Connecticut, and Fort Collins, Colorado-because he believed they were the only ones that offered sufficient post-entry price and volume data to discern a long run time-pattern of effects. Murphy Report ¶ 58.

Compared to Wild Oats stores that did not face entry, Dr. Murphy found that prices in Wild Oats' West Hartford store were [Redacted] six months immediately following entry by Whole Foods, [Redacted] 7 to 12 months following entry, and [Redacted] one year or more. The corresponding percentage reductions in sales in West Hartford were

[Redacted] and [Redacted] for these time intervals. Murphy Report ¶ 58. The initial (0-6 months) price effect in Fort Collins is [Redacted] and remains about [Redacted] its pre-entry level even after a year. In the second year post-entry, sales in Wild Oats' Fort Collins store had [Redacted] compared to control stores. Murphy Report ¶ 59. The Fort Collins Wild Oats store was closed in December 2006. Dr. Murphy did not analyze what happened to Whole Foods prices in Fort Collins in the months after the Wild Oats store closed in December 2006.

From his study of these Whole Foods entry events and his estimate for the effects on Wild Oats and Whole Foods store-wide margins from the banner entries of Whole Foods, Dr. Murphy reached certain conclusions by analogy to the likely exit events that will occur after the merger when Whole Foods closes Wild Oats stores in many markets where they overlap. The Court concludes that these "assumptions" cannot form the basis of a legitimate analysis of effects on competition from the proposed transaction. The Court is unwilling to accept the assumption that the effects on Wild Oats from Whole Foods' entries provide a mirror from which predictions can reliably be made about the effects on Whole Foods from Wild Oats' future exits if this transaction occurs.

***22** Despite the fact that their own expert, Dr. Scheffman, also studied certain banner entry events by Whole Foods and reached conclusions about the success of the new Whole Foods stores and from whom they drew their customers, the defendants vigorously criticize Dr. Murphy's study of banner entry events because they say Dr. Murphy studied the "wrong events"-banner entries by Whole Foods instead of banner exits by Wild Oats.[FN13] The FTC acknowledges that Dr. Murphy's study is a study of only those individual markets and "not itself a study beyond those markets." Aug. 1 a.m. Hearing Tr. at 62 (Bloom). It nevertheless is an important study, according to the FTC, because this information when merged with other studies "casts additional light on what's going on in the marketplace." *Id.* While the Court is troubled that Dr. Murphy's pricing analysis is based on only two entry events and no exit events, the Court considers it, as the FTC suggests it should, to the extent it "casts additional light on what's going on in the marketplace."

FN13. It may be that at least one reason Dr. Scheffman and Dr. Murphy reached different conclusions from their respective studies is that they studied the entry of Whole Foods into different markets. Dr. Scheffman looked at markets that Dr. Murphy excluded.

The problem is that "what's going on in the marketplace," according to the credible evidence before the Court, is that (1) Wild Oats prices are higher than Whole Foods prices where the two companies compete, (2) Whole Foods prices are essentially the same at all of its stores in a region, regardless of whether there is a Wild Oats store nearby, and (3) when Whole Foods does enter a new market where Wild Oats operates Whole Foods takes most of its business from other retailers, not from Wild Oats. *See* Scheffman Report ¶¶ 56-66, 77-79. Furthermore, the market studies and other evidence show that Whole Foods competes vigorously with other supermarkets to retain the business of its many marginal customers.

B. Product Differentiation or Separate Product Market; Consumer Demand for Natural and Organic Products

The complaint alleges that Whole Foods and Wild Oats are both supermarkets. Complaint ¶¶ 2, 4. According to the defendants' food marketing expert, Dr. John Stanton, a "supermarket" is a well-defined and widely accepted term within the food retailing industry-it is a retail food store that carries a full-line and wide variety of food and non-food grocery items, and it typically maintains the selection and depth of products to provide one-stop shopping for a customer's food and grocery needs. Stanton Report ¶ 15. Whole Foods and Wild Oats are supermarkets, but ones that have focused on high-quality perishables, specialty and natural organic produce, prepared foods, meat, fish, and bakery goods, rather than on dry goods. PX06613 at 005; PX01333 at 003-004; JX 37 at 77-79 (Odak I.H.); JX 32 at 40 (LaMacchia I.H.).

The evidence also shows that a typical Whole Foods store carries all the traditional categories of products: fresh produce (both conventional and organic), frozen foods (including ice cream), shelf-stable food and beverage products (including certain popular brands), bread and bakery items, dairy, refrigerated foods, fresh and prepared meats and poultry, fresh seafood, deli, prepared foods, as well as health and beauty aids, cleaning supplies, paper products and other general merchandise, including pet products, kitchen tools, and magazines. Stanton Report ¶ 18. While Whole Foods and Wild Oats had and still have as a primary focus the sale of natural and organic fruits, vegetables, meats and ***23** other perishables of high quality, Whole Foods and Wild Oats each target a large base of supermarket shoppers who shop for larger categories of food products in competition with other supermarkets. Stanton Report ¶¶ 3, 15, 18, 25, 80; Sud Decl. ¶ 14; JX 28 at 31 (Mackey I.H.).

Whole Foods and Wild Oats also emphasize high levels of customer service; they are "mission driven," with an emphasis on "social and environmental responsibility;" they provide the customer with the confidence of a "lifestyle brand" and a "unique environment," in stores that satisfy "core values" of a lifestyle of health and ecological sustainability and provide a "superior store experience." PX00718 at 001; JX 37 at 95:1-25; 96:1-6 (Odak I.H.); JX 31 at 59:4-7 (Paradise I.H.); JX 11 at 69:17-70:7 (Paradise Dep.); JX 33 at 18:22-19:6 (Coblentz I.H.). Whole Foods and Wild Oats traditionally have offered a higher level of service than do the majority of conventional supermarket retailers. PX01301; PX01302 at 004, 012 ("unparalleled customer service" at Whole Foods); JX 28 at 109:13-16, 113:18-21 (Mackey I.H.); JX 32 at 102:11-24 (LaMacchia I.H.) (Whole Foods employees will help the customer by describing the large variety of 450 to 600 types of cheese that Whole Foods offers and offering free samples of any cheese the customer would like to try); PX00670 at 006 ("superior service with sincerely friendly and knowledgeable people-World Class Service" at Wild Oats); PX00670 at 034 (Wild Oats "seek[s] to offer a higher level of service than conventional supermarkets."); PX00518 at 008 (discussing higher level of service, knowledgeable personnel, and more money spent on store labor than conventionals).

The FTC distinguishes between consumers who shop "casually" for natural and organic foods and "customers that have decided that natural and organic is important, lifestyle of health and ecological sustainability is important." The question, according to the FTC, is where will this latter group shop after the merger and the closure of Wild Oats stores. Aug. 1 a.m. Hearing Tr. at 43-44 (Bloom). As explained *supra* at 17-18 and *infra* at 35, however, the Court concludes that the effect of the proposed merger on marginal consumers is more important than the effect on such core consumers, as it is the marginal consumers for whom the stores must and do compete most vigorously.

According to Dr. Stanton, differentiation "is now the primary method a supermarket operator uses to attract customers away from its supermarket competitors, just as location and low prices [were] the primary method of competition several decades ago." Stanton Report ¶ 26. Representatives of other supermarkets, including Delhaize and Trader Joe's, agree with this view. *See* JX 21 at 25 (Vail Dep.) (supermarkets pick and choose what to focus on and offer to consumers), 32 (even though all supermarkets in the United States are differentiated, they all compete against each other); DX 644 at DZA 000089 (Delhaize, "DG Board of Directors"); Boardman Decl. ¶ 10; JX 24 at 112-14 (Bane Dep.) (Trader Joe's looks at what competing supermarkets are doing to differentiate themselves).

Dr. Stanton observed that in today's world of differentiation, most successful supermarkets have developed certain benefits that distinguish them from the "average" supermarket and give customers a reason for shopping their stores. Stanton Report ¶ 23. Differentiating factors can include such things as low prices, ethnic appeal, quality prepared foods, expanded variety within a specific category or department, customer service, or perishable departments such as meats or produce. ***24** *Id.* The question is whether this differentiation creates "sub-markets" or separate product markets for purposes of analyzing competitive impact. Dr. Stanton believes that as the consumer's desires for various benefits change, supermarket operators will continue to change with them, and that supermarkets modify, re-define and reformat themselves all the time to meet the trends in consumer demand and the trends in competition. Stanton Report ¶ 28.

No one can doubt that consumer demand for natural and organic products has sky rocketed in recent years. Stanton Report ¶¶ 31, 66-71; Scheffman Report, Appendix E ¶ 4; DX S73. Demand for the following specific types of organic products has increased dramatically just over the past five years: organic milk (20-30% annually); soymilk (10% annually); organic bread and grain products (13-21% annually); organic fruits and vegetables (10-20% annually); organic meat, poultry and fish (32-120% annually); organic sauces and condiments (16-24% annually); organic packaged and prepared foods (11-20% annually); and organic snack foods (15-30% annually). DX 591 (Organic Trade Association's 2006 Manufacturers' Survey).

Nor is there any doubt that the dramatic growth in demand for natural and organic products is expected to continue. DX 591; Stanton Report ¶ 31; JX 21 at 72 (consumer demand for natural and organic products is not a fad and "is here to stay"); Sliva (WhiteWave) Decl. ¶ 6 ("I expect that consumer demand for natural and organic products will continue to increase into the foreseeable future."); Simon (Hain Celestial) Decl. ¶ 3 ("double-digit growth rates [for natural and organic food products] are expected to continue going forward as more and more consumers demand these products."); JX 21 at 37:20-38:5 (Vail Dep.) ("we have really looked at organic and natural foods as an emerging group within the industry ...").

Traditional or conventional supermarkets have responded to this increased demand for natural and organic products. Supermarket chains throughout the country have been expanding and growing their natural and organic offerings, and most are steadily increasing their offerings of these products. Sliva (White Wave) Decl. ¶ 10; Simon Decl. ¶ 3; Mays Decl. ¶ 13; Stanton Report ¶¶ 31-34; Scheffman Report, Appendix E ¶ 8; JX 24 at 43-44 (Bane Dep.) (organic products available in virtually any supermarket); DX 663 (Kroger recognition of competitor activity, including Whole Foods, in organic products).

While this may not have been the case some years ago, the growth in consumer demand for these natural and organic products now has made them part of the mainstream. Manufacturers and distributors of these products no longer rely on "natural food" stores for distribution of their products. JX 23 at 34-35 (Sliva Dep.); DX 680 (Letter from President of Rainbow Blossom markets in Louisville, KY) ("Many items that used to be of a special nature have now become commodity items obtained almost anywhere food is sold, and have highly competitive pricing structures."); Mays Decl. ¶¶ 16-17, 19; Megahan Decl. ¶¶ 18-20.

The evidence also shows that Whole Foods' supermarket competitors have paid attention to Whole Foods' success and to the changing consumer demands for fresh, natural and organic foods. Stanton Report ¶ 29. Many conventional supermarkets have been refocusing their strategies and repositioning their formats to respond to the changes in consumer demands. *Id.;* Robb Decl. ¶ 19; Gallo Decl. ¶ 20.

Whole Foods' internal documents, prepared in the ordinary course of business, indicate that Whole Foods believes it faces ***25** "eroding product differentiation" as other supermarkets continue to stock many of the same products that Whole Foods offers. DX 12 (2007 Board Report). Whole Foods believes it is in "a time of unprecedented competition" where it increasingly does not have "the advantage of offering a unique selection of products." DX 1 (June 2006 e-mail from Gallo to Mackey entitled "Thoughts on Competition"); *see also* Robb Decl. ¶ 24 ("Losing customers to our supermarket competitors hurts, especially now since they are doing things that used to set Whole Foods apart."); Sud Decl. ¶ 28; DX 253 (competitors mimicking Whole Foods in offering high quality natural and organic foods); DX 259 (competitors copying the offerings and atmosphere of Whole Foods); DX 723 at 3 (Whole Foods' margins will be pressured "once the soccer moms stop shopping at Whole Foods so often now that the same or equivalent products are available at Safeway"); *see also* Stanton Report ¶¶ 3, 28-30, 79-83.

Most of the major supermarket chains (regional and national) are improving perishable departments and offering an increased selection of natural and organic foods. DX 1 (June 2006 e-mail from Gallo to Mackey entitled "Thoughts on Competition"). As a result, Whole Foods believes it is in a "new era of the natural foods revolution" in which "we will all have to work harder and smarter to compete and differentiate." DX 198; Robb Decl. ¶ 18; JX 28 at 33 (Mackey I.H.) (Whole Foods' success has "caused all these supermarkets to try to want to steal Whole Foods' mojo."); *see also* Stanton Report ¶¶ 32-65 (the trend in supermarket retailing is toward expanded selections of fresh, quality perishables, expanded selections of natural and organic products, and improving the overall shopping experience); Scheffman Report, Appendix E, ¶ 8 ("many large supermarkets are focusing on improving quality and freshness and expanding natural and organic products in response to changing consumer demands."); DX 720; DX 721.

Many supermarket companies have invested significant resources into developing and opening new stores some of which mimic Whole Foods' store designs and product offerings. Sud Decl. ¶ 28. Many supermarkets have modeled the look and feel of their stores, as well as many of their current competitive strategies, on Whole Foods. Thus, remodeled competitors' stores often include expanded produce and organic selection, pro-active customer service, in-store demonstrations and promotions, and attractive, high quality fixtures and product cases. *See, e.g.,* JX 21 at 90-93 (Vail Dep.) (detailed account of Hannaford's remodel in Portland, Maine in response to anticipated Whole Foods entry); Paradise Decl. ¶¶ 21, 46-47, DX 49, DX 357, DX 368, DX 480 (discussing Safeway Lifestyle stores); DX 747 (discussing Publix Greenwise stores); Lannon Decl. ¶ 21; DX 504 (Shaw's president, stating that its newly remodeled store "sounds like a Whole Foods, looks like a Whole Foods, but it's a Shaw's").

Nearly every national supermarket chain now carries a wide array of natural and organic products, and many have significantly expanded their offerings of prepared and specialty foods. Sud Decl. ¶¶ 20, 22; Gallo Decl. ¶ 24; Stanton Report ¶¶ 32-65; DX 21; DX 49 (Safeway Lifestyle); DX 54 (Shop Rite); DX 56 (Publix); DX 77 (Wegmans); DX 216 (Ahold); DX 237 (Whole Foods private label strategy); DX 269 (Publix).

In addition, many competing supermarket chains have launched their own private label store brands of natural and organic products. *See infra* at 29-30, 44-48. These private labels are intended in part ***26** to allow other supermarkets to begin competing with Whole Foods in terms of product offerings and price. Sud Decl. ¶¶ 22, 26; DX 263 (Ahold); DX 269; DX 270 (Stop & Shop's private label advertised with tagline "Organic can be affordable.").

The defendants argue that the FTC improperly uses differentiation or uniqueness as the basis to define the market, while the defendants view differentiation as but one competitive dimension in which Whole Foods and Wild Oats engage in competition with other firms. According to the defendants, all supermarkets differentiate themselves in some way from their competitors in order to compete for the same supermarket shoppers and/or dollars. Stanton Report ¶¶ 3, 22-23; *see also* Martin Decl. ¶¶ 4, 5; DX 617 at 25-28, 32 (Vail Dep.). Whole Foods and Wild Oats tout their quality, including excellent perishables, healthful groceries, high-quality prepared foods, and natural and organic products. Some other supermarkets advertise their everyday prices, their special markdowns, or their broad selection of products, advantages that Whole Foods also tries to offer but that are not a central part of its brand image.

Differentiation, however, does not equate to a unique relevant product market for antitrust purposes. Stanton Report ¶ 3. The fact that supermarkets seek to differentiate themselves from one another does not address the relevant question for product market definition-are the differences between conventional supermarkets and PNOS so substantial that Whole Foods could retain most of its customers even if, post-merger, it were to raise price or reduce quality? The determinative question is not "are there any differences?" but "would customers switch?"

C. Whole Foods and Wild Oats Customers Cross-Shop at Conventional Supermarkets and Retailers

The evidence shows that many Whole Foods' customers also shop at other supermarkets and retailers, splitting their purchases and looking for the best price on a variety of different grocery items that they might purchase either at Whole Foods or elsewhere. Robb Decl. ¶ 21; Gallo Decl. ¶ 19; DX 8; Stanton Report ¶ 27; JX 21 at 25-27 (Vail Dep.).

A significant number of Whole Foods customers "cross-shop" between Whole Foods and other supermarkets, such as Delhaize, Kroger, Safeway, Albertsons, Ahold, Publix, and H-E-B. DX 2 at 16; *see also* DX 15 (frequent Whole Foods customers split purchases between Whole Foods and other stores such as Safeway, Costco, Wal-Mart, and Trader Joe's); DX 727; DX 735 at 5; JX 21 at 48:6-18 (Vail Dep.) ("if we can satisfy their needs on a particular shopping trip, then they will shop with us.

If there's something they need that Whole Foods offers that we may not offer, then they will shop at Whole Foods, and that would apply to, potentially, other banners as well.").

Wild Oats customers also cross-shop at conventional supermarkets. DX 568 (national trade area study found that consumers considered food retailers such as [Redacted] to be the best alternative for products that Wild Oats sells); DX 568; DX 567 [Redacted]; DX 572; DX 575.

While cross-shopping has always existed-a customer may have bought organic fruits and vegetables at Whole Foods and milk, coffee and cereal at Safeway-cross-shopping has become particularly prevalent as the different types of distribution channels for natural and organic goods have blurred. Whole Foods' points of differentiation from other stores has eroded because consumers now can purchase natural*27 and organic foods from the same stores where they traditionally bought their milk, coffee and cereal. Robb Decl. ¶ 21; Gallo Decl. ¶ 19; DX 3; DX 8 at 4; DX 13 (Wal-Mart); DX 15 at 18 ("Organic Users and Specialty/Gourmet Users [are] shopping more in mainstream [supermarkets], less in [Whole Foods]...."); DX 16 at 8; DX 24(HEB); DX 25 (Wal-Mart); DX 31 (Safeway); DX 37 (Wal-Mart); DX 38 (Costco); DX 40 (all competitors); DX 370 (Costco, Trader Joe's, Safeway, Wal-Mart, and Food Lion all components of "New Era of Competition"); DX 384 (Wal-Mart); *see also* JX 21 at 44-46 (Vail Dep.) (Delhaize has conducted research that shows that its customers cross-shop at Whole Foods).

The evidence shows that some Whole Foods' customers shop in other stores as often as once a week. JX 10 at 66-67 (Meyer Dep.) ("the reality we're in is our ... core customer base, shops at Safeway or Giant or Wegman's and then they shop at Whole Foods Market, and as those competitors add product to their stores that are like our products, with a halfway decent experience, they're going to not make that second trip. It's the inevitable reality."); *see also* JX 21 at 25-26 (Vail Dep.); Stanton Report ¶ 27; Allshouse Decl. ¶ 7.

Research by other supermarket chains also shows that their customers are cross-shopping at Whole Foods. [Redacted].

Market research reviewed by Dr. Scheffman demonstrates that shoppers at Whole Foods and Wild Oats shop frequently at other supermarkets and grocery retailers, and often do so more frequently than they shop at Whole Foods or Wild Oats. Indeed, some market research shows that many shoppers at Whole Foods and Wild Oats spend more than [Redacted] of their total grocery shopping purchases at retailers other than Whole Foods and Wild Oats. *See* Scheffman Report ¶¶ 131, 140, 148-49, 152, 161, 165-66; DX 568 (The Wild Oats' "core customer[s] only spend [ ] about [Redacted] of their dollars at Wild Oats."); DX 691 (Natural Marketing Institute Organic Trends & Perspective Study); DX 694; DX 702 at 13-18 (most segments of Whole Foods shoppers spend less than [Redacted] of total grocery budget at Whole Foods).

Market research and studies done even four and five years ago indicate that [Redacted] of Wild Oats customers did the majority of their food shopping at other stores. DX 567 at 3; DX 568 at 6, 48-49 ("Even [Wild Oats'] core customer only spends about [Redacted] of their dollars at Wild Oats," whereas [Redacted] of their grocery dollars are spent in "traditional food stores" such as [Redacted]; DX 575, DX 576 (customer interviews); *see* JX 37 at 86-88 (Odak I.H.); JX 16 at 62-65 (Odak Dep.) (Wild Oats customers shop at other supermarkets and compare prices).

As other retailers move more and more aggressively into the sale of organic and natural foods, market research indicates that a substantial percentage of shoppers at Whole Foods and Wild Oats purchase "healthy," organic and natural products (as well as other products) at other supermarkets. *See* Scheffman Report ¶¶ 131, 141, 150-51, 167-68; DX 568; DX 691; DX 694; DX 703. In fact, today, the majority of natural and organic goods sold in the United States are sold by so-called "conventional" supermarkets. Mays Decl. ¶ 19; PX 2072 at 96. Market research also demonstrates Whole Foods shoppers cross-shop for private label products with other supermarkets and grocery retailers. Scheffman Report ¶¶ 171 -72; DX 16 at 8 ("Multiple channel options and a myriad of reasons for purchasing have blurred the marketplace."); DX 240 ("There are significant levels of cross shopping between WFM and [Trader Joe's] ").

***28** The FTC argues that whatever cross-shopping may occur, the customers at Whole Foods and Wild Oats-or at least their "core" customers-do not shop at other, more conventional supermarkets routinely and certainly not for premium natural and organic food products. That is because (at least) these "core" customers and perhaps others are looking not just for the premium products but also for the service and unique atmosphere that Whole Foods and Wild Oats provide. The FTC lists the attributes unique to premium and organic supermarkets that define them-at least for their core customers-as a unique product market different from conventional supermarkets and other retailers:

• "generally focus on high-quality perishables, specialty and natural organic produce, prepared foods, meat, fish and bakery goods;"

• "generally have high levels of customer services;"

• "generally target affluent and well educated customers;"

• "generally select store sites based on the targeted customer;"

• "generally are mission driven with an emphasis on social and environmental responsibility;"

• "generally are a 'third place;' "

• "generally provide the customers with the confidence of a 'lifestyle' brand;"

• "generally provide the customer with added confidence and trust in the provision of the natural and organic products that are good for the consumer,"

• "generally provide a 'unique' environment;" and

• "generally are stores that meet 'core values' and a 'superior store experience.' "

Plaintiff's Third Supplemental Responses and Objections to Interrogatory No. 6 in the First Set of Interrogatories of Defendant Wild Oats Markets, Inc., July 15, 2007, DX 590 ("July 15 Supp. Responses").

Dr. Scheffman found, however, that the various marketing studies of Whole Foods and Wild Oats customers divided the shoppers in a variety of ways, not just by any or all of these attributes. He concluded that people shop at these stores for a variety of reasons, and that there is no clearly definable "core" Whole Foods or Wild Oats shopper. Scheffman Report ¶ 132. His conclusion is supported by market research that shows that there is no definable "core customer" for Whole Foods and that Wild Oats and that Whole Foods and Wild Oats customers cannot be characterized by a unique set of descriptors. Scheffman Report ¶ 170. Whole Foods shoppers "cannot be slotted into coherent categories because they shop at WFM or WO for such a wide variety of reasons." Scheffman Report ¶ 132.

One study showed that [Redacted] of Whole Foods shoppers are infrequent shoppers, shopping Whole Foods less than once every [Redacted] DX 16 (Natural Marketing Institute 2006 Market Corporate Tracker Study); *see* DX 240 at 9 (Natural Marketing Institute ESP Research Summary). Another study identified "6 unique customer segments whose differing attitudes and opinions impact their diverse shopping and buying behaviors". DX 703 (2007 Natural Marketing Institute "Shopper Segmentation Study: Identifying Unique Shopper Segments").

Yet another study run for Whole Foods in early 2007 shows that categories of "core" Whole Foods customers are declining and switching to conventional grocery stores. The data shows that Whole Foods share of specialty/gourmet customers have fallen from [Redacted] in 2005 to [Redacted]***29** in 2006, whereas for traditional grocery stores that percentage has risen from 80% in 2005 to 94% in 2006. DX 15 at 14 (2006 Health and Wellness Trends Database). Wild Oats estimates that so-called "core" customers comprise only approximately [Redacted] of its total customers. Mays Decl. ¶ 18.

As the interest in natural and organic foods increases, the number of customers and potential customers for such foods increases. It logically follows that, with the prevalence of cross-shopping, some such consumers may be drawn to Whole Foods, while others will satisfy their new-found interest in natural and organic foods at their traditional, conventional supermarket. Either way, it increases the number of consumers who potentially will cross-shop between Whole Foods and conventional supermarkets.

D. Whole Foods and Wild Oats Compete with Other Supermarkets and Other Supermarkets Compete with Them

The FTC acknowledges that there is competition between Whole Foods and conventional supermarkets to some extent. But "[t]he question is what are the dimensions of that competition, and what are consumers looking for when they shop at Whole Foods and Wild Oats."Aug. 1 a.m. Hearing Tr. at 31 (Bloom).

Whole Foods checks its prices against the prices of other supermarkets, and "comp shops" their stores. Robb Decl. ¶ 27; Gallo Decl. ¶ 28.[FN14] Whole Foods has offered evidence that it price checks or comp shops against other supermarkets in every area in which it operates. [Redacted] Wild Oats [Redacted] it has price checked certain other grocery stores.

FN14. A "comp shop" is a competitive assessment of another supermarket, including its prices, product offerings, configuration, and other attributes. Allshouse Decl. ¶ 10; Besancon Decl. ¶ 33; Gallo Decl. ¶ 27; Robb Decl. ¶ 28.

The evidence also shows that other supermarkets routinely price check Whole Foods' stores and adjust prices based on their assessment of Whole Foods' prices. *See, e.g.,* DX 359 (Whole Foods team member observing King Soopers employee walking Whole Foods' store and thereafter adjusting prices); Meyer Decl. ¶ 22; JX 10 at 48 (Meyer Dep.); DX 74 (Wegmans directly comparing prices to Whole Foods); DX 72 (scan of two bib tags from Wegmans' shelf directly comparing prices on two organic/natural products); Meyer Decl. ¶ 23 (Giant signage comparing prices to Whole Foods); DX 73 (Gallo email March 2007, forwarding picture of a sign from D.C. metro Giant supermarket comparing its prices to Whole Foods in a similar fashion as Trader Joe's as well as nearby store team member's report of Giant's inaccuracies in its representations of Whole Foods' prices).

Delhaize (consisting of Hannaford, Food Lion, Bloom, and Sweetbay supermarkets) considers Whole Foods to be a competitor. *See* JX 21 at 90 (Vail Dep.) ("They sell things that are core to our strategy, they're certainly a competitor."). It conducts full price checks on Whole Foods. JX 21 at 50-54 (Vail Dep.). According to Peter Vail, the leader of natural and organic foods for Hannaford/Delhaize, the Whole Foods price check is performed to the same degree as all other primary competitors-"They would get a full price check just like we would do against Stop and Shop or anybody else." JX 21 at 54 (Vail Dep.). These price checks cover the whole store and include both branded and private label products. *Id.* at 158. The price checks are then used for purposes of pricing at the Delhaize stores-"We would price check against all categories of Whole ***30** Foods and move [our prices] where we see appropriate." *Id.* at 139-40. Other supermarkets, such as Kroger and Supervalu, have also asked for permission to price check Wild Oats stores. JX 38 at 145 (Smith I.H.).

[Redacted] considers Whole Foods to be a [Redacted] DX 674.

[Redacted] has identified Whole Foods as its [Redacted] One of its business plans states: [Redacted] DX 810.

Whole Foods has three national private label programs: 365 Everyday Value ("365"), 365 Organic, and Whole Brands. Whole Foods' private label program is intended to be competitive with the natural and organic private label products of many supermarkets. A 2006 study by the Natural Marketing Institute shows that there is a significant overlap of private label offerings between Whole Foods, Safeway, Kroger, Costco, and Ahold, although each retailer has put "effort into diversifying their product line." DX 21 (Natural Marketing Institute Private Label Product Analysis). For many of these overlapped SKUs, "[Whole Foods'] prices are very competitive, and in many cases better than those of other stores (with the exception of Costco, most likely due to volume discounts, lower margins, and distribution structure)." *Id.* at 2.

According to Linda Boardman, Senior Coordinator for Private Label for Whole Foods, "[b]ecause more than [Redacted] of Whole Foods shoppers cross-shop at Trader Joe's, other supermarkets, and mass market stores, we want customers to purchase from Whole

Foods more of the products they purchase from competing stores." Boardman Decl. ¶ 5. Indeed, Whole Foods specifically designed its private label program to compete against other supermarkets. The private label acts as "the entry point for crossover shoppers" and, according to Whole Foods internal documents, it faces competition from Trader Joe's and supermarket brands. Although the private label program was originally focused on competition with Trader Joe's, over time its goals have expanded and today Whole Foods uses its private label products to enhance competition with other supermarkets as well. Boardman Decl. ¶ 5; *see also* DX 27, DX 29; DX 733 (Whole Foods Private Label Review); DX 752 (Referring to Safeway, Whole Foods Director Mo Siegel opined that "[a]s competition increases the relevance of our private label increases.") For instance, Whole Foods actively checks against a list of over [Redacted] Safeway "O" Organic items that overlap with Whole Foods private label SKUs. DX 26, 35. Evidence has been offered that Whole Foods' private label pricing strategy requires 365 and 365 Organic private label prices to match Trader Joe's prices on all like items. Boardman Decl. ¶ 17; 17 n. 1, DX 27.

The evidence shows that, when Whole Foods reviews a potential location for a store, it systematically considers every significant supermarket chain in the area a potential competitor for the new store. Sales projections presume that the Whole Foods store will draw the vast majority of its sales from other large supermarket chains. Sud Decl. ¶ 57. Before Whole Foods decides whether to open a new supermarket in a proposed area, it does a demographic study. Bradley Decl. ¶ 6; JX 6 at 34-35 (Bradley Dep.). The study lists all competitors in the expected draw area and presents key data for each competing store to understand the potential competitive implications of competitor proximity. There is evidence in the record that shows that in reviewing competitors, the study computes the sales of all supermarkets in the area, not just those of so-called premium natural and organic supermarkets. *See, e.g.,* DX 80 (Louisville, KY ***31** site study); DX 635 (Boulder, CO site study); Megahan Decl. ¶ 11-15.

A site location report also analyzes what the sales volume potential would be if a store opened in a given area on a given piece of property. JX 7 at 9 (Kadish Dep.). This analysis includes all supermarkets, not just premium natural and organic stores and attempts to [Redacted] JX 7 at 116, 125 (Kadish Dep.). The analysis in the site selection reports include [Redacted] and [Redacted] *See, e.g.,* DX 636 [Redacted] projecting that [Redacted] of Whole Foods sales would be drawn from retailers other than Wild Oats); *see* DX 171 [Redacted] projecting about [Redacted] of its average weekly sales would be captured from non-Wild Oats retailers like [Redacted].

According to Wild Oats internal documents, the site selection process for new Wild Oats stores also considers locations of all other supermarkets. DX 587 (Wild Oats maps all of its competitors on site plan maps); JX 37 at 105-06, 124 (Odak I.H.) [Redacted]; JX 12 at 213-15 (Brier Dep.). Wild Oats analyzes the competitive impact of conventional grocery store openings [Redacted] JX 34 at 140-141 (Martin I.H.).

There is evidence in the record that Whole Foods has been quite concerned about competition from conventional supermarkets and other retailers and that it has seen decreases in sales in some regions that are directly attributable to such stores. For example, in October 2006, Whole Foods Co-President A.C. Gallo noted:

Safeway, Giant Eagle, Giant, Stop & Shop, Harris Teeter, Food Lion, and Publix are all opening lots of new stores and are remodeling existing stores on the East Coast. Every time they open a new store or remodel an existing one with better perishables and natural foods we see a hit. There is an amazing level of activity here that we had not seen the past 5 years and it is affecting our older, smaller, parking challenged stores. Also there is the factor that people who are mostly supermarket shoppers and come to us for certain special items do not have to come to us as frequently now.

DX 3.

According to Whole Foods' Kenneth Meyer, the [Redacted] Whole Foods store's sales dropped [Redacted] when a [Redacted] store opened up just down the street. Meyer Decl. ¶¶ 4, 8; JX 10 at 18-19, 80, 82 (Meyer Dep.). According to Mr. Meyer, sales also at Whole Foods stores in [Redacted] and [Redacted] after [Redacted] stores opened in those areas, and sales dropped at Whole Foods stores in

[Redacted] and [Redacted] after [Redacted] stores opened in those areas. Meyer Decl. ¶ 4; JX 10 at 18-19 (Meyer Dep.).

Whole Foods believes it faces competition from Trader Joe's because Trader Joe's now sells many natural and organic products. Whole Foods matches prices on a significant number of items, both branded and private label. Gallo Decl. ¶ 26; Robb Decl. ¶ 26; DX 251; DX 252; DX 257; DX 262 (Price matching necessary to "stop or minimize the loss of business that [Whole Foods has] been experiencing whenever [Trader Joe's] opens near" a Whole Foods store); DX 264; DX 267; DX 279 (E-mail regarding posters in Trader Joe's locations in Southern California and New England that post comparative register receipts from Whole Foods); Meyer Decl. ¶¶ 24, 32; JX 10 at 61-63 (Meyer Dep.); DX 75 at 3-6 (Meyer email October 2006, detailing planned response in Mid-Atlantic region to Trader Joe's price comparison tactics).

***32** Dr. Stanton's conclusions concerning the competition by Whole Foods and Wild Oats with other, more conventional supermarkets can best be summarized by Paragraph 3 of his Expert Report:

Whole Foods and Wild Oats each compete in the supermarket industry with a plethora of other supermarket businesses. All supermarket retailers, including Whole Foods, attempt to differentiate themselves so as to give customers a reason to shop its stores over its competitors. *This does not, however, indicate that differentiated supermarkets do not compete with each other; to the contrary, it is how they compete with each other.* As consumer demand for fresh, healthy, organic and natural products has increased, more and more supermarket competitors have expanded their product offerings and store formats to more effectively compete for customers; the same customer base that Whole Foods is targeting. This trend has been dramatic, and will continue as consumer demand for these products, and competitor responses, continue to evolve. Whole Foods and Wild Oats face robust competition today in all the cities in which they compete, and Whole Foods will continue to face robust competition in the future after acquiring Wild Oats.

Stanton Report ¶ 3 (emphasis added).

As for the future, Dr. Stanton testified that "I believe that Wild Oats or Whole Foods and/or Wild Oats will face robust competition just about any major area that they go into." JX 19 at 120 (Stanton Dep.). When asked to explain what he meant by "robust competition," Dr. Stanton testified, "I mean that other supermarket chains will fight tooth and nail for those customers." JX 19 at 121 (Stanton Dep.). When asked if this competition includes price competition, Dr. Stanton testified "It certainly does." JX 19 at 121 (Stanton Dep.).

In sum, the evidence before the Court demonstrates that other supermarkets, including Safeway, Wegmans and Delhaize, compete today for the food purchases of customers who shop at Whole Foods and Wild Oats and that Whole Foods' customers already turn for some of their food purchases to the full range of supermarkets. *See, e.g.,* DX 609 at 18, 57-60 (Meyer Dep.); 57:5-60:21; Gallo Decl. ¶¶ 23-24; Robb Decl. ¶¶ 23-24; Sud Decl. ¶ 26; Paradise Decl. ¶ 17; Allshouse Decl. ¶ 7, DX 617 at 44-48 (Vail Dep.); Conway Report 5-36; Stanton Report ¶ 27. All of these stores carry many of the same products and, increasingly, many offer some of the same ambiance as well. Customers who shop at one of these stores usually shop at others as well. *See, e.g.,* DX 617 at 48 (Vail Dep.).

Today more supermarkets offer more natural and organic products, more high-quality perishables, and some even have more and improved service departments. *See, e.g.,* Paradise Decl. ¶ 19 ("King Soopers has been aggressively expanding its offerings of organic, natural and fresh products"), ¶ 20 ("Safeway's O Organic private label line carries many of the same organic products as Whole Foods and is priced similar to us"); DX 365 (King Soopers ad boasts that "Nobody sells more organic produce in Colorado-Nobody"); Stanton Report ¶¶ 28-30, 32-34.

Post-merger, all of these existing competitive alternatives will remain. If the combined firm raised prices or permitted quality to slide, many customers could and would readily shift more of their purchases to any of these alternative sources of natural and organic foods, often stores where they already shop. The evidence of substitutability***33** or "interchangeability of use" is striking.

E. Whole Foods and Wild Oats Do Not Uniquely

Compete with Each Other

The evidence shows that Whole Foods' does not have any specific competitive policies, practices, or strategies directed specifically at Wild Oats-its approach towards competing in a geographic area is the same whether Wild Oats is present or not. Gallo Decl. ¶ 29; Robb Decl. ¶ 29.

The evidence shows that Wild Oats' prices are generally higher than Whole Foods' prices. Gallo Decl. ¶ 9; Robb Decl. ¶ 15; Paradise Decl. ¶ 30; Lannon Decl. ¶¶ 14, 24; Besancon Decl. ¶ 64; JX 28 at 186-87 (Mackey I.H.); DX 488; DX 491; DX 584; DX 580; DX 581; DX 582; JX 37 at 41-46 (Odak I.H.). Furthermore, Whole Foods price checks or comp shops Wild Oats' stores less than it price checks or comp shops other supermarket competitors. Mays Decl. ¶ 27.

Whole Foods does not regard Wild Oats as a significant competitor in areas where they both operate. Kenneth Meyer, the Whole Foods Mid-Atlantic Regional President, described Whole Foods' view of Wild Oats as follows:

Our experience with Wild Oats in Louisville, and most other areas in my region where we both operate, is that their prices are usually higher than ours, and that our true competition on price and other factors is the multitude of other grocery retailers in those areas-and not Wild Oats.

Meyer Decl. ¶ 13.

Sales data confirm the lack of competitive rivalry between Whole Foods and Wild Oats in Louisville, Kentucky. Whole Foods' stores averaged $423,900 in weekly sales in 2006. Scheffman Rep., App. F at 57. By comparison, Wild Oats' weekly sales in 2006 averaged [Redacted] Scheffman Rep., App. F. at 57. Mr. Meyer explained that sales at Whole Foods' Louisville store are sufficiently high that the majority of its sales must be coming from grocery retailers other than Wild Oats, because otherwise "Wild Oats would have closed its doors by now." Meyer Decl. ¶ 7; JX 10 at 101-02 (Meyer Dep.).

Whole Foods and Wild Oats each have one store in the Portland, Maine area. Scheffman Report, Appendix F ¶ 307. Whole Foods and Wild Oats face substantial competition in Portland, Maine from Hannaford, Shaw's and others. Scheffman Report, Appendix F ¶ 309; Martin Decl. ¶¶ 17, 27; Gallo Decl. ¶ 33; DX 171 (2004 Portland, Maine site study); DX 497. Hannaford and Shaw's feature locally grown produce and sell a significant amount of natural and organic foods. Scheffman Report, Appendix F ¶¶ 310, 312; Gallo Decl. ¶ 33. The site report for Portland, Maine shows that Whole Foods expected conventional supermarkets, and not Wild Oats, to be its principal rivals. According to the Whole Foods Portland, Maine site study, Whole Foods expected [Redacted] of its average weekly sales would be captured from Wild Oats supermarkets other than Wild Oats, such as Hannaford and Shaw's. DX 171 at 6, 39; Lannon Decl. ¶ 23 (noting that Whole Foods expected sales to come from Hannaford and Shaw's "right off the bat," and not just Wild Oats).

Wild Oats' prices are significantly higher, on average, than those of Whole Foods in the [Redacted] area. Whole Foods Regional President David Lannon reported to the Whole Foods Leadership Team that, for [Redacted] Wild Oats' prices are "about [Redacted] higher" on average. DX 277 (February 2007 e-mail reporting on [Redacted] Whole Foods store opening); *see also* Lannon Decl. ¶ 24 (Whole Foods does not "find it necessary to price *34 against Wild Oats, because Wild Oats' prices in [Redacted] as in areas throughout my region, are higher than all other supermarkets in the area.").

The lack of meaningful competition between Whole Foods and Wild Oats-at least in the Mid-Atlantic region headed by Kenneth Meyer and in the North Atlantic region headed by David Lannon-is confirmed by the absence of specific pricing comparisons against Wild Oats. Stores in the North Atlantic region were directed to compare the prices of a "market basket" of items against the same basket purchased from its lowest priced competitor. But the Whole Foods store in [Redacted] like other Whole Foods in that region, has "never targeted a Wild Oats [store]" and has never even requested to do so. Lannon Decl. ¶ 25.

Whole Foods created documents in the ordinary course of business documenting the proportion of Wild Oats current sales that might transfer to Whole

Foods after the merger. PX 00553; DX 401 (Project Goldmine Board Discussion Materials) at 15. These "Project Goldmine" documents created by Whole Foods indicate that Whole Foods intends to close roughly [Redacted] Wild Oats stores [Redacted] more or less immediately), most of which currently overlap with Whole Foods stores. DX 402; *see also* Murphy Report ¶ 70. Of the Wild Oats stores that might be closed, the preliminary analysis projected that Whole Foods would capture less than [Redacted] of Wild Oats' sales for [Redacted] Wild Oats stores. PX 00553. The estimates of volume shifts average less than [Redacted] despite the non-existence of any other premium natural and organic supermarkets in most of the relevant geographic markets. DX 401; PX 553. In each of these markets, [Redacted] of the volume, on average, would be transferred to other supermarkets and other food retailers, not to Whole Foods.

The Project Goldmine estimates show the lowest transfers of sales from Wild Oats to Whole Foods in [Redacted] all stores where, after the merger, Whole Foods would be the only remaining PNOS. *See* DX 401. As defendant Whole Foods' counsel put it, "this is a strange monopoly if it results in a transfer of say less than a third of the store's volume.... [I]f two-thirds of the volume is going elsewhere in a market that is contended to be a monopoly, what kind of a monopoly is this?" Aug. 1 p.m. Hearing Tr. at 23 (Denis).

F. Conclusions Concerning Relevant Product Market

The economic evidence, market research studies, and evidence concerning the realities on the ground-the "practical indicia" discussed by the Supreme Court in Brown Shoe and the facts concerning the structure, history and probable future of the particular market alluded to by Judge Bates in *Arch Coal*-all lead to the conclusion that the relevant product market in this case is not premium natural and organic supermarkets ("PNOS") as argued by the FTC but, as Dr. Scheffman has said, at least all supermarkets.

Applying the SSNIP test of the Horizontal Merger Guidelines, the evidence shows that there are many alternatives to which customers could readily take their business if Whole Foods and Wild Oats merged and Whole Foods imposed small but significant and nontransitory price increases-so that such price increases would not be profitable. It follows under this test, as explicated by the critical loss analysis done by Dr. Scheffman, that the product market proposed by the FTC is thus too narrow even under its own Merger Guidelines.

Furthermore, Dr. Scheffman's analysis of banner entries shows that when a new ***35** Whole Foods store opens-both in areas where there are no other PNOSs like Wild Oats and in areas where there are one or more Wild Oats stores-Whole Foods sales do not come primarily from Wild Oats (or other PNOSs) but overwhelmingly from other supermarkets operating in the area. The competitive interaction is between Whole Foods and all supermarkets, not just, or even primarily, with Wild Oats. Indeed, the evidence shows that Whole Foods and Wild Oats do not uniquely compete with each other, but with all other supermarkets in areas where both Whole Foods and Wild Oats operate.

Preliminary studies show that after the merger Whole Foods would capture less than [Redacted] (perhaps only [Redacted] of Wild Oats' sales, meaning that [Redacted] would go to other supermarkets and other food retailers, not to Whole Foods. It follows that customers view natural and organic food products at many stores other than Whole Foods as adequate substitutes for those they can obtain at Wild Oats. Most consumers therefore would take their business elsewhere if prices at Whole Foods increased significantly after the merger.

The Court also concludes, along with Dr. Scheffman, Dr. Stanton and others, that the FTC is wrong to focus only on so-called "core" consumers or "committed" customers of Whole Foods. The economic analysis and other evidence show that the proper focus is on "marginal" customers. A fundamental problem with the FTC's reasoning is that it addresses whether Whole Foods has *any* customers who are so dedicated to that store's product array and other qualities that they would not switch *any* of their purchases to another supermarket if Whole Foods began to compete less vigorously by raising prices or decreasing quality. The question is whether *enough* customers would switch *enough* of their purchases that a post-merger price increase or quality decline would be unprofitable for Whole Foods. The evidence presented persuades the Court that certainly beyond the point of critical loss, enough customers would answer this question in the affirmative and switch some or all of their purchases to other food retailers, thus rendering unprofitable any post-merger effort by Whole Foods to increase prices beyond a certain point.

The FTC is also wrong in looking to differentiation or uniqueness as the basis on which to define a product market. The fact that supermarkets seek to differentiate themselves from one another by emphasizing certain products or services does not address the relevant question for product market definition. The real question is whether the differences and points of uniqueness are so substantial that Whole Foods could retain most of its customers even if it were to raise prices or reduce quality after the merger. Because supermarket chains throughout the country now have recognized the interest of a broad range of consumers in natural and organic foods, conventional supermarkets and other retailers have increased and expanded their offerings of such food products and will continue to do so. Consumers therefore now have the practical ability to switch from Whole Foods to other supermarkets to obtain these products.

The fact is that a large number of Whole Foods and Wild Oats customers today shop frequently at other supermarkets for the same products they sometimes also buy at Whole Foods and Wild Oats-so-called cross-shopping. At the same time, other supermarkets now sell many, and an increasing variety of, natural and organic products. Together, these facts further support the conclusion that the relevant product market for evaluating this merger ***36** includes, at a minimum, all supermarkets. While "cross-shopping" has always existed, as other retailers have moved more aggressively into the sale of natural and organic foods, market research shows that a substantial percentage of these cross-shoppers will purchase their natural and organic foods at stores other than Whole Foods more and more frequently, particularly if prices at Whole Foods increase. If, after the merger, Whole Foods raised its prices or permitted its quality to decline, customers could and would easily shift their purchases of natural and organic products from Whole Foods to other supermarkets.

There is yet another factor that leads to the conclusion that the relevant product market in this case must be broader than premium and organic supermarkets and, indeed, that it must be at least as broad as supermarkets: how the players in the marketplace view each other and how their conduct reflects those views. Whole Foods and Wild Oats view other, more conventional supermarkets as their primary competitors, and they plan their strategies accordingly-through "comp" shopping, price checking, and real estate site selection, among other things. The same is true in reverse. Conventional supermarkets like Delhaize, Publix, Safeway and Wegmans consider Whole Foods to be a significant competitor in the marketplace. In attempting to compete with Whole Foods for consumers interested in natural and organic products, stores like Safeway, Kroger and even Trader Joe's have developed so-called private labels-Safeway's "O" organic label being prime among them. Whole Foods has responded in kind and designed its own private label programs, primarily to compete against other supermarkets, particularly for the kind of cross-over shoppers previously discussed.

In sum, while all supermarket retailers, including Whole Foods, attempt to differentiate themselves in some way in order to attract customers, they nevertheless compete, and compete vigorously, with each other. The evidence before the Court demonstrates that conventional or more traditional supermarkets today compete for the customers who shop at Whole Foods and Wild Oats, particularly the large number of cross-shopping customers-or customers at the margin-with a growing interest in natural and organic foods. Post-merger, all of these competing alternatives will remain. Based upon the evidence presented, the Court concludes that many customers could and would readily shift more of their purchases to any of the increasingly available substitute sources of natural and organic foods. The Court therefore concludes that the FTC has not met its burden to prove that "premium natural and organic supermarkets" is the relevant product market in this case for antitrust purposes.

VI. RELEVANT GEOGRAPHIC MARKET

[8] The Merger Guidelines delineate the relevant geographic market to be a region such that a hypothetical monopolist that was the only present or future producer of the relevant product at locations in that region would profitably impose a "small but significant and nontransitory increase in price."

Merger Guidelines § 1.21. The question is what would happen if a hypothetical monopolist of the relevant product at that point imposed a SSNP in that region. *Id.* If the FTC shows that the merger may lessen competition in any one of the alleged geographic markets, it is entitled to injunctive relief. *See*15 U.S.C. § 18.

The FTC has identified 17 areas where there is a Whole Foods store and a Wild *37 Oats store within a six mile radius of the other ("overlapping draw areas") or within a 16-minute drive of each other. In an eighteenth area, Portland, Oregon, the FTC applies the same test, but there is also a New Seasons store in the area-another PNOS alleged by the FTC.

The defendants criticize the FTC for defining geographic markets by reference only to distance and driving time because it has failed to consider a myriad of other factors, such as traffic, demographics, locations of other supermarkets, projected population growth, and geography-all factors that likely would limit or expand the store's draw in various directions. Whole Foods notes that it considers these factors and more in siting its stores. *See, e.g.,* DX 171, 183, 514. In addition, according to the defendants, because of local variations in traffic and geography, the 16-minute driving distances in each direction from a store are highly unlikely to be equal, and, if plotted on a map, are highly unlikely to produce an even circle at any distance around the store.

The FTC responds that defendants' business records and testimony establish that they generally focus on customers within a distance of three to six miles of their stores-and roughly 16 minutes driving time-when selecting site locations and making other competitive assessments. PX02212 ("3 miles is a general area that we commonly use to compare our stores trade areas"); PX01011 (charting all stores within six miles of Whole Foods in a competitive analysis document); PX00186 at 007 (focusing on customers within a 16 minute driving distance of store); JX 6 at 44:24-45:12 (Bradley Dep.); JX 9 at 28:19-21(Megahan Dep.); JX 10 at 90:16-18 (Meyer Dep.); Lannon Decl. ¶ 23; Besancon Decl. ¶¶ 42, 44, 46, 57, 61, 63, 65, 68-70; Megahan Decl. ¶¶ 7, 8, 25, 28; Martin Decl. ¶ 25; Allshouse Decl. ¶¶ 14; Robb Decl. ¶¶ 36, 38; Paradise Decl. ¶¶ 26-30, 33-37, 39-43, 45-46, 51, 54; PX04733, at 005; PX01374.[FN15]

FN15. The FTC concedes that defendants' documents and testimony suggest that a larger area might be appropriate in a few instances. *See, e.g.,* JX 1 at 138:25-139:4 (Gallo Dep.) (competitive area tends to be smaller in urban areas; larger in suburban areas); JX 7 at 119:10-19 (Kadish Dep.) (Whole Foods will consider [Redacted] JX 10 at 90:13-15 (Meyer Dep.) [Redacted] Lannon Decl. ¶ 10 (most customers for Whole Foods' [Redacted] store come from a [Redacted] mile driving radius); JX 8 at 197:3-5 (Lannon Dep.) (customers of Whole Foods' [Redacted] store come from a [Redacted] mile radius); JX 2 at 91:14-16 (Robb Dep.) (data suggests that people do travel up to [Redacted] miles to shop at Whole Foods, but it does vary); PX00920 (Wild Oats considered stores within a [Redacted] mile radius).

The Court agrees with the FTC that, in the context of this case and the evidence presented, this is a reasonable way to define the relevant geographic market. *See* *United States v. General Dynamics Corp.,* 415 U.S. 486, 521, 94 S.Ct. 1186, 39 L.Ed.2d 530 (1974) (markets need not be delineated by "metes and bounds"); *United States v. Pabst Brewing Co.,* 384 U.S. 546, 549, 86 S.Ct. 1665, 16 L.Ed.2d 765 (1966) (the geographic market need not be identified with scientific precision or "by metes and bounds as a surveyor would lay off a plot of ground").

Applying its six-mile overlapping draw area and 16-minute tests, the FTC maintains that the proposed merger will eliminate Whole Foods' only premium natural and organic supermarket competitor (Wild Oats) in defined areas within the following 17 localities: Albuquerque, New Mexico; Boston, Massachusetts; Boulder, Colorado; Hinsdale, Illinois (suburban Chicago); Evanston, Illinois (suburban Chicago); Cleveland, Ohio; Denver, Colorado; West ***38** Hartford, Connecticut; Henderson, Nevada; Kansas City-Overland Park, Kansas; Las Vegas, Nevada; Los Angeles, California; Louisville, Kentucky; Omaha, Nebraska; Pasadena, California; Portland, Maine; and St. Louis, Missouri. Murphy Supp. Rebut. Report ¶ 8, Exhibit 2 at 012-023, 025-026. In an eighteenth market, Portland, Oregon, the

FTC maintains that because of the continuing presence of New Seasons, the proposed merger will reduce the number of competitors from three to two in a defined area within Portland, Oregon. Murphy Supp. Rebut. Report ¶ 8, Exhibit 2 at 024. While it identifies these 18 overlap markets, the FTC has provided data concerning what percentage of Wild Oats' revenues would transfer from Wild Oats to Whole Foods upon closure of the Wild Oats stores for only nine of the 18 markets in which it says the acquisition and subsequent closure of the Wild Oats stores by Whole Foods would have anti-competitive effect. *See* Pl's FOF ¶¶ 457-499.

In addition, the FTC maintains that the proposed transaction will also eliminate future competition in seven local areas in which Whole Foods has plans in the works to open stores and where Whole Foods and Wild Oats had planned to compete with one another. These areas are located within: Fairfield County, Connecticut; Miami, Florida; Naples, Florida; Nashville, Tennessee; Palo Alto, California; Reno, Nevada; and Salt Lake City, Utah. PX04357. But the FTC has offered no evidence to support this assertion. *See* Pl's FOF ¶¶ 500-511.

Because the Court already has concluded that the relevant product market is not premium natural and organic supermarkets but, rather, all supermarkets, none of this matters. That is, since the FTC has not met its burden with respect to the relevant product market, the Court need not closely examine the alleged relevant geographic market.

VII. HARM TO COMPETITION

A. General Principles/Market Share and Concentration

[9] Mergers that significantly increase market concentration are presumptively unlawful because the fewer the competitors and the larger the respective market shares, the greater the likelihood that a single firm or group of firms could raise prices above competitive levels. United States v. Philadelphia Nat'l Bank, 374 U.S. at 363, 83 S.Ct. 1715; Hospital Corp. of Am. v. FTC, 807 F.2d 1381, 1389 (7th Cir.1986); FTC v. Cardinal Health, Inc., 12 F.Supp.2d at 52; Merger Guidelines § 2.0.

Concentration typically is measured by market share and by the Herfindahl-Hirschman Index ("HHI"). The HHI is calculated by summing the squares of the market shares of each market participant, so that greater weight is given to market shares of larger firms, consistent with their relative importance in competitive interactions. Merger Guidelines § 1.5. *See* FTC v. Cardinal Health, Inc., 12 F.Supp.2d at 53-54; FTC v. Staples, Inc., 970 F.Supp. at 1081-82. Where the pre-acquisition HHI exceeds 1800 points, it "is presumed that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise." Merger Guidelines § 1.51; FTC v. Cardinal Health, Inc., 12 F.Supp.2d at 53.

[10] The FTC argues in this case that the combined shares of Whole Foods and Wild Oats in the premium natural and organic supermarkets would be 100% in 17 of the 18 alleged relevant geographic markets, as they are the only premium natural and organic supermarkets in those geographic*39 markets. This reaches the theoretical maximum HHI of 10,000 points. *See* PX01302 at 020; PX00613 at 018-019; PX01011.

The premise of the FTC's argument, however, is that premium natural and organic supermarkets constitute the relevant product market, that Whole Foods and Wild Oats are unique price competitors, that Wild Oats' presence in a market has a constraining effect on Wild Oats, and that the consumer will lose the availability of significant choices in one or more of the 17 relevant geographic markets. As discussed earlier, however, the evidence does not support these arguments. Thus, any presumption of likely anticompetitive effects has been overcome both by the testimony of the defendants' economic expert and by the realities of the marketplace as reflected in credible evidence presented in this proceeding. Accordingly, there is no need to analyze specific HHI calculations.

B. Presence or Absence of Another PNOS

The evidence shows that Whole Foods and Wild Oats pricing practices do not differ based on the presence or absence of the other in the area. Scheffman Report ¶ 291. Rather, both companies generally price based on relatively broad geographic areas and Wild Oats' prices typically are higher. Scheffman Report ¶ 286, JX 9 at 98 (Megahan Dep.); JX 38 at 71-73 (Smith

I.H.); JX 37 at 35-36 (Odak I.H.)

Pricing for most products at Whole Foods is determined at the regional level rather than at the store level. Scheffman Report ¶ 289; JX 18 at 191 (Scheffman Dep.); JX 1 at 209-10 (Gallo Dep.). Whole Foods does not have price zones or other pricing policies that depend on whether a Whole Foods store is competing with a Wild Oats store. Scheffman Report ¶ 289; Gallo Decl. ¶ 29 ("Whole Foods follows the same general pricing policies or strategies in areas where WO operates as it does in areas where they do not.")

Dr. Scheffman analyzed prices by comparing actual "in the register" prices for June 9, 2007, for all items carried in multiple Whole Foods and Wild Oats stores within a region. Scheffman Report ¶ 298. "In the register" prices are those that are already programmed into the scanner system. *Id.* He testified that he used this approach because Whole Foods does not preserve historic register data due to storage capacity constraints. JX 18 at 189 (Scheffman Dep.); July 31 p.m. Hearing Tr. at 43 (Scheffman). A "snapshot" of prices, rather than a time series, is an appropriate analysis, according to Dr. Scheffman, since the objective was to determine whether prices are higher in monopoly regions. Scheffman Report ¶¶ 297-298. While the FTC criticizes this limited data basis for a variety of reasons, Dr. Scheffman looked at the best evidence available that was directly related to price-the one-day's worth of register prices. While it would have been preferable to have more data, the companies do not keep historical register data, and Dr. Scheffman's results are consistent with the other evidence in the record.

The results of Dr. Scheffman's analyses of actual prices show that there is no systematic pattern in pricing among Whole Foods and Wild Oats stores based on the presence or absence of PNOS competition. Scheffman Report ¶ 288. Whole Foods stores with and without PNOS competition have a low fraction of prices that differ from the regional mean, and the distribution does not differ significantly between overlap and non-overlap stores. Scheffman Report ¶ 312. Actual prices are consistent with the described practices for the two companies-prices are generally common across broad areas, and any differences are not systematically related to the ***40** presence or absence of competition with each other or with another PNOS. Scheffman Report ¶¶ 312, 323. Prices are not lower in areas in which Whole Foods and Wild Oats compete with one another or with another PNOS than in areas where Whole Foods or Wild Oats are PNOS monopolists. Scheffman Report ¶¶ 314, 325.

There is evidence, albeit based on a single example, that after Wild Oats closed its Fort Collins store in December 2006, the Whole Foods store experienced no increase in gross margins. JX 31 at 240 (Paradise I.H.). Whole Foods only gained [Redacted] to [Redacted] in sales per week after the Wild Oats Fort Collins store closed. JX 31 at 239-240 (Paradise I.H.). Under the FTC's theory, Whole Foods should have been able to raise prices after the Wild Oats Fort Collins store closed. Whole Foods did not raise prices after the Wild Oats' store closed because of competition with King Soopers, Vitamin Cottage, and multiple Safeway stores in Fort Collins. JX 31 at 240 (Paradise I.H.).

C. Wild Oats Is Not a Unique Constraint on Whole Foods

The evidence shows that Wild Oats prices are consistently higher than Whole Foods prices. JX 13 at 56-57, 60-61, 111-12 (Davidson Dep.) [Redacted].

Market research commissioned by Wild Oats revealed that the "price gap between Wild Oats and major food stores" [Redacted] DX 572; *see also* DX 570 [Redacted]. Wild Oats' documents confirm that its prices have been higher than Whole Foods. For example, Wild Oats found that Whole Foods' prices were below [Redacted] and Whole Foods private label products are priced as much as [Redacted] comparable Wild Oats products. DX 487 (noting that Wild Oats simply does "not have enough competitive advantages against Whole Foods to compete directly against them.").

Wild Oats' prices are higher than other competitors. DX 580, DX 582 (Wild Oats [Redacted] price check reports that Wild Oats has higher prices than Whole Foods in every category, and has higher prices than [Redacted] in some categories); JX 37 at 41-46 (Odak I.H.)(Wild Oats price checked [Redacted] and discovered Wild Oats was [Redacted] percent higher than the competition in the marketplace). Wild Oats price checking led it to conclude that Wild Oats is typically priced higher than Whole Foods. A September 2006 price check of [Redacted] SKUs revealed that Wild Oats' pricing was above Whole Foods in every geographic area in which the price check was conducted. DX 490. A Wild Oats January 2007 price analysis of [Redacted] items in the [Redacted] showed that Whole Foods' prices were "significantly below" Wild Oats' prices. Wild Oats estimated that it would need to reduce costs by about [Redacted] to achieve pricing parity with Whole Foods. DX 580. Whole Foods' market research confirms this point. In October 2004, the Natural Marketing Institute reported that, based on both shopping frequency and private label brand usage, "Wild Oats seems to have little effect on [Whole Foods]." DX 240 at 8.

Whole Foods' price-checking also confirms that Wild Oats is higher priced than Whole Foods. A.C. Gallo, Co-President and Chief Operating Officer of Whole Foods, explained to Whole Foods regional presidents that:

"[W]e could use the merger with WO to tell some of our stories one of which could be we have great prices. The concern in any merger is that prices may go up in acquired stores. In fact, we know that WOs prices are higher than ours and we will be bringing down *41 quite a few prices. We could use this opportunity to shout out either on a local, regional or national basis our great prices."

DX 58.

David Lannon, Regional President for the North Atlantic Region for Whole Foods, explained that Whole Foods does not "find it necessary to price against Wild Oats, because Wild Oats' prices in [Redacted] as in areas throughout my region, are higher than all other supermarkets in the area." Lannon Decl. ¶ 24; *see also* Lannon Decl. ¶ 25. The North Atlantic stores have "never targeted a Wild Oats [store]" and no store has "ever requested to do so." Lannon Decl. ¶ 14.

Wild Oats is also typically higher priced in the Mid-Atlantic region. Meyer Decl. ¶ 13. Kenneth Meyer, the Mid-Atlantic Regional President for Whole Foods, explained that "our true competition on price and other factors is the multitude of other grocery retailers in those areas-and not Wild Oats."Meyer Decl. ¶ 13. Whole Foods' [Redacted] store has "had little occasion to need to compete-or pay much attention at all, for that matter-to the Wild Oats store in [Redacted] That store has not adapted to the marketplace and displays insufficient innovation or energy to cause us concern." Meyer Decl. ¶ 12; JX 10 at 108-09 (Meyer Dep.).

Whole Foods' Midwest region no longer systematically price checks Wild Oats on a monthly basis as it does for Trader Joe's and other supermarkets. Whole Foods determined that it was unnecessary to regularly check Wild Oats' prices in the Midwest region because Wild Oats pricing has been consistently higher than both Whole Foods and its other competitors. Bradley Decl. ¶ 13; JX 6 at 74 (Bradley Dep.).

In the Southern Pacific region, Wild Oats has little effect on Whole Foods' prices because Wild Oats' prices are also higher than those of Whole Foods and other competing supermarkets. Besancon Decl. ¶ 24. Because historical price checking confirms that Wild Oats is priced above all supermarkets, including Whole Foods, Whole Foods benchmarks other supermarkets and Trader Joe's to determine its own prices. Besancon Decl. ¶ 38.

In the Rocky Mountain region, Wild Oats has minimal impact on Whole Foods since its prices are "generally higher" than those of Whole Foods and other supermarkets. Paradise Decl. ¶ 22. Wild Oats rarely make capital improvements and are therefore not as strong a competitor to Whole Foods as other supermarkets and Trader Joe's. *Id.*

In sum, the existence of Wild Oats does not force Whole Foods' prices down because Wild Oats' prices are consistently higher. Thus, the elimination of Wild Oats will not harm competition with respect to price constraints on Whole Foods.

D. Other Supermarkets and Other Retailers Constrain Competition

As discussed above, competition from other supermarkets is more intense than ever, as supermarkets have improved operations and have increased offerings of natural and organic products. *See, e.g.,* DX 1 (June 2006 e-mail from Whole Foods Co-President and Chief Operating Officer containing thoughts on competition, stating that "[t]his is a time of unprecedented competition for us.... We are currently getting hit from many different directions in each market."); DX 3 (October 2006 e-mail from A.C. Gallo) ("After a total slump by the supermarket industry in the last five years we are seeing a comeback by the survivors. Safeway, Giant Eagle, Giant, Stop & Shop, Harris Teeter, Food Lion, Publix are all opening lots of new stores and remodeling stores on the East *42 Coast. Every time they open a store or remodel an existing one with better perishables and natural foods, we see a hit.").[FN16]

FN16. The Court discusses the vigorous competition between the defendants and other supermarkets in much greater detail, *supra,* in Part V of this Opinion.

E. Repositioning and Entry by Other Retailers

The Merger Guidelines recognize that a merger is not likely to enhance market power or facilitate its exercise if it is easy for other market participants to enter the market or reposition themselves better to compete. Merger Guidelines § 3.0. The question is whether the entry by others (or their repositioning) would be timely-is it easy to enter or reposition-likely and sufficient in its magnitude to "achieve significant market impact within a timely period." *Id.; see also* FTC v. Cardinal Health, 12 F.Supp.2d at 55-58 (adopting "timely, likely, and sufficient" test). To rebut the presumption of anticompetitive effects, the evidence must show that a firm would enter, and that "entry into the market would likely avert the anticompetitive effects from the acquisition." *FTC v. Staples, Inc.,* 970 F.Supp. at 1086 (quoting *United States v. Baker Hughes Inc.,* 908 F.2d at 989); *accord FTC v. Swedish Match,* 131 F.Supp.2d at 170; *FTC v. Cardinal Health,* 12 F.Supp.2d at 55. For entry to be sufficient to restore competition, it must replace the competition that existed prior to the acquisition. *FTC v. Cardinal Health,* 12 F.Supp.2d at 58.

The FTC concedes that there is always the possibility of de novo entry. In principle, the FTC also agrees that existing retailers could reposition to provide increased competition for existing premium natural and organic supermarkets and that such repositioning could increase competition enough to compensate for the loss of pricing restraint within the market. *See* Murphy Report ¶ 130.

The key question is whether such entry or repositioning would occur in a timely fashion and would be of sufficient magnitude to make a small but significant price increase unprofitable-that is, it would prevent any harm to competition that might otherwise result from the merger. Murphy Report ¶ 137. While it is possible that a new retailer, a conventional supermarket, or even a PNOS, could enter one of the relevant geographic markets with a new store or reposition themselves, the FTC argues that it is unlikely that retailers would do so in each relevant geographic market at issue in this case to the extent necessary to make price increases unprofitable. *Id.* ¶¶ 119, 121, 126, 129, 138.

The FTC argues that de novo entry would be neither easy nor timely. It argues that entry and growth in the PNOS market takes significantly longer than two years, the relevant time frame under the Guidelines. *See* Merger Guidelines § 3.2. Whole Foods agrees that it takes time and is costly and sometimes difficult to enter the market de novo. *See* Murphy Report ¶ 138. Finding and developing suitable real estate on which to locate a supermarket is often a multi-year task in many metropolitan areas, and it can easily take three or more years from conception to site selection. *See, e.g.,* JX 10 at 20:15-21, 107:3-25 (Meyer Dep.) ("[I]t's about a three-year process at a minimum of taking a store from the point of idea to opening, at a minimum.").

As for repositioning, the FTC argues that other retailers are unlikely to reposition because, in order to compete effectively with Whole Foods, they would have to dramatically change the nature of their operations. They would have to expand the amount of space dedicated to natural and organic products, increase their focus *43 on perishables, devote substantially more selling space to perishables, improve quality, and provide extra services. The FTC does not suggest that other retailers do not or cannot sell fresh and organic produce. Rather, it argues that they would not reposition in a way that replaces the close, constraining competition that the FTC alleges that Wild Oats provides to Whole Foods. The question, according to the FTC, is how far can a traditional retailer or conventional supermarket go to court the Whole Foods/Wild Oatstype customer without losing focus on its own core constituency.

The problem with the FTC's analysis is that the evidence shows that retailers have already been repositioning their formats, services and product selection in order to respond to the growing consumer demand for natural and organic foods and to better compete against Whole Foods. Stanton Report ¶¶ 21, 29-34; Scheffman Report, Appendix E ¶¶ 3-8. And other supermarkets are expanding their product offering and repositioning themselves at Whole Foods' and Wild Oats' pre-merger prices and pre-merger quality. *See* Simon (Hain) Decl. ¶ 3; Sliva (White Wave) Decl. ¶¶ 7-8; DX 617 and 618-19 (Vail Dep.); Scheffman Report ¶ 256. Indeed, today, over 60% of all natural and organic products are sold by conventional stores. Mays Decl. ¶ 19; *see also* JX 28 at 33 (Whole Foods CEO Mackey explaining that "Our success has created more competition, it has bred more imitation, has caused all these supermarkets to try to want to steal Whole Foods' mojo."); 103 ("... Whole Foods no longer has this product differentiation to itself ...") (Mackey I.H.).

This repositioning trend likely will continue as large, better capitalized supermarkets leverage their scale to obtain high-quality natural and organic foods at lower costs than Whole Foods. JX 28 at 103 (Mackey I.H.). Should prices rise or quality fall post-merger, repositioning is likely to accelerate.

The evidence before the Court shows that the firms that have already proven themselves adept at repositioning and proving competitive in the premium natural and organic food field-through the addition and expansion of organic produce, perishable meats and other products, including private labels natural and organic products, and new "lifestyle" formats-are Delhaize America and in particular its high-end banners, Hannaford and Bloom; Safeway; Publix; Kroger; Supervalu; and Wegmans. The Court is less persuaded, despite some evidence to the contrary, that Trader Joe's is likely to reposition itself to better compete with Whole Foods, and it is not persuaded that Wal-Mart, Target, Costco or other mass-market retailers have repositioned or will reposition sufficiently quickly to provide serious competition with respect to a significant number of Whole Foods' marginal customers.[FN17] The same is *44 true as to Tesco but for different reasons.[FN18]

FN17. Whole Foods acknowledges that Trader Joe's offers only a limited range of natural products, not nearly the range that a Whole Foods customer expects to find. JX 32 at 84-85 (LaMacchia I.H.). Trader Joe's does not offer customers in-store service departments like bakeries, prepared food, or service meat counters. JX 39 at 62:1-18 (Bane I.H.); JX 10 at 79:2-10 (Meyer Dep.); *accord* JX 24 at 109:5-110:4 (Bane Dep.). Trader Joe's has no plans to add these services. *See* JX 39 at 105:2-10 (Bane I.H.). The evidence shows that Whole Foods openings cause only minimal impact on sales at nearby Trader Joe's. The current format for Trader Joe's uses a smaller format and a narrower range of SKUs than either Whole Foods or Wild Oats. A typical new Trader Joe's store is roughly 11,000 square feet, while recently built Whole Foods stores are typically larger than 40,000 square feet. Murphy Report ¶ 133; JX 39 at 44:20-25 (Bane I.H.); JX 24 at 8:16-17, 120:1-3 (Bane Dep.) (Trader Joe's has no plans to enlarge the footprint of future stores.)

FN18. Tesco will not begin opening stores in the United States until the end of 2007, and then with stores "intentionally smaller than the usual supermarket" at only 10,000 square feet. Tesco's plans to offer only a "limited item selection" of natural and organic items. Tesco's U.S. stores, operating under the "Fresh & Easy Neighborhood Market" small store banner, "will not have service departments such as cafeterias or full service food counters." Neville-Rolfe Decl. ¶ 4. Defendants' industry consultant, Dr. Stanton, expressed his belief that Tesco will not compete against supermarkets. JX 19 at 154:5-6 (Stanton Dep.). The Court does not believe that it can effectively compete against Whole Foods.

1. Delhaize America

Delhaize operates over 1,500 supermarkets under the Hannaford Bros., Bloom, Food Lion, Kash n' Karry, Harvey's, Bottom Dollar and Sweetbay banners. Stanton Report ¶ 35. Delhaize has been actively growing the number of natural and organic products sold at its banners-especially Hannaford, Bloom and Sweetbay-in response to consumer demand. JX 21 at 37-40 (Vail Dep.); Stanton Report ¶¶ 35-36.

Peter Vail, the Leader of Organic and Natural Foods for Hannaford Bros., a part of Delhaize, testified that Delhaize has taken the approach that natural, organic and fresh foods are "critical" to the growth plan for all of its banner stores. Over the last four years or so, the company has viewed natural and organic products as an "emerging" part of the industry. JX 21 at 37 (Vail Dep.). These products have been identified as one of the "Engines of Growth" for the company. JX 21 at 56-57 (Vail Dep.); *see* Scheffman Report, Appendix E ¶ 18.

Delhaize has recently launched its own line of private label natural and organic products called "Nature's Place," and these products are being rolled-out at all its banners. The company introduced approximately 150-200 SKUs in this line in April 2007. The evidence shows that the company is planning to grow these offerings by introducing another 100 SKUs in the fall of 2007 and another 100 SKUs within a year. JX 21 at 38-39, 60-68, 104-105 (Vail Dep.). The company anticipates rolling out new products in 2008 and 2009 as well. JX 21 at 83-84 (Vail Dep.). Delhaize's sales of its private label natural and organic line have been so strong that the company doubled its original sales projections shortly after the product line was launched, and the sales have gone up another 25 percent since then. JX 21 at 114-115 (Vail Dep.). The private label organic line has become a "key strategic initiative for us and how we compete in our marketplace." JX 21 at 73-74 (Vail Dep.).

Delhaize's pricing strategy for its Nature's Place organic SKUs is targeted after other supermarkets, including Whole Foods and Wild Oats, and other food retailers. *See* DX 645 at DZA 000098 (Delhaize, "EOG Strategic Overview") (document specifically lists Whole Foods and Wild Oats). Peter Vail testified that Delhaize specifically prices its Nature's Place SKUs against Whole Foods and Wild Oats under its Engines of Growth (EOG) strategy because "... we look at Whole Foods and Wild Oats as two competitors ..." and "[w]e wanted to ensure that we were priced competitively against those two banners specifically...." JX 21 at 71 (Vail Dep.).

About 90 percent of Hannaford stores-one of Delhaize's banners-now have a dedicated "Nature's Place" section, which is a "store-within-a-store" concept specializing in natural and organic products, and which carries about 4,000 different natural and organic products. JX 21 at 16-17 *45 (Vail Dep.). Hannaford stores currently carry approximately 5,000 different natural and organic products, or about 10 percent of its total SKUs. JX 21 at 18,108-109 (Vail Dep.).

A Hannaford customer survey also refers to Whole Foods and Wild Oats as both "Key" and "Primary" competitors. DX 652 at DZA 000111 (Delhaize, "2006 Customer Source Survey") ("primary" competitors for the Hannaford store in Norwell, Massachusetts for Sept. 16, 2006 are limited to Stop & Shop, Whole Foods, and Foodmaster); DX 653 at DZA 000115 (Delhaize, "2006 Customer Source Survey") ("primary" competitors for the Hannaford store on Forest Ave. in Portland, Maine as of Sept. 23, 2006-prior to the opening of Whole Foods in Feb. 2007-are limited to Shaw's, Wild Oats and Save-A-Lot).

Delhaize has developed two new banners-Bloom and Sweetbay-and is repositioning, re-formatting and re-branding a number of former Food Lion and Kash n' Karry stores so as to provide a new shopping experience, with a particularly strong emphasis on freshness, natural and organic products, and convenience. Stanton Report ¶ 37; JX 21 at 20-21 (Vail Dep.).

2. Safeway

Safeway is one of the largest supermarket chains in the United States. DX 592 at 4; Stanton Report ¶ 39; Scheffman Report, Appendix E ¶ 60. Safeway operates over 1,500 supermarkets in 21 states and the District of Columbia. DX 592 at 5-6; Scheffman Report, Appendix E ¶ 60. Safeway operates under the Safeway (Western and Mid-Atlantic states), Vons (Southern California), Pavilion, (Southern California), Dominick's (Chicago area), Genuardi's (Philadelphia area), Randall's (Texas), Tom Thumb (Texas), and Carr (Alaska) store banners. DX 592 at 5; Stanton Report ¶ 41; Scheffman Report, Appendix E ¶ 60.

As of December 31, 2006, Safeway had remodeled

751 of its stores into a newly developed "Lifestyle" format. DX 592 at 20. Safeway plans to spend $1.7 billion in 2007 to remodel 275 additional Safeway stores into the Lifestyle format and to open 25 newly constructed Lifestyle format stores. DX 592 at 20. In total, Safeway has spent several billion dollars repositioning its stores into the Lifestyle format. Stanton Report ¶ 40. [Redacted].

[Redacted].

Ms. Hasker testified that the Lifestyle format was developed in response to customers that "clearly articulated the desire for quality products, for knowledgeable and friendly service and a higher expectation of a shopping experience." JX 25 at 106-07 (Hasker Dep.). *See also* Scheffman Report, Appendix E ¶ 63 (citing a Bear Stearns December 2006 report noting that Safeway is "not only responding to shifting consumer demand, but helping to drive demand"); Stanton Report ¶ 39 (Lifestyle format also offers consumers an "experiential factor").

[Redacted] *See also* Scheffman Report, Appendix E ¶ 60.

[Redacted].

[Redacted] In addition to launching the "O" organic brand products, Safeway recently introduced its "Eating Right" brand of products for health conscious consumers. DX 592 at 11. "Eating Right products combine great taste with nutritional efficacy and feature a unique nutritional icon system to help consumers identify product attributes that they seek." DX 592 at 11. Safeway's increased emphasis on natural and organic products is in response to consumer demand. Rojan Hasker testified that "our customer base has an ***46** interest and a growing interest in organic and natural products. All trend [in]formation obviously supports that." JX 25 at 16 (Hasker Dep.).

[Redacted] Whole Foods considers Safeway a competitor and has observed the success Safeway has reported at its remodeled stores. DX 22 (E-mail December 2006 K. Meyer to Whole Foods executives) Paradise Decl. ¶ 21 (Safeway Lifestyle stores designed to compete with Whole Foods and imitates strategies Whole Food has used to compete against other supermarkets).

Dr. Stanton observed that Safeway's Lifestyle "strategy is aimed at helping the company [Safeway] compete with the likes of Whole Foods, and is winning over customers with organic foods, high-quality meats and produce, and extensive bakery and deli offerings." Stanton Report ¶ 40.

Whole Foods perceives that Safeway has increased the competitive pressure on Whole Foods. Robb Decl. ¶ 23 ("Safeway's aggressive launch of its "O" line of organic products is an important and challenging development for Whole Foods."); *see also* DX 609 at 18, 54 (Meyer Dep.) ("Safeway has put together a format, their Lifestyle format, that I think is very concerning to me that when they open their stores, ... [o]ur sales growth diminishes"). Safeway is also actively recruiting suppliers of natural and organic products, making it more difficult for Whole Foods to be "first to market with new organic foods." DX 7 at 1 (February 2006 e-mail, R. Megahan).

3. Publix

Publix operates a supermarket chain in the southeastern United States. The company's primary focus has been on providing an upscale "experience," high quality and excellent customer service. Stanton Report ¶ 56.

Publix [Redacted] Publix has added a large selection of organic and natural foods, including an entire line of private label organic foods called GreenWise. Scheffman Report, Appendix E ¶¶ 56-57. The first GreenWise store is set to open in September 2007 and will provide an array of natural and organic foods, earth-friendly products, freshly prepared cuisine, and high-quality produce, dairy, frozen food, vitamins, grocery items and nutrition products. Stanton Report ¶ 57. The GreenWise products include shelf-stable food products, dairy, poultry, snacks, juices and an environmentally-friendly line of paper products. Stanton Report ¶ 56.

[Redacted] DX 677.

4. Kroger

Kroger operates over 2,400 supermarkets and multi-department stores across the United States, and its banners include Kroger, Smith's, Fred Meyer, Dillon's, Ralphs, and King Soopers. Stanton Report ¶ 53; Scheffman Report, Appendix E ¶ 44.

Kroger sells a wide variety of natural and organic products, including shelf-stable groceries, produce, poultry, dairy, and beverages. It introduced its own line of private label natural and organic products under the "Naturally Preferred" label, which includes over 275 items in a variety of categories. Stanton Report ¶¶ 53-54. Kroger also offers a premium private label food line known as "Private Selection," which is designed to meet or beat national or regional gourmet and upscale brands. *Id.* Many of the Kroger stores (approximately 1,600) feature dedicated natural and organic departments, such as the "Nature's Marketplace" section within Kroger-bannered stores. Stanton Report ¶ 54.

Kroger is aware of the growth in demand for natural and organic products, and the repositioning going on all around *47 them in the industry. DX 66 (e-mail from Scott Allshouse). Kroger has stated in its recent internal planning documents: "Kroger is the # 1 grocery retailer; we should also be the # 1 natural and organic food retailer. The question is: 'How big do we want to get and how soon do we want to get there?' If we are to gain dominance in this industry, we must do more and we must do it now." DX 663 (memorandum from Nancy Moon-Eilers). Chain-wide, Kroger's organic produce sales increased by over 82 percent by January of 2006, and the company felt "we still have a huge upside sales potential." DX 669 (Kroger, Email re: "2006 Organic Produce Sales Goals").

Kroger has a store-within-a-store concept in order to "improve on our ability to meet the Natural Foods needs of our Customers" and to "allow us to enhance our selection with new items and categories and to create an ease-to-shop destination for our Customers." DX 664 (Kroger, "Natural Foods Growth Strategy"). One of Kroger's "Strategy Objectives" is to "Improve distribution for Natural Foods" which "will lower costs of goods and improve instocks." DX 664.

Kroger is remodeling and upgrading its stores, including 158 store remodels in 2006. Kroger's other banners are also upgrading their formats. Stanton Report ¶ 54. For instance, the Ralph's "Fresh Fare" concept emphasizes fresh products, selection and service. Scheffman Report, Appendix E ¶ 54. King Soopers is planning to build a 99,000 square foot store (the largest in the chain) near Boulder, Colorado next year which will emphasize an improved shopping experience, expanded produce, and organic foods. Stanton Report ¶ 54.

5. Supervalu

Supervalu is one of the largest grocery distributors and supermarket operators in the nation. It operates supermarkets under the Albertson's, Shaw's, Star, Jewel-Osco, Cub, Acme and other banners, and distributes grocery products to over 2,000 independent supermarkets across the country. Stanton Report ¶¶ 47-48; Scheffman Report, Appendix E ¶ 76. Supervalu has recognized the importance of meeting the growing consumer demand for freshness, nutrition and organic products. Stanton Report ¶ 47.

Supervalu has recently established an aggressive remodeling campaign in order to expand its presence in natural, organic and premium foods. The company is spending approximately $1 billion to remodel and construct new stores in order to customize and enhance the customer shopping experience. Stanton Report ¶ 49; Scheffman report, Appendix E ¶ 78. The remodeling and new store campaign, called "Premium Fresh & Healthy," places a strong emphasis on: the "Wild Harvest" concept, which is a store-within-a-store focused on natural and organic products; expanded perishables, including produce, meat, seafood, bakery and deli; "Shop the World," which is an international food destination department; and expanded health and beauty care products to support a healthy lifestyle. Stanton Report ¶ 49.

Supervalu has established two different lines of private label organic products-"Nature's Best" and "Wild Harvest." The Nature's Best brand is available to all of Supervalu's corporately-owned supermarkets and to the approximately 2,200 independent supermarkets to which Supervalu is the primary grocery distributor. There are currently over 500 different products under the Nature's Best label. Stanton Report ¶ 48.

In addition to the "Premium Fresh & Healthy" remodeling and new store campaign, Supervalu has created a new format *48 called "Sunflower Market," which is a value-priced natural and organic retail outlet offering between 8,000 and 12,000 SKUs of natural and organic products. Supervalu has announced plans to open 50 Sunflower markets over the next five years. Stanton Report ¶ 51; Scheffman Report, Appendix E ¶ 96.

6. Wegmans

Wegmans operates supermarkets in New York, New Jersey, Pennsylvania, Maryland and Virginia. Scheffman Report, Appendix E ¶ 119. It has become recognized within the industry as one of the best supermarkets in the country in terms of produce, fresh product offerings and prepared foods. Stanton Report ¶¶ 43-45.

Wegmans has introduced its own line of private label organic products and offers a store-within-a-store format called "Nature's Marketplace," selling a large assortment of natural and organic foods, supplements, herbal remedies, non-food items, and foods for special dietary needs. Stanton Report ¶ 45; Scheffman Report, Appendix E ¶ 112.

Whole Foods sees [Redacted] every time Wegmans opens a store in the vicinity of a Whole foods store. DX 59 at 3 (FY 2007 First Quarter Board Report by A.C. Gallo); DX 209 at 3 (Co-President A C. Gallo explained to the Board of Directors that "Wegmans has temporarily taken from us the image of being the best Foodie store in [Redacted] For example, when Wegmans opened two new stores within 15 minutes of Whole Foods' [Redacted] store, Whole Foods ascribed a [Redacted] decrease in comps to Wegmans. DX 86 at 5. Wegmans also directly engages in price competition with Whole Foods by comparing its prices to Whole Foods' prices on shelf tags and advertisements. DX 72; DX 74. Whole Foods says it has been forced to reduce prices to retain sales. *See* DX 209 (stating Whole Foods will drop prices to go "toe to toe" with Wegmans).

In sum, the snapshot of the marketplace today is very different than it may have been a few years ago. Delhaize, Safeway, Publix, Kroger, Supervalu, and Wegmans have already repositioned themselves to compete vigorously with Whole Foods and Wild Oats for the consumers' premium natural and organic food business. To put it colloquially, this train has already left the station.

VIII. POTENTIAL DEFENSES

The defendants suggest two possible affirmative defenses to the potential conclusion that this merger's effect would be anticompetitive: (1) that the merged company would result in the more efficient use of existing resources, thus improving the performance of the merging firms and benefitting consumers, and (2) that Wild Oats is a "flailing" or weakened company.

The Request for Additional Information ("Request") issued to Whole Foods in the investigation of the proposed acquisition asked Whole Foods to provide a "detailed description of all efficiencies that [Whole Foods] claims will or may arise from the proposed acquisition." The Request also asked Whole Foods to describe the means by which each efficiency was to be accomplished, the investments required, the expected savings, and the time required for Whole Foods to achieve each efficiency. Whole Foods in its response to the Request did not include a single efficiency and did not specify the time in which it expected to achieve any efficiency. *See* PX01349 at 001-004.

Defendants' expert, Dr. Scheffman, testified in his deposition that he was "not putting forward a [Merger G]uidelines analysis of merger efficiencies" and that his analysis of the purported benefits of the acquisition were based on "guesstimates."*49 JX 18 at 227:12, 233:24-25 (redacted) (Scheffman Dep.). Whole Foods' Senior Vice-President of Growth and Business Development, James Sud, testified that the savings he expected the company to achieve was based on unverified assumptions of general and administrative expenses as a percentage of sales. And Whole Foods' Co-President and COO, Walter Robb, testified that it would be speculative to identify the redundant jobs that would be eliminated to allow for cost savings until Whole Foods can "get in there" and see how Wild Oats is organized. JX 2 at 183:18-185:7 (Robb Dep.).

Based upon the testimony of Dr. Scheffman, Mr. Sud and Mr. Robb, as well as on defendants' response to the FTC's Request for Additional Information, the

Court concludes that defendants have failed to meet their burden on the issue of efficiencies under Section 4 of the Horizontal Merger Guidelines. *See* Merger Guidelines § 4; *see also* *FTC v. H.J. Heinz Co.*, 246 F.3d at 720; *FTC v. Cardinal Health*, 12 F.Supp.2d at 62.

The defendants do not claim that Wild Oats is a failing firm or that it could meet the high standard for showing a failing firm defense. In Camera Session August 1, 2007 PM Tr. Mot. Hr'g at 47:23-24 (Under Seal) (Aronson). They do argue, however, that Wild Oats is a "weakened" or "flailing" firm and that its elimination by Whole Foods will lead to a more efficient competitor. As the FTC points out, however, the "flailing firm" doctrine is "probably the weakest ground of all for justifying a merger." *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1221 (11th Cir.1991).

While the Court has some concern whether Wild Oats can remain as a stand-alone viable competitor if the merger does not go forward, there is simply insufficient record evidence in the record before the Court to reach any conclusion on this matter. And clearly the defendants have failed to carry their burden of establishing this defense.

CONCLUSION

As noted at the very outset of this Opinion, under Section 13(b) of the Federal Trade Commission Act, the FTC must demonstrate a likelihood of success on the merits-that is, that the effect of the Whole Foods/Wild Oats merger under Section 7 of the Clayton Act "may be substantially to lessen competition or tend to create a monopoly" in properly defined relevant product and geographic markets. 15 U.S.C. §§ 18, 53(b); *see* *United States v. Philadelphia National Bank*, 374 U.S. at 355-56, 83 S.Ct. 1715; *FTC v. H.J. Heinz Co.*, 246 F.3d at 714; *United States v. Baker Hughes Inc.*, 908 F.2d at 982-83; *FTC v. Libbey, Inc.*, 211 F.Supp.2d at 44; *FTC v. Staples, Inc.*, 970 F.Supp. at 1071. The FTC also has the burden of showing that the balance of the equities warrants entry of an injunction in the public interest. 15 U.S.C. § 53(b). *See* *FTC v. H.J. Heinz Co.*, 246 F.3d at 726; *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C.Cir.1980); *FTC v. Staples, Inc.*, 970 F.Supp. at 1091-92.

For all of these reasons discussed herein, the Court concludes that the FTC has not proven that it is likely to prevail on the merits at an administrative proceeding and subsequent appeal to the court of appeals. Considering the voluminous factual record taken as a whole, the FTC has not "raise[d] 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 and ultimately by the Court of Appeals." *FTC v. H.J. Heinz Co.*, 246 F.3d at 714-15. There is no substantial likelihood***50** that the FTC can prove its asserted product market and thus no likelihood that it can prove that the proposed merger may substantially lessen competition or tend to create a monopoly.

Because the FTC has not demonstrated a likelihood of success on the merits, the Court need not consider the equities and the public interest-whether, as defendants argue, there is a real risk that the transaction will not occur at all if an injunction issues or whether, as the FTC suggests, this is hyperbole based on a single unsubstantiated footnote in defendants' opening brief. The answer may lie in the language and terms of Article VII of the Agreement and Plan of Merger itself (DX 811), but, in view of the Court's findings and conclusions, the Court need not reach this issue.

For all the forgoing reasons, the Court will deny plaintiff Federal Trade Commission's motion for a preliminary injunction. An appropriate Order will be issued this same day.

ORDER

This matter is before the Court on plaintiff's motion for a preliminary injunction. Plaintiff, the Federal Trade Commission, filed this lawsuit on June 6, 2007 pursuant to Sections 7 and 11 of the Clayton Act, 15 U.S.C. §§ 18, 21, and Sections 5(b) and 13(b) of the Federal Trade Commission Act, 15 U.S.C. §§ 45(b), 53(b), seeking to enjoin defendant Whole Foods Market, Inc. from acquiring defendant Wild Oats Markets, Inc. during the pendency of an administrative proceeding to be commenced by the FTC. *See* Complaint at 2, 6.[FN1]

FN1. On June 7, 2007, the Court signed and entered a stipulated temporary restraining order "pending the Court's ruling on the

> motion of the Commission for a preliminary injunction[.]"

For the reasons set forth in the Court's 93-page Opinion issued this same day under seal, it is hereby

ORDERED that plaintiff Federal Trade Commission's motion for a preliminary injunction [4] is DENIED. This is a final appealable order. *See*28 U.S.C. § 1292(a)(1); Fed. R.App. P. 4(a). Any other pending motions are denied as moot.[FN2]

> FN2. Counsel for plaintiff and counsel for defendants should meet and confer and contact Chambers with their agreed-upon proposed redactions within two business days, after which time the Court will issue a redacted version of the Opinion on the public docket. As in the past, counsel should propose only those redactions necessary to protect confidential information.

SO ORDERED.

D.D.C.,2007.
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