

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FEDERAL TRADE COMMISSION,)
)
 Plaintiff,)
)
 v.)
)
WHOLE FOODS MARKET, INC.,)
)
And)
)
WILD OATS MARKETS, INC.,)
)
 Defendants.)
_____)

Civ. No. 1:07-cv-01021 – PLF

PUBLIC VERSION

**JOINT FINDINGS OF FACT & CONCLUSIONS OF LAW
OF WHOLE FOODS MARKET, INC., AND WILD OATS MARKETS, INC.
IN OPPOSITION TO MOTION FOR A PRELIMINARY INJUNCTION**

Paul T. Denis (DC Bar No. 437040)
Paul H. Friedman (DC Bar No. 290635)
Jeffrey W. Brennan (DC Bar No. 447438)
James A. Fishkin (DC Bar No. 478958)
Michael Farber (DC Bar No. 449215)
Rebecca Dick (DC Bar No. 463197)
Gorav Jindal (DC Bar No. 471059)

DECHERT LLP
1775 I Street, N.W.
Washington, DC 20006
Telephone: (202) 261-3430
Facsimile: (202) 261-3333

Of Counsel:

Roberta Lang
Vice-President of Legal Affairs
and General Counsel
Whole Foods Market, Inc.
550 Bowie Street
Austin, TX 78703

Alden L. Atkins (DC Bar No. 393922)
Neil W. Imus (DC Bar No. 394544)
John D. Taurman (DC Bar No. 133942)

VINSON & ELKINS L.L.P.
The Willard Office Building
1455 Pennsylvania Avenue, N.W., Suite 600
Washington, DC 20004-1008
Telephone (202) 639-6500
Facsimile (202) 639-6604

Attorneys for Whole Foods Market, Inc.

Clifford H. Aronson (DC Bar No. 335182)
Thomas Pak (Pro Hac Vice)
Matthew P. Hendrickson (Pro Hac Vice)

SKADDEN, ARPS, SLATE, MEAGHER
& FLOM LLP

Four Times Square
New York, NY 10036
Telephone: (212) 735-3000
caronson@skadden.com

Gary A. MacDonald (DC Bar No. 418378)
SKADDEN, ARPS, SLATE, MEAGHER
& Flom LLP

1440 New York Avenue, N.W.
Washington, DC 20005
Telephone: (202) 371-7000
gmacdona@skadden.com

Terrence J. Wallock (Pro Hac Vice)
2224 Pacific Dr.
Corona Del Mar, CA 92625
(949) 375-0683

Attorneys for Defendant Wild Oats Markets, Inc.

August 3, 2007

TABLE OF CONTENTS

I.	BACKGROUND	1
A.	Whole Foods.	1
B.	Wild Oats	2
C.	The Whole Foods-Wild Oats transaction	3
D.	The FTC's investigation and this lawsuit	3
II.	THE RELEVANT PRODUCT MARKET IS BROADER THAN PREMIUM NATURAL AND ORGANIC SUPERMARKETS	4
A.	Whole Foods and Wild Oats are supermarkets.	4
B.	All supermarkets, including Whole Foods and Wild Oats, seek to differentiate themselves from competitors.	6
1.	Supermarkets differentiate themselves on a number of different attributes, such as, price selection, services, perishable departments, promotions, quality, private label offerings, and others.	6
2.	Growth in consumer demand for natural and organic products has changed the nature of supermarket competitions.	7
3.	In response to consumer demand, other supermarkets have eroded the points of differentiation once enjoyed by Whole Foods and Wild Oats.	10
4.	As a result of the loss of differentiation, the attributes that the FTC identifies with Whole Foods and Wild Oats are emphasized and shared by other supermarkets.	13
C.	Intense competition against other supermarkets is a daily reality for Whole Foods and Wild Oats.	14
1.	Consumers who shop at Whole Foods and Wild Oats also shop at supermarkets for the same products.	15
a.	Many Whole Foods and Wild Oats customers shop regularly at other supermarkets and retailers.	15
b.	Consumers buy the same products at Whole Foods and at other supermarkets.	18
c.	The percentage of "loyal" Whole Foods customers has declined	20
2.	Whole Foods and Wild Oats compete with other supermarkets.	21
a.	Whole Foods has engaged in a number of strategies to attract a broader group of consumers, including larger stores, expanded service and food venues.	21
b.	Whole Foods checks prices and "comp shops" against other supermarkets	23
c.	Whole Foods' private label program is designed to compete with other supermarkets	26
d.	The Site Selection process for new Whole Foods supermarkets considers locations of all other supermarkets	29

e.	Competition with other supermarkets has affected Whole Foods' rate of growth.	33
f.	Wild Oats won customers from other supermarkets during the California-supermarket strike.	34
g.	Wild Oats' non-compete agreement demonstrates that it considers other supermarkets as competitors	35
3.	Other supermarkets view Whole Foods and Wild Oats as competitors.	36
4.	There is no "unique" competition between Whole Foods and Wild Oats	40
D.	Whole Foods and Wild Oats also face brisk competition from other food retailers.	41
E.	The consumer survey performed by Ms. Conway shows that customers are buying the same types of products at other supermarkets.	44
F.	Defendants' industry expert, whose views are not contested, confirms that Whole Foods and WO compete with all supermarkets.	47
G.	The economic evidence confirms that Whole Foods and WO compete against all supermarkets.	48
1.	Dr. Scheffman's critical loss analysis confirms that the relevant market includes supermarkets.	50
2.	Dr. Scheffman's entry analysis confirms that the relevant market includes supermarkets.	54
3.	Dr. Murphy's conclusions on the relevant product market are not persuasive because he does not control for competitor behavior responsive to and independent of Whole Foods entry.	56
H.	The FTC's reliance on transfer rates in Project Goldmine for proof of product markets is misplaced. Project Goldmine denies, rather than supports, the existence of a market composed of only premium natural and organics supermarkets.	57
I.	The FTC has failed to properly define the "premium natural and organic supermarket" product market.	58
J.	Dr. Stanton's Qualifications	58
K.	Response to Misleading Statements by Michael Bloom Regarding Dr. Stanton During his Closing	59
L.	The Cross-Sectional Analysis of Whole Foods' Margins in WF-WF "Markets" vs. WF-WO "Markets" Does Not Yield a Meaningful Result	60
M.	Exit Events	61
III.	THE GOVERNMENT HAS FAILED TO PROPERLY DEFINE ANY RELEVANT GEOGRAPHIC MARKETS	62
A.	The FTC's shifting positions (at least six different positions) undermines its credibility about the geographic markets alleged.	62
B.	The FTC has failed to properly define geographic market.	63
1.	Whole Foods measures a new store's potential reach a number of different ways.	64

2.	Projections of sales of a new store, and where those sales come from, do not conform neatly to a circle.	65
a.	Local factors matter in determining geographic contours of competition.	65
b.	Draw areas vary.	65
c.	Draw areas reflect current market conditions, not what customers would do in the event of a price increase.	65
IV.	THE MERGER WILL NOT HARM COMPETITION	66
A.	The FTC’s proposed market definition implies that monopoly pricing already plagues the country.	66
B.	There is no evidence that the number of premium natural or organic supermarkets in a particular area affects market pricing.	67
1.	Dr. Scheffman’s cross-sectional pricing analysis and the testimony of supermarket operators confirms that Whole Foods and Wild Oats do not price in response to one another.	67
2.	Whole Foods’ inability to raise prices in Ft. Collins, CO after Wild Oats exited substantiates the existence of considerable competition from other sources.	71
C.	Wild Oats is not a unique constraint on Whole Foods. Wild Oats’ prices [REDACTED] Whole Foods’ prices.	71
D.	Other Supermarkets will continue to constrain Whole Foods post-merger.	75
1.	Economic evidence demonstrates that Whole Foods is constrained by other supermarkets.	75
2.	Other supermarkets have advantages over Whole Foods in size, scope, and distribution, which will continue to exert pressure on Whole Foods	75
3.	Whole Foods and Wild Oats face more intense competition than at any other time.	76
E.	Other food retailers will continue to take sales from Whole Foods and Wild Oats.	76
1.	[REDACTED] offers price and non-price competition, including an eclectic product mix and high quality products.	76
2.	Tesco, a new class of competitor, will redefine the sale of high-quality perishables.	78
3.	Mass merchandisers like Costco have focused on selling high-velocity natural and organic foods, which is attracting Whole Foods consumers.	79
F.	[REDACTED]	80
1.	[REDACTED]	82
2.	[REDACTED]	83
3.	[REDACTED]	84
4.	[REDACTED]	85
5.	Its new prototype store in Boulder, CO [REDACTED]	86
6.	[REDACTED]	88

G.	Whole Foods invests in store improvements and renovations.	90
1.	It has a comprehensive program to provide capital to stores.	92
2.	It invests in store improvements in response to all competitors, including Safeway, Trader Joe’s and Ralph’s Fresh Fare. There is no evidence that investments depend on the presence of Wild Oats.	92
3.	The FTC has no basis to conclude that non-price competition will be reduced by the merger.	93
H.	The merger will not harm competition in any alleged geographic area.	93
1.	Albuquerque, NM	93
2.	Boston, MA	96
3.	Boulder, CO	99
4.	Cleveland, OH	104
5.	Denver, CO	106
6.	Evanston and Hinsdale, IL	109
7.	Henderson and Las Vegas, NV	111
8.	Kansas City – Overland Park, KS	114
9.	Los Angeles, CA and Pasadena, CA	116
10.	Louisville, KY	121
11.	Omaha, NE	126
12.	Portland, ME	128
13.	Portland, OR	131
14.	St. Louis, MO	135
15.	West Hartford, CT	137
16.	Fairfield County, CT (potential competition)	140
17.	Miami Beach, FL (potential competition)	142
18.	Naples, FL (potential competition)	143
19.	Nashville, TN (potential competition)	144
20.	Palo Alto, CA (potential competition)	147
21.	Reno, NV (potential competition)	149
22.	Salt Lake City, UT (potential competition)	150
I.	Competitive Effects in Overlap Markets Where the Wild Oats Store May be Closed	151
J.	Analyses of the effect of Whole Foods Entry on Wild Oats’ Margins, Net Sales and Prices are Neither Reliable nor Relevant	154
1.	Margins are not prices	154
2.	Failure to Control for Competitor Behavior Responsive to and Independent of Whole Foods Entry.	155
K.	Analyses of the effect of Whole Foods’ Entry on Wild Oats’ Margins, Net Sales and Prices is not Particularly Probative of the effect of Wild Oats’ Exit on the Prices Whole Foods Charges in the Future	157
L.	Analyses of the effect of Other Competitors’ Entry on Whole Foods’ Margins, Net Sales and Prices are Not Relevant	160
M.	There is no evidentiary basis for the FTC’s “better buyer” claim.	160
N.	Third parties believe this merger will either have no negative impact on competition or will actually <i>increase</i> competition among supermarkets.	161

O.	Statements of John Mackey, by themselves, cannot demonstrate likely competitive harm. The statements of CEO John Mackey describe his feelings, his predictions, or his efforts to influence public opinion, not objective market facts.	164
1.	The statements of Mackey are not all one-sided, as the FTC suggests. The record is replete with evidence that Mackey was preparing the company for battle in the new competitive environment.	164
a.	The statements of Mackey are not all one-sided, as the FTC suggests. The record is replete with evidence that Mackey was preparing the company for battle in the new competitive environment.	164
2.	Mackey did not project a price increase post-merger.	167
3.	Mackey did project improvement of Wild Oats stores.	167
4.	Even crediting the FTC's views, the competitive effects of the merger can be effectively assessed only on the basis of evidence of market dynamics, not on the basis of hopes expressed by corporate officials.	168
P.	Whole Foods has not made final decisions on the closing of Wild Oats' stores because it has not had access to store-level financial data.	168
Q.	The purchase price does not reflect a premium to eliminate Wild Oats as a competitor.	170
R.	The FTC's alleged non-price competitive effect is nonsensical: if the merged firm permits quality to decline, it will no longer be differentiated in any way from conventional supermarkets.	171
S.	The testimony of Perry Odak is unreliable and biased.	172
1.	Odak's testimony reveals his lack of experience and knowledge of the supermarket industry.	172
2.	This lack of experience and knowledge led to Wild Oats' decision not to renew his contract.	173
3.	Odak is embittered toward Wild Oats and its current managements, which has made him a biased witness.	174
V.	SUPERMARKET REPOSITIONING AND ENTRY WILL CONTINUE TO EXERT ADDITIONAL COMPETITIVE PRESSURE ON THE COMBINED FIRM	174
A.	Repositioning by supermarket and other retailers is ongoing.	174
1.	Delhaize America	176
a.	179
b.	182
2.	Safeway	184
3.	Publix	189
4.	Kroger 191	
5.	SuperValu	192
6.	Wegmans	194

7.	Giant Eagle	195
8.	Wal-Mart.	196
9.	Target (SuperTarget).	198
10.	Other supermarkets	198
B.	The trends in supermarket and retail repositioning will continue	201
VI.	THE TRANSACTION WILL MAKE WHOLE FOODS A MORE EFFICIENT SUPERMARKET, WHICH WILL LOWER ITS COSTS AND ENABLE IT TO OFFER LOWER PRICES AND ENHANCED SERVICE	202
A.	Whole Foods has improved the prices, quality, and performance of the stores it has purchased previously	202
1.	Wellspring Grocery.	203
2.	Bread & Circus.	203
3.	Mrs. Gooch's.	204
4.	Fresh Fields.	204
5.	Bread of Life.	205
6.	Nature's Heartland.	205
7.	Food for Thought.	205
8.	Harry's.	205
B.	Whole Foods has in the past transformed underperforming Wild Oats stores into productive supermarkets	206
C.	Wild Oats is [REDACTED] current and future competitive position must be discounted.	206
1.	[REDACTED]	206
2.	[REDACTED]	207
D.	Whole Foods will improve the performance of Wild Oats stores.	209
E.	The acquisition will enable Whole Foods to lower prices and expand output	210
F.	The acquisition will allow Whole Foods to compete better with larger supermarkets	212
VII.	THE BALANCE OF THE EQUITIES FAVORS DENIAL OF THE PRELIMINARY INJUNCTION	212
VIII.	CONCLUSIONS OF LAW	213
A.	The FTC has not proven a "likelihood of ultimate success" on the merits that the effect of the proposed merger "may be substantially to lessen competition." 15 U.S.C. §§ 18, 53(b).	213
a.	The FTC failed to allege or prove what products are at issue.	216
b.	In pursuing this case, the FTC has ignored its past enforcement practices and its Horizontal Merger Guidelines.	217

c.	The alleged product market seems to have been constructed for this case alone, because it does not reflect the reality of everyday competition.	218
4.	The FTC’s two potential competition claims are, respectively, legally insupportable and unproved.	229
a.	The Clayton Act does not prohibit a merger because it fails to enhance competition	229
b.	As to the geographic markets in which it alleges harm to potential competition, the FTC fails to establish the initial element of a potential competition claim.	229
5.	Attention to purported intent evidence, including the statements of John Mackey, cannot distract from analysis of relevant marketplace conduct (<i>i.e.</i> , everyday competition), which the Court has determined is the relevant inquiry.	230
a.	The statements of John Mackey have been misinterpreted and misused.	230
b.	The testimony of Perry Odak is unreliable and biased.	231
B.	The public interest and the balance of the equities do not favor issuance of an injunction	231
IX.	CONCLUSION	1

TABLE OF AUTHORITIES

Cases

<i>A. A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.</i> , 881 F.2d 1396, 1402 (7th Cir. 1989)	183
<i>Bell Atlantic Corp. v. Twombly</i> , 127 S. Ct. 1955, 1973 n.13 (2007)	183
<i>Brown Shoe v. U.S.</i> , 370 U.S. at 325	174, 175
<i>FTC v. H.J. Heinz Co.</i> , 246 F.3d 708 (D.C. Cir. 2001)	173
<i>FTC v. Arch Coal, Inc.</i> 329 F. Supp. 109, 116 (D.D.C. 2004)	passim
<i>FTC v. Elders Grain, Inc.</i> , 868 F.2d 901, 904 (7th Cir. 1989)	185
<i>FTC v. Exxon Corp.</i> , 636 F.2d 1336, 1343 (D.C.Cir. 1980)	184
<i>FTC v. Foster, Memorandum Op.</i> ¶ 181, No. CIV-07-352 JB/ACT (D.N.M. May 29, 2007 (appeal pending) (“ <i>Western Refining</i> ”))	175
<i>FTC v. Freeman Hospital</i> , 69 F.3d 260, 263 (8th Cir. 1995)	178
<i>FTC v. Great Lakes Chemical Corp.</i> , 528 F. Supp. 84, 98 (N.D. Ill. 1981)	184
<i>FTC v. H.J. Heinz</i> 10, 246 F.3d 708 (D.C. Cir. 2001)	173
<i>FTC v. Libbey, Inc.</i> , 211 F. Supp. 2d 34, 45 (D.D.C. 2002)	179
<i>FTC v. Nat’l Tea</i> , 603 F.2d 694, 697 (8th Cir. 1979)	185
<i>FTC v. Occidental Petroleum Corp.</i> , 1986-1 Trade Cas. (CCH) ¶ 67,071 at 62,516 (D.D.C. 1986)	184, 185
<i>FTC v. Staples, Inc.</i> , 970 D. Supp. 1066, 1072 (D.D.C. 1997)	174, 179, 180
<i>FTC v. Swedish Match</i> , 131 F. Supp. 2d . 151, 172 (D.D.C. 2000)	185
<i>FTC v. Tenet Health Corp.</i> , 186 F.3d 1045, 1052 (8th Cir. 1999)	177
<i>FTC v. Weyerhaeuser Co.</i> , 665 F.2d 1072, 1082 (D.C. Cir. 1981)	184, 185
<i>Morgan v. Ponder</i> , 893 F.2d 1355, 1359 (8th Cir. 1989)	183

<i>United States v. Baker-Hughes Inc.</i> , 908 F.2d 981, 982-83 (D.C. Cir. 1990)	173, 174, 175
<i>United States v. Central State Bank</i> , 817 F.2d 22, 23 (6th Cir. 1987)	175
<i>United States v. Connecticut National Bank</i> , 418 U.S. 656 (1974)	178
<i>United States v. E.I. du Pont de Nemours & Co.</i> , 353 U.S. 586, 593 (1957)	174
<i>United States v. General Dynamics Corp.</i> , 415 U.S. 486 (1974)	180
<i>United States v. Gillette Co.</i> , 828 F. Supp. 78, 83 (D.D.C. 1993)	176
<i>United States v. International Harvester Co.</i> , 564 F.2d 769, 775-65 (7th Cir. 1977)	181
<i>United States v. Long Island Jewish Medical Center</i> , 983 F. Supp. 121, 138 (E.D.N.Y. 1997)	175, 181
<i>United States v. Marine Bancorporation</i> , 418 U.S. 602, 622-23 (1974)	173, 182
<i>United States v. Oracle Corp.</i> , 331 F. Supp. 2d 1098 (N.D. Cal 2004)	175, 176
<i>United States v. Philadelphia National Bank</i> , 374 U.S. 321 (1963)	173
<i>United States v. SunGard Data Sys.</i> , 172 F. Supp. 2d 172, 191-92 (2001)	176

Statutes

§ 7 of the Clayton Act	passim
15 U.S.C § 18	171
15 U.S.C. § 18	174
15 U.S.C. § 53(b)	164, 176
15 U.S.C. §§ 15, 53(b)	164
Hart-Scott-Rodino Antitrust Improvements Act of 1976	3

Other Authorities

G. Manne & W. Williamson, *Hot Docs and Cold Economics*, 47 Ariz. L. Rev. 609,
646 (2005) 176

Horizontal Merger Guidelines § 1.0 (1992) 167

P. Areeda & H. Hovenkamp Antitrust Law § 1506 (2d d3d, 2003) 175

INTRODUCTION

Whole Foods Market, Inc. (“Whole Foods”) and Wild Oats Markets, Inc. (“Wild Oats”) respectfully submit that the following joint proposed findings of fact and conclusions of law are fully supported by the evidence in the record. The clear weight of the evidence provides a clear basis for denying the Federal Trade Commission’s (“FTC’s”) motion for a preliminary injunction.

In short, the evidence overwhelmingly shows that competition among supermarkets and other retailers has never been more intense across the entire country. Whole Foods and Wild Oats are two of many supermarkets fighting for the business of consumers in every area in which they operate. Combined, the two companies will be able to better compete and will deliver to customers lower prices and improved quality.

In this Section 13(b) proceeding, the FTC failed to carry its burden of “showing that, weighing the equities and considering the Commission’s likelihood of ultimate success,” a preliminary injunction “would be in the public interest.” To the contrary, the evidence establishes that: (1) Wild Oats imposes no meaningful constraint on Whole Foods; (2) the acquisition of Wild Oats by Whole Foods will not alter Whole Foods prices; (3) Whole Foods and Wild Oats compete with other supermarkets and other retailers; (4) the proposed transaction will not harm competition; (3) substantial equities favor permitting the merger to proceed; and (5) a preliminary injunction would be adverse to the public interest.

I. BACKGROUND

A. Whole Foods.

1. Whole Foods first opened its doors in 1980. At that time, all of Whole Foods' operations consisted of a single 10,000-square-foot health foods store in Austin, Texas. Its current Austin store is approximately 80,000 square feet and, like Whole Foods' 193 other stores in the United States, is a full-service supermarket with a broad array of conventional, natural, organic, gourmet, prepared and specialty product offerings. Sud Decl. ¶¶ 14, 16, 17.

2. Whole Foods currently employs over 39,000 people (referred to by the Company as "team members") across its 194 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.

3. Due to Whole Foods' decentralized corporate structure, most competitive decisions – and nearly all 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.).

4. Each Whole Foods store in the U.S. is headed by a store team leader and is operated by between 40 to 650 team members comprising up to 13 teams per store. Each team is led by a team leader and is responsible for a different product category or aspect of store operations such as customer service, prepared foods, grocery, meat, produce, and others. Much as with its regions, each store promotes a decentralized approach that allows teams to make decisions on behalf of the store. DX 457; Bradley Decl. ¶ 3.

5. Whole Foods has evolved from a health food store into a supermarket. Whole Foods' new stores typically range in size between 50,000 and 60,00 square feet. DX 457. 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. The Company is building larger stores so that it can sell products to a broader consumer base. *Id.*, Sud Decl. ¶ 17.

6. At the same time, Whole Foods has adjusted its product mix to attract customers that historically shopped at other supermarkets and other food retailers. 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 much larger portion of its prepared foods, bakery, and specialty items. Sud Decl. ¶¶ 17, 25.

B. Wild Oats

7. Wild Oats Markets, Inc. ("Wild Oats"), is headquartered in Boulder, Colorado and operates 115 stores in the U.S., under three different banners: Wild Oats Marketplace¹, Henry's Farmers Market, and Sun Harvest. DX 494 at 3 (2006 Wild Oats 10-K).

8. Wild Oats offers a range of natural and organic foods, household products, vitamins and supplements, and body care products. *Id.* Its stores (for the Wild Oats banner only) average 23,700 square feet. Mays Decl. ¶ 22. Thirty-five of the 70 Wild Oats banner stores today are less than 25,000 square feet (Wild Oats Response to Spec. 2 of FTC's Second Request, DX 807), which Dr. Murphy says "are not competitively significant." Murphy Expert Report ¶ 26.

¹This includes a single store in Boulder, CO that operates under the name "Ideal Market," but is reported under the Wild Oats banner.

C. The Whole Foods-Wild Oats transaction

9. 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 Wild Oats stock at a price of \$18.50 per share. At this share price, the total price of the transaction would be approximately \$565 million. The parties have agreed to close the transaction contemplated by the Agreement on or before August 31, 2007. Sud Decl. ¶ 45. Whole Foods filed a notice of this planned transaction with the Federal Trade Commission on February 26, 2007, pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended.

D. The FTC’s investigation and this lawsuit

10. On March 13, 2007, Whole Foods and Wild Oats Markets, Inc. received a Second Request for additional information from the FTC in connection with the proposed tender offer. The Second Request contained twenty-six specifications, many with multiple sub-parts, requesting detailed information and data relating to, *inter alia*, the parties’ individual stores, products, pricing, and business plans. Pursuant to the Second Request, Whole Foods produced approximately 2.5 million pages of documents and approximately 2300 MB of data and Wild Oats produced over 14 million pages of documents and over 100 MB of data. *See* Status Conf. Tr. at 3 (June 11, 2007). During the course of this investigation, the FTC also conducted investigational hearings of five employees of Whole Foods, five employees of Wild oats, the chief executive officer of Trader Joe’s, and the former chief executive officer of Wild Oats. During its investigation, the FTC also sent civil investigative demands to dozens of third parties, including Safeway, Kroger, SuperValu, Delhaize America, and Trader Joe’s.

11. The FTC announced its plans to challenge the proposed transaction on June 5, 2007. On June 6, 2007, the FTC filed a Complaint in Federal District Court in the District of Columbia seeking a temporary restraining order and preliminary injunction to halt the transaction pending an administrative trial on the merits. With the consent of the parties, a temporary restraining order was entered to delay completion of the transaction until the court ruled on the motion for a preliminary injunction.

12. During the prosecution of this lawsuit, the FTC served the parties with three separate requests for production of documents and data. In response, Whole Foods produced thousands more documents and over 68 GB of additional data, mostly relating to pricing. Whole Foods and Wild Oats also produced fourteen witnesses for deposition, including five who had been previously questioned by the FTC at investigational hearings. The FTC also requested vast amounts of economic data from third parties and deposed representatives of industry competitors such as Delhaize America, Safeway, and Trader Joe's. The FTC furthermore deposed and reviewed the reports of each of Defendant's three expert witnesses and had the opportunity to work with its own expert – Dr. Murphy – who prepared three separate reports in support of the FTC's case. In all, the FTC has deposed over two dozen individuals during the course of this litigation. Status Conf. Tr. at 22 (June 11, 2007).

II. THE RELEVANT PRODUCT MARKET IS BROADER THAN PREMIUM NATURAL AND ORGANIC SUPERMARKETS

A. Whole Foods and Wild Oats are supermarkets.

13. The complaint alleges that Whole Foods and Wild Oats are supermarkets. Complaint ¶ 2, 4; Stanton Report ¶ 3, 17-18, 80.

14. Whole Foods and Wild Oats each target a large base of supermarket shoppers in competition with other supermarkets. Stanton Report ¶¶ 3, 15, 18, 25, 80; Sud Decl. ¶ 14; JX 28

at 31 (Mackey I.H.); [REDACTED];
[REDACTED]; Mays Decl. ¶ 12; Martin Decl. ¶¶ 6-14, 16-17; DX 626 at 150
(Coblentz I.H.); JX 17 at 37-43 (Zeeb Dep.).

15. 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 typically maintains the selection and depth of products to provide one-stop shopping for a customer’s food and grocery needs. Stanton Report ¶ 15.

16. A typical Whole Foods store carries all the traditional categories of products: fresh produce (both conventional and organic), frozen foods (including ice cream from Ben & Jerry’s, Breyer’s and Edy’s), shelf-stable food and beverage products (including popular brands such as Goya, Del Monte green beans, McIlhenny’s Tabasco Sauce and French’s Yellow Mustard), bread and bakery items, dairy, refrigerated foods (including Kozy Shack puddings and juices from Tropicana and Dole), fresh and prepared meats and poultry, fresh seafood, deli, prepared foods, health and beauty aids, cleaning supplies, paper products and other general merchandise, including pet products, kitchen tools, and magazines. Whole Foods accepts coupons, sells gift cards and offers services such as prepared coffee, flowers and gift baskets. Stanton Report ¶ 18.

17. All supermarkets, including Whole Foods and Wild Oats, possess these similar attributes, and this is what makes them relevant competitors for the same base of supermarket consumers. Stanton Report ¶ 16; [REDACTED]
[REDACTED]

18. Consumers can obtain all of their requirements at Whole Foods or Wild Oats, just as they can at other supermarkets, whether they are stocking up for a week or picking up only a few items. Stanton Report ¶¶ 15, 23, 80; *see also* JX 41 at 130-31 (Foster I.H.).

B. All supermarkets, including Whole Foods and Wild Oats, seek to differentiate themselves from competitors.

1. Supermarkets differentiate themselves on a number of different attributes, such as, price selection, services, perishable departments, promotions, quality, private label offerings, and others.

19. Given that they all offer the same essential product categories and a wide-assortment of products within those categories, all supermarket operators, including Whole Foods and Wild Oats, attempt to differentiate themselves in order to give customers a reason to shop at its stores instead of the supermarkets operated by its competitors. Stanton Report ¶¶ 3, 21-26; [REDACTED]; JX 28 at 34 (Mackey I.H.); Martin Decl. ¶¶ 4-5.

20. Differentiation is the primary method by which supermarkets compete with each other, and in many ways has become the most important element of competition. 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; *see also* [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; Boardman Decl. ¶

10; [REDACTED]

[REDACTED].

21. Every supermarket seeks to seeks to differentiate itself in some ways from its competitors. Whole Foods’ CEO, John Mackey, testified “Kroger doesn’t have every product

that Safeway sells and vice versa. There will always be some differentiation between stores in the marketplace. Part of that differentiation will be on product.” JX 28 at 34 (Mackey I.H.).

22. In today’s world of differentiation, most successful supermarkets have developed one or two benefits that distinguish them from the “average” supermarket and give customers a reason for shopping their stores. Stanton Report ¶ 23. Differentiating factors can include, for example, 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. *Id.*; see also [REDACTED]

23. Supermarket differentiation is a dynamic process and changes as the consumer’s desires for various benefits change. As consumer demands change, supermarket operators will continue to change with them. Stanton Report ¶ 28; [REDACTED] Supermarkets modify, re-define and re-format themselves all the time as they evolve with both the trends in consumer demand and the trends in competition. Stanton Report ¶ 28; [REDACTED]

2. Growth in consumer demand for natural and organic products has changed the nature of supermarket competitions.

24. Consumer demand for natural and organic products has sky-rocketed over the past several years. JX 2 at 56-57 (Robb Dep.); [REDACTED]; Stanton Report ¶¶ 31, 66-71; Scheffman Report, Appendix E ¶ 4; DX 573.

25. Demand for the following specific types of organic products has increased dramatically 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); organic snack foods and (15-30% annually). DX 591 (Organic Trade Association's 2006 Manufacturers' Survey).

26. The explosive 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"); [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

27. Now that natural and organic products have entered the mainstream, supermarkets have responded. 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. [REDACTED]; Mays Decl. ¶ 13; Stanton Report ¶¶ 31-34; Scheffman Report, Appendix E ¶ 8. Most supermarkets have even added full lines of private-label natural and organic products. Stanton Report ¶¶ 33, 35 (Delhaize), 39 (Safeway), 44 (Wegman's), 48 (Supervalu), 56 (Publix), 62 (Bashas'); DX at 37-40 (Wal-Mart, Costco, and Tesco), [REDACTED]; DX 593 (Safeway 2006 annual report); JX 41 at 118-19 (Foster I.H.); DX 25 (Wal-Mart is working with organic suppliers and competing aggressively on prices); DX 36 (Wal-Mart calling out a nationwide organic program); DX 37; DX 354; [REDACTED]

[REDACTED]

[REDACTED]

28. Manufacturers of natural and organic products no longer rely on “natural food” stores for distribution of their products. While this may have been the case in prior years, the growth in consumer demand for these products has now made them part of the mainstream.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; Mays Decl. ¶¶ 16-17, 19; Megahan Decl. ¶¶ 18-20; DX 7 (symposium for natural and organic companies inviting Costco and Safeway and join Whole Foods for panel presentations).

29. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

30. Manufacturers have responded to the rapid growth in demand for natural and organic products by rapidly expanding their product offerings. This includes both “traditional” natural and organic companies such as WhiteWave and Hain Celestial, but also conventional and mainstream food companies. Stanton Report at ¶¶ 72-75.

31. For instance, Kellogg sells organic cereals through its Kashi line, but has also added organic versions of its popular ready-to-eat cereals such as Rice Krispies, Corn Flakes and Raisin Bran. Stanton Report ¶ 72. Other mainstream manufacturers, such as General Mills, and PepsiCo have all expanded into natural and organic product lines. Stanton Report ¶¶ 73-75.

3. In response to consumer demand, other supermarkets have eroded the points of differentiation once enjoyed by Whole Foods and Wild Oats.

32. In prior years, Whole Foods was able to use its differentiation strategy to achieve higher sales growth rates than the supermarket industry generally. Stanton Report ¶ 29. Not surprisingly, its supermarket competitors have paid attention to Whole Foods' success and to the changing consumer demands for fresh, natural and organic foods. *Id.* In response, these competitors have been refocusing their strategies and repositioning their formats to respond to the changes in consumer demands. *Id.*; Robb Decl. ¶ 19; Gallo Decl. ¶ 20.

33. Whole Foods faces "eroding product differentiation" as other supermarkets continue to stock many of the same products that Whole Foods offers. DX 12 Whole Foods is in "a time of unprecedented competition" where it increasingly does not have "the advantage of offering a unique selection of products." DX 1; *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); JX 28 at 122-23 (Mackey I.H.) ("Our basis of differentiation is eroding"); DX 362; DX 383 (other stores have closed the gap and product uniqueness, quality, selection, and presentation); 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"); Stanton Report ¶¶ 3, 28-30, 79-83.

34. Most of the major supermarket chains (regional and national) are becoming more competitive by improving perishable departments and offering an increased selection of natural and organic foods. DX 1. This combination has brought Whole Foods into 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. at ¶ 18; JX 28 at 33 (Mackey L.H.) (Whole Foods’ success has “caused all these supermarkets to try to want to steal Whole Foods’ mojo.”); 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.

35. Many of supermarket competitors to Whole Foods and Wild Oats are larger, better capitalized companies. Sud Decl. ¶ 28. These companies have invested a significant amount of resources into developing and opening new stores. Many of these stores mimic Whole Foods’ store designs and product offering. *Id.*; *see also*, *infra*, ¶¶ 23, 24, 26-30.

36. As a result of increased competition and decreased differentiation from other supermarkets, Whole Foods has tried to expand its customer bases to appeal to a wider range of customers. Sud Decl. ¶ 17. Whole Foods has expanded product offerings to include a variety of items in each product category – from conventional products to everyday value private label items to organic, premium, or gourmet items. *Id.*; Stanton Report ¶¶ 23, 80; [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

37. Channel blurring is becoming especially noticeable as the natural foods class of trade is rapidly losing insulation from competition.” DX 8 at 4, *see also* DX 40 at 14; DX 705 at 3. Access to “the same brands at cheaper prices” at other retailers are causing Whole Foods customers to “split[] their purchases.” DX 8 at 4.

38. There are no impediments to a supermarket operator establishing distribution for natural and organic products or increasing the number or volume of stock keeping units (“SKUs”) that it already carries. Manufacturers have made it easy for supermarket firms to establish and grow distribution, either directly or through a distributor. [REDACTED]

39. Many supermarkets have modeled the look and feel of their stores, as well as many of their current competitive strategies, on Whole Foods. 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.*, [REDACTED]
[REDACTED]; Paradise Decl. ¶¶ 21, 46-47, DX 49, DX 357, DX 368, DX 480 (discussing Safeway Lifestyle stores); DX 747 (discussing Publix Greenwise stores); DX 763 (Safeway); Bradley Decl. ¶ 25; JX 6 at 81 (Bradley Dep.); DX 225 at 21 (Byerly’s supermarket design based upon Whole Foods’ flagship Austin store); DX 546 at 6; (Baker’s Omaha store remodeled in response to Whole Foods’ opening); 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”).

40. Overall, Whole Foods and Wild Oats are more like other supermarkets than they are different. Mays Decl. ¶¶ 15-19. They both carry the same categories of products and share

the same customers, distributors, and suppliers as other supermarkets. *Id.*; JX 33 at 97-103 (Coblentz I.H.).

4. As a result of the loss of differentiation, the attributes that the FTC identifies with Whole Foods and Wild Oats are emphasized and shared by other supermarkets.

41. Supermarkets are increasing their selection of natural and organic foods, and “HEB, Wegmans, Publix, Safeway, Ahold, etc, are all figuring out ways to offer much nicer customer[] experiences than they did in the past.” DX 1. This is “a new era of competition” for Whole Foods. DX 19; DX 38; Gallo Decl. ¶ 19 Robb Decl. ¶ 18; JX 2 at 224 (Robb Dep.); DX 721 at 12 (“This new business model moves supermarkets away from center aisle groceries to a fresher, more exciting, format that emphasizes high-quality perishables departments and prepared foods.”).

42. The percentage of Wild Oats’ total sales in perishable items is about [REDACTED]. Wild Oats defines “perishables” to include produce (including floral), meat, seafood, deli, bakery and food service, and excludes dairy and frozen items, which, although literally perishable, are considered “grocery” items. Moreover, Wild Oats’ percentage of perishables sales is [REDACTED] conventional supermarkets, which typically have perishables sales (using the same categories that Wild Oats uses) in the 25-35% range. In fact, because most conventional supermarkets are much larger and have much higher sales volumes than even the largest Wild Oats stores, conventional retailers generally have higher absolute perishables sales than do Wild Oats. Martin Decl. ¶ 23.

43. Nearly every national supermarket chain 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).

44. Most competing supermarket chains have launched their own private label store brands of natural and organic products. These private labels allow other supermarkets to begin competing very quickly with Whole Foods' both 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.").

45. "[T]he days of waiting for new vendors and new products to come to [Whole Foods] first are over. Costco and Safeway are changing that landscape forever." DX 7 at 1. As a consequence, Whole Foods' [REDACTED] are declining as more and more other supermarkets begin to carry the same types of natural and organic foods. DX 4 at 3. "[S]tronger competition in the health food area from mainstream companies such as Kroger, Safeway and Albertsons has taken a toll." DX 31; *see also* DX 254, DX 255 (noting increased supermarket competition in traditional Whole Foods spaces); DX 262 (Whole Foods is not unique anymore because its products are sold by other supermarkets).

C. Intense competition against other supermarkets is a daily reality for Whole Foods and Wild Oats.

46. Whole Foods now faces "unprecedented competition" from a significant number of "newly improved supermarkets." DX 1; Gallo Decl. ¶ 19; Robb Decl. ¶¶ 6, 18; Sud Decl. ¶ 23; *see also* DX 384 ("very big" topic for meeting with Whole Foods Co-Presidents and regional presidents will be the "new competition"); DX 40 (presentation entitled "What does it take for us to win?"); DX 61 (lists of a number of Whole Foods' supermarket competitors in different regions in the eastern United States); Meyer Decl. ¶ 36; DX20 at 2 ("[REDACTED]

[REDACTED] We cannot underestimate what is happening in the retail industry.”); DX 209 (“more intense competition everywhere”).

1. Consumers who shop at Whole Foods and Wild Oats also shop at supermarkets for the same products.
 - a. Many Whole Foods and Wild Oats customers shop regularly at other supermarkets and retailers.

47. Whole Foods’ customers typically shop at other supermarkets and retailers, given the restrictions Whole Foods places on what products its stores can carry. Whole Foods’ customers are now buying even more products 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 at Whole Foods. Robb Decl. ¶ 21; Gallo Decl. ¶ 19; DX 8; Stanton Report ¶ 27; [REDACTED]

48. The fact that Whole Foods’ customers can buy an increasing variety of products at competing supermarkets is sometimes at Whole Foods referred to as the “pick-off factor.” Bradley Decl. ¶ 9; JX 6 at 39 (Bradley Dep.).

49. More than [REDACTED] of Whole Foods customers also shop at these other supermarkets and at grocers such as Trader Joe’s. Boardman Decl. ¶ 5; *see generally*, Conway Report.

50. A significant number of Whole Foods customers “cross-shopped” between Whole Foods and other supermarkets, such as Kroger, Safeway, Albertsons, Ahold, Publix, and H-E-B. DX 2 at 16. “[REDACTED]

[REDACTED]; *see also* DX 15 (frequent Whole Foods customers split purchases between Whole Foods and other stores such as Safeway, Costco, Wal-Mart, and Trader Joes); DX 727; DX 735 at 5.

51. Cross shopping has become particularly prevalent as the different types of distribution channels for natural and organic goods have blurred. Over the last few years, Whole Foods' point of differentiation from other stores has eroded and consumers can purchase natural and organic foods from a number of different outlets. 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 ore 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* [REDACTED]

52. Whole Foods' customers often shop in other stores as often as once a week. JX 10 at 66 – 67 (Meyer Dep.) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. *See also*, [REDACTED]; Stanton Report ¶ 27; Allshouse Decl. ¶ 7.

53. Research by other supermarket chains show that their customers are cross-shopping with Whole Foods. For instance, [REDACTED]

[REDACTED]

54. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

55. Market research 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, shoppers at Whole Foods and Wild Oats overwhelmingly 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 (NMI 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).

56. Market research indicates that a substantial percentage of shoppers at Whole Foods and Wild Oats purchase “healthy,” organic and natural products at other supermarkets as well. *See* Scheffman Report ¶¶ 131, 141, 150-51, 167-68; DX 568; DX 691; DX 694; DX 703.

57. Market research 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]).

58. Wild Oats’ customers view Wild Oats as a “fill in” store and over █████ of them do 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 █████ of their dollars at Wild Oats,” whereas █████ of their grocery dollars are spent in “traditional food stores” such as Kroger, Albertson’s, and Safeway); DX 575, DX 576 (customer interviews); *see* JX 37 at 86 – 88 (Odak JH); JX 16 at 62 – 65 (Odak Dep.) (Wild Oats customers shop at other supermarkets and compare prices).

b. Consumers buy the same products at Whole Foods and at other supermarkets.

59. Whole Foods faces declines in store sales growth as more and more conventional supermarkets begin to carry the same types of natural foods. “After a total slump by the supermarket industry over the past 5 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 existing stores on the East Coast. Every time they open a new store or remodel an existing one with better perishables and natural foods [Whole Foods] see[s] a hit.” DX 3 at 1.

60. Whole Foods has recognized a need to be more price competitive as more and more conventional supermarkets begin to carry the same types of natural and organic foods. “The world has changed now – [Whole Foods has] real competition, other stores are selling [Whole Foods] products” and consequently, Whole Foods is “forced to be much, much sharper on price than we have ever had to be in our past.” DX 5 at 2. “Any ‘extra profit dollars’ [we save]...are all going to be spent being more price competitive with Trader Joe’s, Wegmans, Safeway, Wal-Mart, etc.” DX 11 at 1; *see also* Lannon Decl. ¶ 12; JX 8 at 48

(Lannon Dep.) (Whole Foods sells products like Ben & Jerry's ice cream, "just like every other supermarket we compete with"); Mays Decl. ¶ 16 (approximately [REDACTED] of Wild Oats' top SKUs are available at conventional supermarkets); DX 748 (other supermarkets carrying brands that "Whole Foods has grown up with").

61. 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; *see also* Scheffman Report ¶ 131.

62. The Hartman Group was retained by Wild Oats for some consumer research,

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] (PX02072). JX 33 at 89-104 (Coblentz Dep.).

63. The FTC discounts defendants' volumes of evidence of price competition with multitude other supermarkets yet it relies on a subset of the same type of ordinary course of price competition as evidence of "unique" competition between Whole Foods and Wild Oats. 8/1 Hearing Tr. at 46-47 (citing a single \$5 discount, planned discounts and fliers in one market, and a one-time 20% off discount as evidence of systematic competition). Competitive interacting between Whole Foods and Wild Oats is not unique to supermarket competition in any area where defendants have stores.

64. Evidence of competition between Whole Foods and Wild Oats is dwarfed by the evidence showing that Whole Foods monitors, tracks, and responds to the actions of other supermarkets to retain sales. *See e.g.*, DX 2 (AC Nielsen market research showing that

significant Whole Foods customers shop at other supermarkets across the United States); DX 1 (Gallo e-mail discussing cross-shopping and new competitive realities); *See supra* II.C.2.b.

65. That Whole Foods no longer regularly price checks Wild Oats is not surprising since Wild Oats' prices [REDACTED]. *See infra* IV.C.

c. The percentage of [REDACTED] Whole Foods customers has [REDACTED]

66. The consumer base for Whole Foods is increasingly diverse and fragmented. While a 1999 market research study segmented Whole Foods customers into various “lifestyle” groups, a similar 2007 study updated those customer groups “in light of the changing marketplace.” The study concludes that “[t]he WFM shopper is *evolving* from the fringe consumer who was devoted to Whole Foods based on philosophies related to organic/[Lifestyles of Health and Community Sustainability]/community to a larger and more diverse, ‘conventional’ consumer base (where WFM philosophies are not the main purchase drivers).” DX 703 at 3 (February 2007 NMI market research report).

67. Categories of “core” Whole Foods customers are [REDACTED] [REDACTED]. In a study run for Whole Foods in early 2007, the data shows that Whole Foods share of specialty/gourmet customers have [REDACTED] in 2005 [REDACTED] in 2006, whereas for traditional grocery stores that percentage has risen from 80% in 2005 to 94% in 2006. DX 15 at 14. Wild Oats estimates that so-called “core” customers comprise only approximately [REDACTED] of its total customers. Mays Decl. ¶ 18.

68. Indeed, market research shows that there is no definable “core customer” for Whole Foods and Wild Oats. Whole Foods and Wild Oats customers cannot be characterized by a unique set of descriptors. Scheffman Report ¶ 170; DX 16; DX 240 at 9 ([REDACTED])

█████; DX 703 (study identifying “█████ unique customer segments whose differing attitudes and opinions impact their diverse shopping and buying behaviors”); DX 713 at 12 (Whole Foods draws customers from a variety of demographics).

69. The majority of Whole Foods shoppers do not place a heavy emphasis on natural and organic foods and beverages. In a 2003 study, less than █████ of Whole Foods shoppers indicated that the consumption or use of organic and natural foods and beverages were extremely important to a “healthy, balanced lifestyle.” JX 21 at 40. Today, only █████ of Whole Foods’ shoppers are strong, organically focused consumers. *Id.* at 12, 15 (describing the characteristics of the “Corganics” category).

2. Whole Foods and Wild Oats compete with other supermarkets.

70. Whole Foods views all supermarkets and food retailers as its competition. “Every grocery is a competitor of [Whole Foods], so any Safeway, Kroger, Albertsons, local regional player, Wegman’s, Molly Stone’s, anyone is a competitor.” JX 41 at 101 (Foster I.H.); *see also* JX 41 at 182 (Foster I.H.).

71. Wild Oats views its competitors to “include other independent and multi-unit natural foods supermarkets, smaller traditional natural foods stores, conventional supermarkets and specialty grocery stores.” DX 494 at 6, 8 (2006 Wild Oats 10-K); *see also* Martin Decl. ¶¶ 7-8, 15-17.

- a. Whole Foods has engaged in a number of strategies to attract a broader group of consumers, including larger stores, expanded service and food venues.

72. One of Whole Foods’ priorities is to build and operate large format stores that attract a broad customer base. DX 457 (Whole Foods 2006 10-K). At these large format stores, Whole Foods seeks to provide a large selection of products, including freshly prepared foods,

food venues and other features to attract a variety of different types of customers. Sud Decl.

¶ 17; DX 17 ([REDACTED]); DX 373 ([REDACTED]); DX 508 ([REDACTED]); JX 28 (Paradise I.H.) at 188 [REDACTED]); DX 209 (Whole Foods' plans to upgrade [REDACTED]); DX 218 (Discussing many of the features of Whole Foods' Fair Lakes [Fairfax, VA] store.).

73. In response to increasing pressure from competing supermarkets, Whole Foods has invested in stores to expand offerings and to attract a wider range of customers. Robb Decl. ¶ 34; DX 236 (notes of a Whole Foods personnel, including Robb, "walk through" of the [REDACTED] to develop plans to counter the [REDACTED] store's featured attributes); DX 759; DX 763; *see also* DX 209 (Whole Foods is improving its [REDACTED] store design in response to [REDACTED]); Meyer Decl. ¶ 17; DX 196 at 2 (Kenney email August 2003, explaining that a "perceptual design group" has been engaged to assist with the [REDACTED] store remodel); Lannon Decl. ¶ 18; DX 503 (improving Kosher foods selection in [REDACTED]); Lannon Decl. ¶ 20; JX 8 at 182-84 (Lannon Dep.) ([REDACTED] store to better compete with [REDACTED]). DX 59 at 2-3 (strategies to compete with [REDACTED]); Meyer Decl. ¶ 14; Meyer Decl. ¶ 17, DX 218 at 1-3 ([REDACTED] store renovations in response to [REDACTED]); Meyer Decl. ¶ 34; JX 10 at 69-70, 72 (Meyer Dep.); DX 91 at 1 (Whole Foods store in [REDACTED] responded to hit in sales caused by opening of two [REDACTED] stores by relocating its store); Meyer Decl. ¶ 35; DX 94 (Whole Foods store in [REDACTED] responded to [REDACTED] drop in sales caused by opening of new [REDACTED] store by price-matching and re-merchandising, and currently planning major renovation to

[REDACTED] store); Meyer Decl. ¶ 36; DX 86 (forming Mid-Atlantic region “competition task force” to collect metrics on [REDACTED] to evaluate its quality and overall customer experiences). DX 207 ([REDACTED] store to be remodeled to answer [REDACTED]); Besancon Decl. ¶ 51 (remodel of [REDACTED] store in response to competition from [REDACTED]); Sud Decl. ¶ 11 (Whole Foods doubled the size of its [REDACTED] store in response to a planned [REDACTED] store); Paradise Decl. ¶¶ 29, 35.

b. Whole Foods checks prices and “comp shops” against other supermarkets

74. Because Whole Foods recognizes that other supermarkets are its competitors, it constantly checks its prices against their prices, and “comp shops” their stores. Robb Decl. ¶ 27; Gallo Decl. ¶ 28. A “comp shop” is a competitive assessment of another supermarket, and may involve an assessment of a combination of store attributes, including prices, product offerings, configuration, and others. Allshouse Decl. ¶ 10; Besancon Decl. ¶ 33.

75. At Whole Foods, price checks or comp shops are performed by either an outside third party or by a Whole Foods team member. This types of analysis of prices and other factors takes a number of different forms. Gallo ¶ 27; Robb ¶ 28. Most analyses of supermarket competitors will involve an assessment of prices of common items (sometimes referred to as “known value items”). These are the items that customers purchase often (e.g., organic milk). Robb Decl. ¶ 21; Meyer Decl. ¶ 20.

76. Whole Foods has adopted a “[REDACTED]” to enhance Whole Foods’ image as a place where customers can get good value for their money. Sud Decl. ¶ 30; DX 8; DX 396. This strategy focuses on [REDACTED] competing supermarkets on the prices of “[REDACTED].” See Gallo Decl. ¶ 20; Robb Decl. ¶ 21; DX 85 (applying [REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]; DX 9, DX 17, DX 215.

77. Whole Foods price checks or comp shops is each geographic area in which the FTC has alleged the proposed transaction will cause anticompetitive effects.

78. Whole Foods price checks or comp shops against other supermarkets in every area in which it operates:

North Atlantic Region: [REDACTED]

Mid-Atlantic Region: [REDACTED]

South Region: [REDACTED]

Florida Region: [REDACTED]

Midwest Region: [REDACTED]

[REDACTED]

Rocky Mountain Region:

[REDACTED]

Southern Pacific Region:

[REDACTED]

[REDACTED]

Pacific Northwest: [REDACTED]

Northern California Region: DX 465 [REDACTED]

79. Although Wild Oats has not historically engaged in competitive pricing, it has price checked other grocery stores such as [REDACTED]

[REDACTED]

c. Whole Foods' private label program is designed to compete with other supermarkets

80. Whole Foods has three national private label programs: 365 Everyday Value (“365”), 365 Organic, and Whole Brands. The first is the lowest priced category of products offered by Whole Foods, and represents an inexpensive alternative to its branded counterparts. Boardman Decl. ¶ 8. The second is the organic version of the 365 line. The last consists of a family of products carrying the prefix “Whole” (e.g., Whole Catch, Whole Creamery, Whole Dairy, Whole Fields, Whole Kitchen, Whole Pantry, Whole Paws, Whole Ranch, Whole Treat). *Id.*

81. Whole Foods’ private label program is very competitive with the natural and organic private label products of many supermarkets. There is a significant overlap of private label offerings between WFM, Safeway, Kroger, Costco, and Ahold, although each retailer has put “effort into diversifying their product line.” DX 21. 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 [REDACTED], most likely due to volume discounts, lower margins, and distribution structure).” *Id.* at 2.

82. Whole Foods checks prices against private label offerings at other supermarkets and grocers. Whole Foods actively checks against a list of over [REDACTED] that overlap with Whole Foods private label SKUs. DX 26, 35. Further, Whole Foods’ private label pricing strategy requires 365 and 365 Organic private label prices to [REDACTED] [REDACTED] Boardman Decl. ¶ 17; 17 n.1. DX 27. For organic private label items,

83. Whole Foods designed its private label program to compete against other supermarkets. The private label acts as “the entry point for crossover shoppers” and as such

faces competition from Trader Joe's and supermarket brands. 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.").

84. Today, Whole Foods' private label program exists primarily to enhance competition with other supermarkets. A decade ago, Whole Foods recognized that it was losing sales to ██████████, a grocer that sells high quality natural and organic products under its successful private label. Boardman Decl. ¶ 4. In response, Whole Foods began to develop its own private label products. *Id.* Although the private label program was originally focused on competition with ██████████, over time its goals have expanded.

85. Now, Whole Foods uses its private label products to compete with other supermarkets as well. *Id.* ¶ 5. DX 27, 29. It identifies where it has a product gap compared to competitors, and it develops competing products. Boardman Decl. ¶¶ 13-14. Then, to ensure that its products are competitive, it carefully studies the prices being charged by competitors and ██████████. *Id.* ¶¶ 15-22. It recognizes it will lose sales if it prices above its competitors. *Id.* ¶ 15.

86. Trader Joe's product roster is uniquely positioned to compete with Whole Foods private label. More than 80% of Trader Joe's SKUs are private label. *Id.* ¶ 23.

87. H.E.B. / Central Market has an organic private label brand under the Central Organics label, which was established by former Whole Foods employees. This program has contributed to the success of Central Market, which is the leading food retailer in Texas. *Id.* ¶ 23.d.

88. Whole Foods private label program is also designed to help promote Whole Foods' value image, to show customers that they can buy either a premium item at a premium price or an alternative private label product at a price comparable to what they see at other supermarkets. *Id.* ¶ 6. Linda Boardman, Senior Coordinator for Private Label for Whole Foods, explained that “[b]ecause more than ██████ 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.” *Id.* ¶ 5. Thus, the private label program was created to respond to competitive pressures from other supermarkets and to enhance Whole Foods’ ability to compete with, and attract consumer dollars from, other supermarkets.

89. “The biggest competitive threats to Whole Foods’ private label are Trader Joe’s, Safeway, Ahold (Giant), Wegmans, Kroger, Loblaw’s, and H.E.B.” *Id.* ¶ 23. Whole Foods does not even bother to check Wild Oats prices for its private label products. *Id.* ¶ 22.

90. Whole Foods’ broadening of ██████ ██████ program and application of program to competing with other retailers has helped control erosion of customers and sales to other competitors. Meyer Decl. ¶ 9; JX 10 at 63-64 (Meyer Dep.); DX 93 (Zambito email February 2007, describing how comp results from ██████ reflect lower pricing on ██████ products by either Whole Foods ██████, that ██████ is “highlighting some of [Whole Foods’] ██████, and suggesting Whole Foods “call them out too”); DX 97 (Foster email September 2003, forwarding extremely detailed plan ██████).

- d. The Site Selection process for new Whole Foods supermarkets considers locations of all other supermarkets

91. 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. The following documents show Whole Foods' approach to site selection decisions:

Florida Region: DX 116 (Miami); DX 117 (Miami); DX 118 (Wellington, FL); DX 119 (Pembroke Pines, FL); DX 120 (Naples, FL); DX 121 (Jacksonville, FL); DX 123 (Coral, FL); DX 124 (Orlando, FL).

Mid-Atlantic Region: DX 80 (Louisville, KY); DX 99 (Yonkers, NY); DX 100 (White Plains, NY); DX 101 (Brooklyn (Park Slope), NY); DX 102 (New York (Tribeca), NY); DX 103 (New York, New York); DX 122 (Union, NJ); DX 159 (Annapolis, MD); DX 160 (Cleveland, OH); DX 161 (Philadelphia, PA); DX 162 (Plymouth Meeting, PA); DX 163 (Jersey City, NJ); DX 164 (Concordville, DE); DX 165 (Charlottesville, VA); DX 166 (Short Pump, VA); DX 167 (South Hills, PA); DX 168 (Paramus, NJ); DX 177 (Cleveland, OH); DX 805 (Rockville, MD).

Midwest Region: DX 104 (St. Louis, MO); DX 105 (Madison, WI); DX 106 (Kildeer and Vernon Hills, IL); DX 107 (Schaumburg, IL); DX 108 (Northbrook, IL); DX 109 (Chicago, IL); DX 110 (Chicago, IL); DX 111 (Chicago, IL); DX 112 (Naperville, IL); DX 113 (Town & Country, MO); DX 114 (Sugenash, IL); DX 115 (Minneapolis, MN); DX 455 (Indianapolis, IN); DX 634 (Evanston, IL); DX 639 (Omaha, NE).

North Atlantic Region: DX 169 (Fairfield County, CT); DX 170 (Darien, CT); DX 171 (Portland, ME); DX 173 (Dedham, MA); DX 174 (Reading, MA); DX 178 (Cranston, RI); DX 172 (Glastonbury, CT); DX 175 (Nashua, NH); DX 176 (Glastonbury, CT); DX 484 (Portland, ME); DX 636 (West Hartford, CT);

Northern California Region: DX 125 (Reno, NV); DX 142 (Oakland, CA); DX 152 (Napa and Sonoma, CA); DX 153 (Coddington, CA); DX 154 (Flosom, CA); DX 155 (Albany, CA); DX 156 (Roseville, CA); DX 158 (Novato, CA).

Pacific Northwest Region: DX 189 (East Portland, OR); DX 190 (Portland, OR); DX 191 (Eugene, OR); DX 192 (Tanasbourne, OR); DX 193 (West Seattle, WA); DX 239 (Lake Oswego, OR); DX 514 (Portland, OR); DX 638 (Portland, OR)

Rocky Mountain Region: DX 184 (Salt Lake City, UT); DX 185 (Basalt, CO); DX 187 (South Denver, CO); DX 188 (Boise, ID); DX 635 (Boulder, CO); DX 637 (Overland Park, KS); DX 641 (Lakewood/Golden, CO).

South Region: DX 144 (Nashville, TN); DX 146 (Birmingham, AL); DX 148 (Alpharetta, GA); DX 149 (Cary, NC); DX 150 (Asheville, NC); DX 151 (Charlotte, NC); DX 180 (Sugarland, TX).

Southern Pacific Region: DX 126 (Las Vegas, NV); DX 127 (Phoenix); DX 128 (Scottsdale, AZ); DX 129 (Hollywood/LA); DX 130 (Los Angeles, Manhattan Beach); DX 131 (San Fernando Valley, CA); DX 132 (Venice, CA); DX 133 (Oxnard, CA); DX 134 (Malibu, CA); DX 135 (Santa Rosa, CA); DX 136 (Dublin, CA); DX 137 (Santa Barbara, CA); DX 138 (Burbank, CA); DX 139 (Malibu, CA); DX 140 (Kahului, HI); DX 141 (Santa Clara Valley, CA); DX 143 (Tustin, CA); DX 152 (San Francisco/Sonoma); DX 153 (Coddington, CA); DX 154 (Flosom, CA); DX 155 (Albany, CA); DX 156 (Roseville, CA); DX 157 (Portero Hill, CA); DX 158 (Novato, CA); DX 186 (South Pasadena); DX 640 (Henderson, NV); DX 642 (Pasadena, CA).

Southwest Region: DX 147 (Sugar Land, TX); DX 179 (Houston, TX); DX 181 (Austin, TX); DX 182 (Dallas – University Park, TX).

92. The initial decision as to whether a particular area offers a good opportunity for a new store begins with a Whole Foods regional president taking a broad overview of the proposed area. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

93. If the area passes this initial “gut check,” the regional president will request that

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Bradley Decl. ¶ 6; JX 6 at 34-35 (Bradley Dep.).

94. [REDACTED]

[REDACTED] See

e.g., DX 80 (Louisville, KY site study). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] See *e.g.*, DX 635 (Boulder, CO site study); Megahan Decl. ¶ 11-15.

95. [REDACTED]

[REDACTED]

[REDACTED] JX 7 at 9 (Kadish Dep.).

[REDACTED]

[REDACTED], JX 7 at 116 (Kadish Dep.). [REDACTED]

[REDACTED]

[REDACTED]

96. Such [REDACTED] models are used by virtually every supermarket chain in the country.

JX 7 at 123 (Kadish Dep.). [REDACTED]

[REDACTED] JX 7 at 118

(Kadish Dep.). [REDACTED]

[REDACTED]

[REDACTED], JX 7 at 121 (Kadish Dep.). With the addition

of the proposed Whole Foods site, the model [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] JX 7 at 125 (Kadish Dep.).

97. [REDACTED]

[REDACTED]

[REDACTED]

98. If the Real Estate Committee approves a new site, a team from Whole Foods again visits each supermarket in the area to gauge their retail savvy. The team studies each competitor's selection, promotions and pricing. Whole Foods looks at the quality of the perishables each supermarket is offering and looks at each competitor's customer service. Whole Foods also price checks against competing supermarkets to see how they measure up. Bradley Decl. ¶ 7; JX 6 at 35 (Bradley Dep.).

99. The Site Selection process for new Wild Oats stores 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.) (Wild Oats managements visits local supermarkets); JX 12 at 213-15 (Brier Dep.). [REDACTED]

[REDACTED]

e. Competition with other supermarkets has affected Whole Foods' rate of growth.

100. In October 2006, members of the Whole Foods executive team ("E-Team") e-mailed one another about Whole Foods' declining rate of sales growth. One common reason cited was increasing competition from other supermarkets. Whole Foods Co-President A.C. Gallo noted:

[REDACTED]

DX 3.

101. “With the entrance of Wal Mart and other competitive pressures such as [REDACTED] [Whole Foods] will continue to see margin pressures that will impact our plans going forward.” DX 13 at 2. In the Southwest region Whole Foods projects erosion of margins if “[REDACTED]” *Id.*

102. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Meyer Decl. ¶¶ 4, 8; JX 10 at 18-19, 80, 82 (Meyer Dep.). [REDACTED]
[REDACTED]
[REDACTED]

103. “[S]ales dropped at Whole Foods stores in [REDACTED] [REDACTED], after [REDACTED] stores opened in those areas . . . sales dropped at Whole Foods stores in [REDACTED], after [REDACTED] stores opened in those areas.” Meyer Decl. ¶ 4; JX 10 at 18-19 (Meyer Dep.).

f. Wild Oats won customers from other supermarkets during the California-supermarket strike.

104. During the Southern California supermarket strike, which occurred from October 2003 to March 2004 and affected three major supermarket chains including Vons/Pavilions,

Ralph's and Albertsons, five Wild Oats stores in the area experienced [REDACTED] [REDACTED] in same store comparable sales ("comps").

For the two quarters after the strike ended, the Wild Oats stores comps [REDACTED] [REDACTED]. DX 460.

This dramatic [REDACTED] provides strong evidence that Wild Oats was able to retain some of the business that it had taken from the supermarkets affected by the strike. Martin Decl.

¶¶ 12-14;

105. The strike had a positive impact on Wild Oats stores and post-strike Wild Oats attempted to keep the customers it had gained. JX 16 at 41-46 (Odak Dep.).

g. Wild Oats' non-compete agreement demonstrates that it considers other supermarkets as competitors.

106. The Employment Agreement of Perry Odak, Wild Oats' former Chief Executive Officer, prohibited him from "engaging[ing] in any matter in any activity that is directly or indirectly competitive with the business of the Company [Wild Oats]," which was expressly defined to be "retail or wholesale operations for the sale of groceries and ancillary Products, such as health and beauty aids, vitamins and supplements" DC 492 at LOAT-000899.

107. In the summer of 2006, Robert Miller, who had been the non-executive Chairman of the Board of Wild Oats up to that time, was required to resign as Chairman because his acceptance of the position of ECO of Albertson's LLC, a major competitor of Wild Oats, created a conflict of interest. Mays Decl. ¶ 3; JX 15 at 100-101 (Mays Dep.).

108. Wild Oats' founder, Mike Gilliland, breached his non-compete agreement when he left Wild Oats to start a competing chain of stores named Sunflower. DX 615 at 109-112.

3. Other supermarkets view Whole Foods and Wild Oats as competitors.

109. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

110. Supermarkets routinely price check Whole Foods' stores and adjust prices based upon 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 DC 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).

111. [REDACTED]

[REDACTED]

112. [REDACTED]

[REDACTED]

113. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

114. [REDACTED]

[REDACTED]

[REDACTED]

115. [REDACTED]

[REDACTED]

116. [REDACTED]

[REDACTED]

[REDACTED]

117. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

118. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

119. A number of supermarket competitors of Whole Foods and Wild Oats have intervened in this proceeding to prevent disclosure to Whole Foods and Wild Oats of competitively sensitive information. This reflects the fact that these supermarkets view Whole Foods and Wild Oats as competitors:

Kroger: “Whole Foods Market (“Whole Foods”) and Wild Oats Market, Inc (“Wild Oats”), among others, generally compete with Kroger.” Foley Decl. ¶ 6; “The FTC has obtained sensitive business information from Kroger that Kroger would never otherwise disclose to unauthorized persons outside the company, much less companies like Whole Foods and Wild Oats that generally compete with Kroger.” Mem. of Points and Auths. in Support of Unopposed Mot. of the Kroger Co. to Intervene for the Purpose of Protecting its Confidential Bus. Info. at 5, *FTC v. Whole Foods Mkt.*, No 1:07-CV-01021-PFL (D.D.C. dated June 18, 2007);

Supervalu: “If Whole Foods’ proposed protective order were to be put into effect, SUPERVALU would face a significant risk of commercial harm because proprietary and highly-sensitive information relating to its store operations, store-level margins, store expansion, remodeling, construction and closure plans, and other confidential financial and business information would be disclosed to the General Counsel of a competitor.” *Supervalu Inc.’s Opp. to Def. Whole Foods Mkt., Inc.’s Mot. for Entry of a Final Protective Order* at 2, *FTC v. Whole Foods Mkt.*, No. 1:07-CV-01021-PFL (D.D.C. dated June 22, 2007); “SUPERVALU seeks intervention in order to protect its confidential and competitively-sensitive information from reaching the hands of the general counsel of another grocery retailer.” *Supervalu Inc.’s Mot. to Intervene* at 5, *FTC v. Whole Foods Mkt.*, No. 1:07-CV-01021-PFL (D.D.C. dated June 18, 2007);

Safeway: “Safeway operates grocery stores in a number of the geographic areas where Whole Foods operates stores. The Safeway stores sell some of the same products as the Whole Foods stores.” Gordon Decl. ¶ 9;

Wegmans: “Wegmans’ confidential information no doubt would be commercially valuable to Whole Foods, given the stated view of Whole Foods’ CEO that Wegmans is one of his company’s primary competitors.” Arsdale Decl. ¶ 9.;

Publix: “If Whole Foods’ proposed protective order were to be put into effect, Publix would face a grave risk of commercial harm because confidential and highly-sensitive information relating to its store operations, store-level profitability, expansion and remodeling plans, store construction and closure plans, and other confidential financial and business information would be disclosed to the General Counsel of a competitor, Whole Foods...” *Publix Super Mkts., Inc.’s Opp. to Def. Whole Foods Mkt., Inc.’s Mot. for Entry of a Final Protective Order* at 2, *FTC v. Whole Foods Mkt.*, No. 1:07-CV-01021-PFL (D.D.C. dated June 22, 2007);

Trader Joe's: "Notwithstanding Trader Joe's unique and distinctive format, the Company competes with any other retailer that sells similar grocery products. For example, Trader Joe's sells, among other things, meat, dairy and produce items - thus the Company competes with all other retailers that sell similar products - namely grocery stores, including Whole Foods and Wild Oats." Third Party Trader Joe's Co.'s Opp. to Def.'s Mot. for Protective Order, Decl. of Bryan Palbaum ¶ 3, FTC v. Whole Foods Mkt., No. 1:07-CV-01021-PFL (D.D.C. executed June 15, 2007); "Access to this information - inadvertent or not - would provide Whole Foods with a distinct competitive advantage and would cause Trader Joe's irreparable commercial harm." Third Party Trader Joe's Co.'s Opp. to Def.'s Mot. for Protective Order at 6, FTC v. Whole Foods Mkt., No. 1:07-CV-01021-PFL (D.D.C. dated June 22, 2007);

H-E-B: "Granting Whole Foods' General Counsel unfettered access to H-E-B's confidential business information, including its highly sensitive real estate expansion plans, would unfairly put H-E-B at a severe competitive disadvantage with respect to Whole Foods...." Intervenor H.E. Butt Grocery Co.'s Opp. to Whole Foods Mkt., Inc.'s Mot. for Entry of a Final Protective Order at 1, FTC v. Whole Foods Mkt., No. 1:07-CV-01021-PFL (D.D.C. dated June 22, 2007);

Target: "For example, the FTC has requested Target's plans for future stores in particular geographic markets and documents related to Target's strategic planning for products comparable to those offered by Whole Foods." Target Corp.'s Amicus Br. in Support of Pl.'s Opp. to Whole Foods Mkt., Inc.'s Mot. for Entry of a Final Protective Order at 3, FTC v. Whole Foods Mkt., No. 1:07-CV-01021-PFL (D.D.C. dated June 22, 2007);

Wal-Mart: "Permitting highly confidential and sensitive business information to be examined and analyzed at competitor's headquarters is intuitively problematic." Wal-Mart Stores, Inc.'s Opp. to Joint Mot. for the Entry of a Protective Order at 2-3, FTC v. Whole Foods Mkt., No. 1:07-CV-01021-PFL (D.D.C. dated July 3, 2007).

4. There is no "unique" competition between Whole Foods and Wild Oats

120. 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.

121. Wild Oats' prices ██████████ 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.). Given this, Whole Foods price checks or comp shops Wild Oats' stores less than it price checks or comp shops other supermarket competitors. Mays Decl. ¶ 27.

122. There is no evidence of unique competition (price or non-price) between Whole Foods and Wild Oats. The competitive rivalry between Whole Foods, Wild Oats, and other supermarkets and retailers is as great as any rivalry between Whole Foods and Wild Oats.

123. There is no evidence of the likelihood of "nasty price wars" between Whole Foods and Wild Oats in Portland, Oregon, Portland, Maine, Boulder, Colorado, Nashville, Tennessee, or anywhere else.

D. Whole Foods and Wild Oats also face brisk competition from other food retailers.

124. Whole Foods shares many of its customers with other food retailers such as [REDACTED]. A significant number of Whole Foods customers cross-shopped between Whole Foods and retailers like [REDACTED]. DX 2 at 16. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

125. Whole Foods has recognized a need to be more price competitive as more and more conventional supermarkets begin to carry the same types of natural and organic foods. "Other stores have closed the gap on the advantage [Whole Foods] had in product uniqueness, selection, quality and presentation. [Whole Foods'] stores and product selection are not

differentiated from [its] competition as they were in the past.” DX 6 at 2. Many of the products that were once unique to Whole Foods are now being sold through low-price retailers such as Costco and Trader Joe’s. DX 6 at 3, *see also* DX 40.

126. Other food retailers such as Costco are continuing to stock organic items and competition for organic suppliers between food retailers is intensifying. “[T]he days of waiting for new vendors and new products to come to [Whole Foods Market] first are over. Costco and Safeway are changing that landscape forever.” DX 7 at 1.

127. Whole Foods ██████████ as more and more mass market retailers and other food retailers begin to carry the same types of natural and organic foods. Scheffman Report, Appendix E ¶ 11. “With the entrance of Wal Mart and other competitive pressures such as Trader Joe’s, Safeway Lifestyle[,] [Whole Foods] will continue to see ██████████ that will impact our plans going forward.” DX 13 at 2. In the Southwest region Whole Foods projects ██████████ *Id.*

128. In many areas, Whole Foods faces aggressive competition from ██████████ a fast growing grocery store chain that sells a significant number of natural and organic products. Whole Foods competes with ██████████ by matching prices on a significant number of items, both branded and private label. Gallo Decl. ¶ 26; Robb Decl. ¶ 26; DX 81 (e-mail regarding posting comp shop results against ██████████ in Whole Foods); 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 ██████████ opens near” a Whole Foods store); DX 264; DX 267; DX 276 (AC Gallo email announcing “[t]his is exactly the ‘war’ that I have wanted with ██████████. Take the gloves off in ██████████ and put up our own comparisons in our stores...”); DX 279 (E-mail regarding posters in ██████████ locations in

██████████ and ██████████ that post comparative register receipts from Whole Foods); DX 285 (██████████ comp shop); DX 383; DX 422 ██████████ shopper flow analysis); DX 426.

129. ██████████ was engaging Whole Foods in areas throughout the ██████████ Coast by posting signs with direct Whole Foods/██████████ register receipt comparisons. Meyer had all his region's store post more accurate comparison signs targeting ██████████, monitoring ██████████ pricing weekly, and changing signs and lowering Whole Foods prices ██████████ lowered its prices. Meyer Decl. ¶¶ 24, 32; JX 10 at 61-63 (Meyer Dep.); DX 75 at 3-6 (Meyer email October 2006, detailing planned response in ██████████ to ██████████ price comparison tactics, and emphasizing that Whole Foods should ██████████, *i.e.*, fail to lower its prices if ██████████ does); DX 76 at 1 (Gallo email October 2006, calling for Meyer and other Whole Foods Regional Presidents to be just as "aggressive" as ██████████ at their own game); DX 81 (Gallo email October 2006, encouraging Meyer and other regional presidents to check ██████████ pricing every week, and forwarding a ██████████ to use in the stores).

130. Comp shopping of ██████████ is to establish a competitive benchmark – because ██████████ usually has lowest pricing among all other competitors, by price-matching to ██████████ ██████████ Whole Foods knows it is competitively priced against all other competitors. Lannon Decl. ¶ 15; JX 8 at 142 (Lannon Dep.); DX 508 (explanation by Lannon in September 2006 that by focusing on ██████████ prices "we cover ██████████ of our ██████████"); DX 510 (explanation by Lannon in October 2006 that by "competing on price with ██████████ . . . makes us super competitive with 'regular' chains like ██████████"); DX 498 (benchmarking prices

through [REDACTED] comp shop was Lannon's rationale for "approving a competitive response to [REDACTED] pending opening of a new store in [REDACTED], where we would offer certain products at what a store member called "[REDACTED]" to retain customers.).

131. [REDACTED] not only price-checks against Whole Foods in all markets in which they both operate, but also posts the results in its stores. JX 10 at 48 (Meyer Dep.).

E. The consumer survey performed by Ms. Conway shows that customers are buying the same types of products at other supermarkets.

132. Whole Foods and Wild Oats retained the polling companyTM, inc. to conduct a telephone survey of Whole Foods and Wild Oats shoppers for use in this proceeding. Conway Decl. ¶ 2. The survey was directed by the President and CEO of the polling companyTM, inc., Kellyanne Conway ("Conway"). *Id.*

133. Conway has extensive experience in the field of market research and has testified as an expert witness based on surveys conducted by her firm under her direction. Conway Decl., Exhibit 1; JX 20 at 31-42, 45-51, 54-55, 67-94 (Conway Dep.). Conway also has experience performing market research in the grocery industry. JX 20 at 77-82, 117 (Conway Dep.). Conway is qualified as an expert to conduct and analyze the consumer survey ("Conway Survey") described in the Conway Report.

134. The Conway Survey was carried out June 22-28, 2007 in eight localities selected by Whole Foods' and Wild Oats' economic expert, Dr. David Scheffman. Conway Report at 2; Scheffman Report ¶ 184. The eight localities included four "overlap" areas where both Whole Foods and Wild Oats are present: Portland, Maine; Medford and Saugus, Massachusetts; Hinsdale, Illinois; and Los Angeles, Santa Monica, and Brentwood, California. Scheffman Report ¶ 184. The other four localities surveyed were two in which Whole Foods is present but Wild Oats is not (the Washington, D.C. metropolitan area and West Bloomfield, Michigan) and

two in which Wild Oats is present but Whole Foods is not (Memphis, Tennessee and Salt Lake City, Utah). Conway Report at 2; Scheffman Report ¶ 184. The eight localities were selected to emphasize a variety of competitive situations within a variety of geographic areas. Scheffman Report ¶ 184.

135. In each of the eight localities, Whole Foods or Wild Oats customers were identified in each of two groups: “Frequent” shoppers and “Cusp” shoppers. Conway Report at 2-3. “Frequent” shoppers were survey respondents who reported shopping at Whole Foods or Wild Oats at least once a month, and “Cusp” shoppers were survey respondents who reported having shopped at Whole Foods or Wild Oats, but less frequently than once a month. *Id.* at 2.

136. The 1,607 Frequent and Cusp Whole Foods and Wild Oats shoppers included in the Conway Survey reported buying groceries at a number of different types of stores, including supermarkets; specialty, organic, or ethnic stores; warehouse or super stores; farmer’s markets or food co-ops; and discount clubs. Conway Report at 6. The survey respondents in each locality also identified by name a large number of retail outlets where they bought groceries. *Id.* at 7.

137. Whole Foods and Wild Oats customers shop at a number of different stores for their grocery needs. Conway Report at 5. Fewer than 10% of those surveyed devoted 51% or more of their total grocery expenditure to Wild Oats or Whole Foods. Conway Report at 5.

138. In the six localities surveyed where Whole Foods is present, 53% of Frequent Whole Foods shoppers reported spending 20% or less of their grocery budget at Whole Foods, and only 14% reported spending 51% or more of their grocery budget at Whole Foods. Conway

Report at 9. In the six localities surveyed where Wild Oats is present, 62% of Frequent Wild Oats shoppers reporting spending 20% or less of their grocery budget at Wild Oats, and only 9% reported spending 51% or more of their grocery budget at Wild Oats. *Id.* at 12. Thus, the majority of shoppers surveyed who were Frequent Whole Foods or Wild Oats customers reported spending most of their grocery budget elsewhere. Not only do these customers visit other stores, but they buy same or similar products at the other stores. Conway Report at 36.

139. Only a minority of respondents who qualified as Frequent Whole Foods or Wild Oats shoppers (ranging from 5% to 19%) reported buying products from produce, natural and organic foods, dairy products, fresh meat and fish, prepared foods, breads, rolls, and other bakery items, and frozen foods only at Whole Foods or Wild Oats and never at another grocery store. Conway Report at 14. A substantial portion of Frequent Whole Foods or Wild Oats shoppers (ranging from 40% to 71%) reported buying products in these categories as often, or more often, at other grocery stores. *Id.* These findings were not materially different in overlap versus non-overlap localities. *Id.* at 15. Accordingly, the surveyed Frequent Whole Foods and Wild Oats shoppers reported extensive cross-shopping at other grocery stores in each of the categories, including natural and organic foods. Conway Report at 14-35.

140. The data underlying the Conway Survey indicate that very few of the survey respondents reported cross-shopping between Whole Foods and Wild Oats JX 27 at 234-38 (Van Liere Dep.); DX 775 at 115 (cross-tabulation of survey responses regarding frequency of purchasing produce at Wild Oats versus other grocers, showing little overlap with Whole Foods).

F. Defendants' industry expert, whose views are not contested, confirms that Whole Foods and WO compete with all supermarkets.

141. The FTC had the opportunity to provide its own industry expert to challenge Dr. Stanton's conclusions, but either could not or did not. The FTC also had ample opportunity to challenge or refute Dr. Stanton's conclusions both at his deposition and at trial, and again it did not or could not. Dr. Stanton's conclusions are therefore uncontested in this matter.

142. Dr. Stanton's conclusions 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.

143. Dr. Stanton further testified at his deposition 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. I believe that." JX 19 (Stanton Dep.) 120. 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 (Stanton Dep.) 121. When asked if this competition includes price competition, Dr. Stanton testified "It certainly does." JX 19 (Stanton Dep.) 121.

G. The economic evidence confirms that Whole Foods and WO compete against all supermarkets.

144. Dr. David T. Scheffman, Ph. D., 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 2001-03. *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 taught, written and consulted extensively in these areas. Scheffman Report App. A at 3-18.

145. From his service as head economist at the FTC and in other senior positions at the FTC covering twelve years, Dr. Scheffman has extensive 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 App. A at 7; JX 18 at 38-39 (Scheffman Dep.). The FTC’s Director of the Bureau of Economics introduced Dr. Scheffman at this conference as his “eminent predecessor” (*id.* at 9) and remarked that “there’s no one better able to comment” on the supermarket antitrust topics at hand than Dr. Scheffman. *Id.* at 137.

146. The framework for defining the relevant product market comes from case law and the Horizontal Merger Guidelines. It is a forward-looking test that asks where customers would turn if a hypothetical monopolist of the candidate product imposed a “small but significant and nontransitory increase in price” (SSNIP). *Guidelines* § 1.11. If there are alternatives to which

customers could readily take their business such that the price increases would be unprofitable, the proposed product market is too narrow and additional alternatives must be included, even if customers did not view them as substitutes at the lower price. *Id.*

147. Dr. Scheffman applied the hypothetical monopolist test to the facts in this case. JX 18 at 33-34 (Scheffman Dep.); Scheffman Report ¶ 49. In this case, the FTC contends that the relevant market is “premium and natural organic supermarkets” (“PNOS”). The product market analytical framework here focuses on how consumers would behave if the price of grocery products in PNOS rose relative to the price of grocery products in other supermarkets. 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. JX 18 at 95 (Scheffman Dep.).

148. A marginal consumer is someone who would switch where he or she shops in response to a SSNIP. In the context of supermarkets, including premium and natural organic supermarkets, 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. Second, from the set of supermarkets that they currently frequent, 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 they no longer believe offers good quality for value. Scheffman Report ¶ 51.

149. Firms compete to retain existing business and win new business by competing for marginal consumers. Intuitively, 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.

150. Because supermarket retailers make their pricing, quality and service decisions in ways to retain and attract marginal consumers, the appropriate focus for defining the relevant product (and geographic) market definition is those marginal consumers. This is consistent with the analytical framework set out in the DOJ/FTC Merger Guidelines. Scheffman Report ¶ 53.

1. Dr. Scheffman's critical loss analysis confirms that the relevant market includes supermarkets.

151. Dr. Scheffman used critical loss analysis to analyze the FTC's proposed product market. This is a widely accepted analytical tool in antitrust cases both for market definition and competitive effects. Scheffman Report ¶ 100; JX 18 at 33-34. The FTC does not dispute this. 8/1 Hearing Tr. at 64. Critical loss is implicit in the hypothetical monopolist test. *Id.* 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.

152. 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 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.

153. 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.

154. In calculating critical loss, Dr. Scheffman 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 used by the FTC in supermarket merges. JX 18 at 34-37 (Scheffman Dep.).

155. 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]. A 5% price increase implies a critical loss for Wild Oats of about [REDACTED] in volume. Scheffman Report ¶ 115. Dr. Scheffman also calculated critical loss for a 1% SSNIP, in response to Dr. Murphy’s report. Critical loss at that price increase would be just over [REDACTED]. JX 18 at 41-42 (Scheffman Dep.). At closing argument, counsel for the FTC stated: “the critical loss number, which again is mathematics. I don’t quibble with it.” 8/1 Hearing Tr. at 64.

156. 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. 7/31 Hearing Tr. at 13-14; JX 18 at 70-71. In merger cases it is often not possible to have a statistical analysis of actual loss. 7/31 Hearing Tr. at 10. Actual loss should not be based on inferences from margins, because such analysis is economically unsound. JX 18 at 70-71. Rather, a conclusion as to what the actual loss should likely be based on weighing all of the evidence, which is the approach Dr. Scheffman used. JX 18 at 91 (Scheffman Dep.).

157. The evidence supports the conclusion 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. This result obtains regardless if the SSNIP is 5% (*id.*) or 1%. JX 18 at 40, 89 (Scheffman Dep.).

158. First, grocery shopping is a relatively high price sensitive category of retail shopping. Scheffman Report ¶ 204; JX 18 at 96 (Scheffman Dep.). Whole Foods and Wild Oats realize that they have a substantial proportion of price sensitive shoppers. *See* Scheffman Report ¶¶ 144, 154, 156, 164, 204-8.

159. Second, 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. Scheffman Report ¶ 122; JX 18 at 99 (Scheffman Dep.) (since they are also regular shoppers at other supermarkets, Whole Foods customers “will buy the raspberries at Giant instead of Whole Foods if their Whole Foods price is too high”).

160. Third, most Whole Foods and Wild Oats shoppers shop frequently at other supermarkets and grocery retailers. 7/31 Hearing Tr. at 77-79; JX 18 at 99 (Scheffman Dep.); Scheffman Report ¶ 123.

161. Fourth, other supermarkets compete vigorously for the patronage of customers who also shop at Whole Foods and Wild Oats. Scheffman Report ¶¶ 125, 212-13; JX 18 at 99-100 (Scheffman Dep.). In particular, other supermarkets have followed the increased interest in health and food, shifting toward emphasizing fresh, “natural” and organic. Scheffman Report ¶ 215. Likewise, high selling products at Whole Foods and Wild Oats are now generally available at other supermarkets. Scheffman Report ¶ 216. Also, many other chains have been active in creating organic and natural private label lines. Scheffman Report ¶ 219.

162. Finally, 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. JX 18 at 105-106 (Scheffman Dep.); Scheffman Report ¶¶ 127, 224-29. Price-check evidence is a standard factor in FTC market definition analysis of supermarket mergers. JX 18 at 106 (Scheffman Dep.).

163. It may be that only certain products are sold at Whole Foods or Wild Oats, or that certain perception of quality to some consumers is only available at those stores. But 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, show that the actual loss from a SSNIP would exceed the critical loss. 7/31 Hearing Tr. at 25-27.

164. Dr. Scheffman’s critical loss analysis demonstrates 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, 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.

2. Dr. Scheffman’s entry analysis confirms that the relevant market includes supermarkets.

165. Dr. Scheffman’s entry analysis demonstrates that when Whole Foods enters in to a new local area, Whole Foods generates substantial sales that are overwhelmingly captured from the same local supermarkets and grocery retailers that the FTC contends are not competitors in the relevant market. Scheffman Report ¶ 60; 7/31 Hearing Tr. at 11.

166. Evidence that premium natural and organic supermarkets compete directly with other supermarkets is provided by analyzing situations in which Whole Foods has opened a new store in a new local area in which the company had no other stores. Scheffman Report ¶ 60. A study of these store opening events is directly relevant to product market definition because it provides a natural experiment regarding how consumers react to a change in their options. Scheffman Report ¶ 61; 7/31 Hearing Tr. at 21-23.

167. Whole Foods has opened large stores and those stores have very quickly gained substantial sales. Scheffman Report ¶65. A new Whole Foods store overwhelmingly gains sales that were being made by grocery retailers in that area, because the opening of a Whole Foods store could not significantly change total food consumption the area. In an area in which there are

no other PNOS, all the sales for the new Whole Foods come from other grocery retailers. Scheffman Report ¶ 62. That is, 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.

168. When a Whole Foods store opens in an area served by a Wild Oats store, Wild Oats stores can be expected to lose sales. This would be true whether or not PNOS are a relevant product market. Scheffman Report ¶ 62. Combined Whole Foods and Wild Oats revenues after entry of the Whole Foods store average ██████████ the revenues of the Wild Oats store prior to entry. Scheffman Report ¶¶ 75-76. The sales gained by the Whole Foods store are much larger than any loss in sales experienced by the Wild Oats store(s). Scheffman Report ¶¶ 77-79; 7/31 Hearing Tr. at 23.

169. Like the opening of a WFM store in an area with no PNOS, when Whole Foods opens a new store in an area with an existing Wild Oats store, overwhelmingly the sales for the new WFM store come from grocery retailers other than WO. Scheffman Report ¶ 62. In these situations, all the consumers in the area could have shopped at Wild Oats for their needs from a PNOS. Thus, when Whole Foods entered and overwhelmingly picked up sales from non-PNOS firms, it necessarily had to be competitive with those non-PNOS supermarkets and other grocer retailers to attract so many sales. JX 18 at 82-83 (Scheffman Dep.).

170. The evidence of Whole Foods' entry with new stores provides further evidence that many consumers are "at the margin," in that when Whole Foods opens a new store, whether in an area with a Wild Oats store or with no competitor in the FTC alleged product market, Whole Foods picks up the lion's share (or all) of its sales from retailers other than a competitor in the FTC alleged product market. Scheffman Report ¶ 93.

3. Dr. Murphy's conclusions on the relevant product market are not persuasive because he does not control for competitor behavior responsive to and independent of Whole Foods entry.

171. The Merger Guidelines test for product market definition assumes that a hypothetical monopolist is the sole seller and therefore controls all promotions and prices of firms in the putative market. 7/31 Hearing Tr. at 55.

172. Professor 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. 7/31 Hearing Tr. at 55-56; JX 26 at 233-35 (Murphy Dep.).

173. Instead, Professor Murphy includes the responses of competitors' to Whole Foods' entry, and the effects caused by those competitors, as effects caused by Whole Foods. JX 26 at 233 (Murphy Dep.).

174. Where multiple firms enter simultaneously, Professor 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. 7/31 Hearing Tr. at 63; JX 26 at 228 (Murphy Dep.).

175. ██████████ entered at the same time as Whole Foods in ██████████

176. ██████████ entered at the same time as a Whole Foods in ██████████

177. ██████████ entered ██████████ at the same time was Whole Foods in ██████████

██████████ Professor Murphy's estimates of the effect of Whole Foods' entry on Wild Oats margins and prices do not control for the entry of these other firms or permit one to tell which of the firms is causing how much of the effect on Wild Oats.

H. The FTC's reliance on transfer rates in Project Goldmine for proof of product markets is misplaced. Project Goldmine denies, rather than supports, the existence of a market composed of only premium natural and organics supermarkets.

178. Whole Foods commissioned a [REDACTED] [REDACTED] of the proportion of Wild Oats current sales that might transfer to Whole Foods after the merger. PX 00553; DX 401 at 15. The FTC has placed great weight on Project Goldmine's estimates of sales transfers from Wild Oats to Whole Foods because, in its view, it establishes the existence of unique competition between them. FTC Br. at 19-20; FTC Response Br. at 8.

179. The estimates of volume shifts average [REDACTED] despite the non-existence of any other premium natural and organic supermarkets in most of the relevant geographic markets alleged by the FTC. DX 401; PX 553. In each of these markets, [REDACTED] of the volume, on average, would be transferred to their supermarkets and other food retailers. This significant competition is difficult to square with FTC's view that Whole Foods would become a monopolist.

180. Specifically, [REDACTED], the preliminary analysis projected that Whole Foods would capture [REDACTED] of Wild Oats' sales for 19 Wild Oats stores. [REDACTED]

181. The estimates of volume shifts were, as described by the person who created them, "guesstimates." JX 7 at 41 (Kadish Dep.). As an economic matter, they are not indicative of market definition or competitive effects, because the transfers were not predicted with a price increase. JX 18 at 73-74 (Scheffman Dep.); JX 7 at 210 (Kadish Dep.). See JX 18 at 171-73 (Scheffman Dep.) (transfer projections not remarkable because buyers try to keep customers and because no price increase assumption).

182. By the FTC's analysis, sales transfers should be lowest where there is a premium natural and organic supermarket besides Whole Foods and Wild Oats. The estimates show, however, the lowest transfers in [REDACTED], all stores that would become "monopolies" as alleged by the FTC. DX 401.

I. The FTC has failed to properly define the "premium natural and organic supermarket" product market.

183. The FTC has produced no evidence that the "premium natural and organic supermarket" is a term used by anyone in the industry.

184. Instead, the FTC attempts to define the premium natural and organic supermarket market by ascribing 8-11 attributes to its product market description. DX 590 (July 15, 2007 Supplemental Discovery Responses); FTC's Brief on its Motion for Preliminary Injunction, at 29-47. The FTC has offered no evidence that the firms in the alleged product market – Whole Foods, Wild Oats, Earth Fare, and New Seasons – possess these listed attributes. Interestingly, Wild Oats is not a certified organic foods retailer but Whole Foods is. Mays Decl. ¶ 29.

185. The FTC has produced no evidence that other firms lack these attributes. For example, while Wild Oats is not a USDA certified organic foods retailer, both Hannaford, part of Delhaize [REDACTED]; Stanton Report ¶ 36) and Bigg's, part of Supervalu, (DX 682) are.

186. The FTC has produced no credible evidence that Whole Foods' and Wild Oats' customers base their purchasing decisions on the existence of the alleged attributes.

J. Dr. Stanton's Qualifications

187. 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.

188. Dr. Stanton teaches a variety of food marketing courses in both the BS and MS programs including Food Marketing Strategy, Target Marketing in the Food Industry, Segmentation and Positioning, and Food Marketing Advertising. His MS courses include elements of both retail food marketing and food service marketing. Stanton Report ¶ 5.

189. 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.

190. Dr. Stanton has also held executive positions in food companies and is also on the Board of Directors of Herr's, a regional snack food company. Stanton Report ¶ 8.

K. Response to Misleading Statements by Michael Bloom Regarding Dr. Stanton During his Closing

191. During the closing argument, Mr. Bloom asserted that Dr. Stanton's basis for identifying competitors of Whole Foods and Wild Oats was based on Yahoo searches. At the same time, Mr. Bloom failed to mention to the Court that Dr. Stanton used online searches merely to verify specific competitor store locations in the specific geographic markets alleged by defendants. See JX 19 at 119-20 (Stanton Dep.). Mr. Bloom also failed to mention to the Court that immediately after Dr. Stanton's testimony regarding how he verified competitor specific store locations through online searches, he then provided exhaustive testimony in response to questions from the FTC 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 (Stanton Dep.) at 123 – 167. Dr. Stanton also provided additional testimony during his deposition regarding Hy-Vee, and Roche Brothers. JX 19 at 74-75.

192. During the closing, Mr. Bloom also failed to mention that Dr. Stanton testified that he had reviewed the deposition testimony from officials from [REDACTED] and [REDACTED] and he had reviewed information from the Organic Trade Association, Hartman Group, A.C. Nielsen, numerous articles, as well as public information from Whole Foods and Wild Oats. JX 19 (Stanton Dep.) at 67-68, 69, 70, 73, 136.

193. The information and conclusions in Dr. Stanton's report remain uncontested by the Federal Trade Commission.

L. The Cross-Sectional Analysis of Whole Foods' Margins in Whole Foods "Markets" vs. Whole Foods-Wild Oats "Markets" Does Not Yield a Meaningful Result

194. Dr. Murphy studied Whole Foods' store-wide margins in supposed "monopoly" markets vs. competitive "markets" to test whether Whole Foods' margins were higher in "monopoly" markets than in "competitive" markets. Dr. Murphy's test yielded a result that was not statistically significantly different from zero at the five percent level. 7/31 Hearing Tr. at 79-80. Dr. Murphy's study in this regard was testing the same question Dr. Scheffman examined with his price study – was there a difference in price (inferred by Dr. Murphy from margin data) in markets where Whole Foods faced no other PNOS competition than in markets where there

was other PNOS competition. Both experts came up with the same result – neither was able to identify a statistically significant difference in price in the so-called “monopoly markets.

195. In most scientific work, the level of statistical significance required to obtain a statistically significant result is 5 percent. 7/31 Hearing Tr. at 80. In other words, at the level of confidence recognized by the Federal Judicial Center in its Reference Guide on Multiple Regression as typically required to obtain a statistically significant result, Dr. Murphy found that Whole Foods’ margins were no different in “monopoly” markets than in “competitive” markets.

196. Dr. Murphy also compared the difference in Whole Foods’ margins at the department level. Of 9 departments he examined, results in 7 were not statistically significant at the 5 percent level. Dr. Murphy did obtain statistically significant results in two departments, produce and seafood. 7/31 Hearing Tr. at 86-88.

197. Produce sold at premium and organic supermarkets is not, and is not alleged to be, a separate relevant product market. 7/31 Hearing Tr. at 87.

198. Seafood sold at a premium natural and organic store is not, and is not alleged to be, a separate relevant product market. 7/31 Hearing Tr. at 87.

199. It would be misleading to do a product-by-product analysis for market definition because consumers do not choose retailers on a product-by-product basis. Murphy Report ¶97; 7/31 Hearing Tr. at 87-88.

M. Exit Events

200. Dr. Murphy did not study the effect of any Wild Oats exit events on Whole Foods prices.. 7/31 Hearing Tr. at 35, 42-43, 54, 91-93; JX 26 at 239.

III. THE GOVERNMENT HAS FAILED TO PROPERLY DEFINE ANY RELEVANT GEOGRAPHIC MARKETS

A. The FTC's shifting positions (at least six different positions) undermines its credibility about the geographic markets alleged.

201. The FTC has taken at least six different positions on the scope of the relevant product markets. First, in the Complaint, it alleged that 25 markets faced harm to direct competition, and that in another 7 potential competition allegedly would be harmed. Complaint ¶¶ 38, 40. The FTC alleged two different definitions: that each market could be as small as approximately five to six miles in radius around each premium natural and organic supermarket, or as large as a metropolitan area. The FTC offered no guidance about which definition applied under which circumstances, although the metropolitan definition was, for most cities, an order of magnitude larger than the radius measure.

202. In initial responses to interrogatories, the FTC alleged for the first time that the markets were the "overlapping draw areas" of Whole Foods and Wild Oats. It continued to define a draw area as the area within a five-to-six mile radius of the stores but added an alternative measure, the area within a 16-minute drive of one of the party's stores. It continued to mention a larger area, now described as a Metropolitan Statistical Area, as an alternative. DX 550.

203. In its second supplemental responses to the interrogatories, the FTC introduced two new geographic market concepts. For the first time asserted that it did not have to prove relevant geographic markets at all. It also modified the overlap area description to include "all or part of" the draw area for each of two overlapping stores. It continued to allege a radius of five to six miles or a 16-minute drive as a draw area, and, in the alternative, to allege metropolitan

statistical areas. It alleged 18 direct competition markets and 8 potential competition markets. DX 552.

204. Finally, in response to an order from the Court on July 12, 2007, requiring more specificity in its geographic market contentions, the FTC alleged draw areas of a six miles and a 16-minute drive around each store, with no variation for overlaps or geographic or demographic circumstances. It alleged 18 direct competition markets, although not the same 18 previously named, and 7 potential competition markets. DX 553.

205. In its reply brief, the FTC revived its overlap theory. It cited its expert, Dr. Murphy, for the proposition that the competitive effects of the merger will be felt in the areas of “meaningful overlap” FTC Response Br. at 17.

206. The FTC’s positions on geographic market definition have been constantly shifting and frequently inconsistent with one another.

B. The FTC has failed to properly define geographic market.

207. The FTC did not consider any factors other than distance and driving time in defining its geographic markets. DX 553.

208. The FTC drew simple circles, reflecting a radius of six miles, around each store of the merging parties to delineate its proposed geographic markets. It also asserts as an alternative market definition the area within a 16-minute drive of each store. DX 553.

209. The FTC’s alternative market definitions are at variance with each other. 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.

210. The FTC offered no evidence about which of its geographic market definitions would apply in any particular market alleged, or what factors would determine the applicability of one definition or the other.

211. In defining geographic markets in this way, the FTC failed to consider myriad other factors, such as traffic, demographics, locations of other supermarkets, projected population growth, and geography, all factors that would likely limit or expand the store's draw in various directions. Whole Foods considers these factors and more in siting its stores. *E.g.*, DX 171, 183, 514.

212. The FTC offered no evidence, beyond its 6-mile circles, relating to the draw areas of stores in any of the particular geographic markets it alleged.

1. Whole Foods measures a new store's potential reach a number of different ways.

213. Whole Foods considers multiple factors in siting a new store, and selects those most appropriate to the particular site under review. It considers, *e.g.*, [REDACTED] DX 171 at 8; the [REDACTED] [REDACTED] DX 183 at 8; [REDACTED] DX 104 at 10 and DX 184 at 11; [REDACTED] DX 239, DX 125 at 8; [REDACTED] DX 183 at 9; [REDACTED] DX 514, DX 177 at 7; and [REDACTED] DX 171 at 13-14, 21, DX 187 at 32.

214. The factors relied upon by Whole Foods vary according to the local market and the specifics of the individual site. DX 171, 183, 514

215. Even the site survey relied upon by the FTC for its 16-minute drive approach also illustrated a three-mile and a ten-mile radius around the store. Ex. 58 (PX 186); FTC Corrected Br. at 47.

2. Projections of sales of a new store, and where those sales come from, do not conform neatly to a circle.

216. Draw areas are often oddly shaped. *See e.g.*, DX 144 at 14-16; Allshouse Decl.

¶ 14. For example, at a proposed store in [REDACTED], the projected draw area was “wedge-shaped.” DX 177 at 5.

- a. Local factors matter in determining geographic contours of competition.

217. A [REDACTED] [REDACTED]” affecting a site’s draw. DX 104 at 12.

218. [REDACTED], on the other hand, can draw in customers from a greater distance. Meyer Decl. ¶ 6.

219. [REDACTED], on the other hand, can draw in customers from a greater distance. Meyer Decl. ¶ 6.

- b. Draw areas vary.

220. Some stores near rural areas draw from a considerable distance. DX 171 at 20-21.

221. Some stores in congested areas draw from a relatively small area. Allshouse Decl. ¶ 14.

222. Natural features, such as a river or lake, affect draw as well. DX 159 at 21.

223. Demographics also affect draw areas, more than [REDACTED] in one direction as opposed to others. DX 160 at 5.

- c. Draw areas reflect current market conditions, not what customers would do in the event of a price increase.

224. Spotting surveys conducted at Whole Foods’ [REDACTED] store show that about [REDACTED] of customers come from a radius of 10-15 miles. Lannon Decl. ¶ 10.

225. Spotting surveys at Whole Foods' [REDACTED], store show that [REDACTED] customers come from within a [REDACTED]-minute drive. Lannon Decl. ¶ 23. Some of that store's customers drive in from rural [REDACTED] to shop. *Id.*

226. Spotting surveys at Whole Foods' [REDACTED] show that [REDACTED] of the customers are come from an area within a [REDACTED]-minute drive. Meyer Decl. ¶ 6.

227. Whole Foods' spotting surveys reflect current customer draw. Meyer Decl. ¶ 6; Lannon Decl. ¶¶ 10, 23. They do not address what customers would do in the event of a price increase.

228. The FTC has failed to establish that Metropolitan Statistical Areas, which are defined in terms of overall commercial activity around an urban area, accurately delineate relevant geographic markets for supermarkets.

IV. THE MERGER WILL NOT HARM COMPETITION

A. The FTC's proposed market definition implies that monopoly pricing already plagues the country.

229. Whole Foods stores in cities where Wild Oats is not present charge the same prices, and offer the same ambience, as Whole Foods stores elsewhere where there are Wild Oats stores. For example, the prices and ambience of Whole Foods Washington, D.C., stores, where there are no Wild Oats stores, are the same as the prices and ambience of Whole Foods stores in Boston, where there are a number of Wild Oats stores. Gallo Decl. ¶ 29.

230. Dr. Scheffman's cross-sectional pricing analysis confirms that neither firm systematically charges higher prices in areas where it does not compete with the other. Scheffman Report ¶¶ 314, 323-26; Scheffman Rebuttal Report ¶ 60.

231. The seven markets where the FTC alleges potential competition will be harmed are in cities where today, only one of the merging parties operates a store. The FTC has not

shown that any of those markets suffers from monopoly conditions today – significantly higher prices or significantly lower quality – than in markets in which both merging firms compete today.

B. There is no evidence that the number of premium natural or organic supermarkets in a particular area affects market pricing.

232. The parties’ economist experts agree on one fundamental point - there is no statistically significant difference between Whole Foods’ prices in "monopoly" markets and in "competitive" markets.

1. Dr. Scheffman’s cross-sectional pricing analysis and the testimony of supermarket operators confirms that Whole Foods and Wild Oats do not price in response to one another.

233. Whole Foods and Wild Oats pricing practices do not differ based on the presence or absence of other PNOS in the area. Scheffman Report ¶ 291. Rather, both companies generally price based on relatively broad geographic areas. 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.)

234. Pricing for most products at Whole Foods is determined at the regional level rather than at the store level. Scheffman Report ¶ 289. JX 1 at 209-10 (Gallo dep.) Whole Foods prices are put into a computer system at the various regional headquarters and downloaded to individual stores. JX 18 at 191 (Scheffman Dep.)

235. Whole Foods does not have price zones that depend on whether a Whole Foods store is competing with a Wild Oats store. Scheffman Report ¶ 289. Gallo Decl. 1 ¶ 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.”)

236. Promotions at Whole Foods are primarily done at the regional and national level. JX 8 at 182 (Lannon Dep.) Regional promotions supplement national promotions. Scheffman

Report ¶ 289. Promotions that do not require a coupon are reflected in the price charged at the register. 7/31 Hearing at 37. Whole Foods does very little couponing, which is reflected in the company's profit and loss statements at the store level where the amount of such promotions show up in a line item. 7/31 Hearing at 37-38.

237. Wild Oats' general approach to pricing at a store is to use [REDACTED] [REDACTED] at the store level. Generally, [REDACTED] [REDACTED]. Wild Oats stores are supplied by wholesalers who [REDACTED] to the Wild Oats stores. Different wholesalers supply different product categories, and for some products different wholesalers supply different Wild Oats stores. Wild Oats [REDACTED] prices with wholesalers. These prices may vary for different geographic groupings of stores, even when a wholesaler is supplying all, or nearly all of Wild Oats stores. Scheffman Report ¶ 290. Mays Decl. ¶ 25; JX 15 at 147-148; (Mays Dep.) JX 38 at 64-65, 71-77 (Smith I.H.); JX 134 at 180-81 (Martin I.H.). JX 13 at 73-75 (Davidson Dep.)

238. Wild Oats promotions are generally determined [REDACTED] [REDACTED] [REDACTED] [REDACTED]. Scheffman Report ¶ 290. JX 38 at 75 (Smith I.H.)

239. Dr. Scheffman's cross-sectional pricing analyses study whether prices are higher in areas without PNOS competition than elsewhere and whether prices are affected by the level of PNOS competition. Scheffman Report ¶ 299. Since Whole Foods prices at the regional level, Dr. Scheffman's analysis examines price variation within each Whole Foods region. Scheffman Report ¶ 306. To determine the degree of variation in prices, Dr. Scheffman's analyses consider

all UPCs (“universal product code,” which is the unique identifier for each stock keeping unit (SKU) sold and read by the supermarket scanner) sold in the region under consideration.

240. Dr. Scheffman’s pricing analysis compares 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.* Whole Foods does not preserve register data due to storage capacity constraints. JX 18 at 189 (Scheffman Dep.); 7/31 Hearing Tr. at 43. This is not uncommon. For example, Dr. Scheffman has twice recently submitted merger analyses in unrelated cases to the FTC in which he conducted the same sort of analysis using only a single day of data. JX 18 at 193-94 (Scheffman Dep.). A “snapshot” of prices, rather than a time series, an appropriate analysis, since the objective was to determine whether prices are merger in monopoly regions. Scheffman Report ¶¶ 297-298.

241. Dr. Scheffman found that a very small percentage of Whole Foods UPCs are not priced uniformly across stores within each Whole Foods region. Scheffman Report ¶¶ 307-08. Wild Oats has a higher percentage of [REDACTED] [REDACTED]. Scheffman Report ¶ 319. This result is not surprising, since [REDACTED] [REDACTED] [REDACTED] for some products. *Id.* Nevertheless, over [REDACTED] of products at Wild Oats stores are priced the same throughout an operating region for Wild Oats.

242. Dr. Scheffman’s analysis of price variation at the store level examines the extent to which the prices of each Whole Foods and Wild Oats store deviate from the regional average. Scheffman Report ¶ 301. Dr. Scheffman’s analysis first determines the number of UPCs sold at a specific store that have prices different from the region price (*i.e.*, the most common price in

the region), then examined whether this fraction of prices that differ from the region price varies systematically with the presence of Wild Oats or other PNOS competition. *Id.* Next, he calculated the percentage of revenues associated with being different (on average) from the region price; this in essence shows the overall revenue gain or loss associated with being different from the regional price. *Id.*

243. Table 3-111-2 of Dr. Scheffman's report provides Whole Foods information at the store level as to the percentage of UPCs that differ from the regional price and the weighted average difference between the store's price, and the regional price. Scheffman Report ¶ 309. Table 3-III-10 provides similar information for Wild Oats stores. Scheffman Report ¶ 320. Each store in color means is in an area overlap between Whole Foods and Wild Oats. Scheffman Report ¶ 310.

244. 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.

245. 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 on the presence or absence of competition with each other or other PNOS. Scheffman Report ¶¶ 312 and 323. Prices are not lower in areas in which Whole Foods and Wild Oats compete with one another or with other PNOS than in areas where Whole Foods or Wild Oats are PNOS monopolists. Scheffman Report ¶¶ 314 and 325.

246. The absence of a price differential denies the FTC's theory of competitive effects.

Scheffman Report ¶ 288.

2. Whole Foods' inability to raise prices in Ft. Collins, CO after Wild Oats exited substantiates the existence of considerable competition from other sources.

247. William Paradise, Whole Foods Regional President for the Rocky Mountain Region, which covers Ft. Collins, explained that Wild Oats' prices ██████████ Whole Foods. For this reason, Wild Oats' prices do not constrain Whole Foods' prices. Paradise Decl. ¶¶ 22, 30, 49, 66.

248. After Wild Oats closed its Ft. 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 ██████████ in sales per week after the Wild Oats Ft. Collins store closed, which was much less than Whole Foods expected. JX 31 at 239-240 (Paradise I.H.).

249. 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 and could not raise prices after Wild Oats' store closed because of competition with King Soopers, Vitamin Cottage, and multiple Safeway stores in Ft. Collins. JX 31 at 240 (Paradise I.H.). In fact, after Wild Oats closed its store, instead of sitting back, Whole Foods implemented customer service improvements, improved in-store signage, and refocused efforts on promoting local products. DX 369; Paradise Decl. ¶ 52.

C. Wild Oats is not a unique constraint on Whole Foods. Wild Oats' prices ██████████ ██████████ Whole Foods' prices.

250. Wild Oats prices ██████████. Roger Davidson, Senior Vice-President of Marketing and Merchandising for Wild Oats, explained that

[REDACTED] JX 13 at 56-57, 60-61, 111-12 (Davidson Dep.).

251. Market research commissioned by Wild Oats revealed that the [REDACTED] [REDACTED] since January 2003. DX 572; see also DX 570 (showing that [REDACTED] [REDACTED]).

252. Wild Oats' documents confirm that its prices [REDACTED] [REDACTED] at different points in time. For example, Wild Oats found that Whole Foods' prices were [REDACTED] Whole Foods private label products are priced as much as [REDACTED] Wild Oats products. DX 487 (noting that Wild Oats simply does "not have enough competitive advantages [REDACTED] [REDACTED]).

253. Wild Oats price checking also demonstrate that Wild Oats [REDACTED] [REDACTED]. A September 2006 price check of 400 SKUs revealed that Wild Oats' pricing was [REDACTED] [REDACTED]. DX 490.

254. A Wild Oats November 2006 price check comparing prices for 400 top items at the Wild Oats' store in Superior, CO to those at Whole Foods' Boulder, CO revealed that Wild Oats was [REDACTED] than Whole Foods. DX 488.

255. A Wild Oats January 2007 price analysis of 42 items in the Northeast showed that Whole Foods prices were [REDACTED] Wild Oats' prices. [REDACTED] [REDACTED]. DX 491.

256. [REDACTED] [REDACTED]

DX 491. Wild Oats

estimated that it would need to reduce costs by about [REDACTED] to achieve [REDACTED] with Whole Foods. DX 580.

257. Whole Foods' market research confirms this point. In October 2004, the NMI 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.

258. Whole Foods' price-checking also confirms that Wild Oats [REDACTED] Whole Foods. A.C. Gallo, Co-President and Chief Operating Officer, in considering messages about the merger, explained to all 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 [REDACTED] and we will be bringing down 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 (emphasis added).

259. In the North Atlantic, Whole Foods does not even price-check Wild Oats stores regularly [REDACTED]. 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 Portland [ME], as in areas throughout my region, are [REDACTED]" Lannon Decl. ¶ 24; *see also* DX 502 (noting that "it is not about Wild Oats any more"); Lannon Decl. ¶ 25 ([REDACTED])

[REDACTED] The North Atlantic stores have "never targeted a Wild Oats [store]" and no store has "ever requested to do so." Lannon Decl. ¶ 14.

260. Wild Oats is also [REDACTED] 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.

261. Whole Foods’ Midwest region no longer systematically price checks Wild Oats on a monthly basis as it does for [REDACTED] and other supermarkets. Whole Foods determined that it was unnecessary to regularly check Wild Oats’ prices in the Midwest region because Wild Oats [REDACTED].
Bradley Decl. ¶ 13; JX 6 at 74 (Bradley Dep.).

262. In the Southern Pacific region, Wild Oats has little effect on Whole Foods’ prices because Wild Oats’ [REDACTED].
[REDACTED]. Besancon Decl. ¶ 24. Because historical price checking confirms that [REDACTED], Whole Foods benchmarks other supermarkets and [REDACTED] to determine its own prices. Besancon Decl. ¶ 38.

263. In the Rocky Mountain region, Wild Oats has minimal impact on Whole Foods since its [REDACTED].
Paradise Decl. ¶ 22. Wild Oats rarely make capital improvements and are therefore not as strong a competitor to Whole Foods as other supermarkets and [REDACTED]. *Id.*

D. Other Supermarkets will continue to constrain Whole Foods post-merger.

1. Economic evidence demonstrates that Whole Foods is constrained by other supermarkets.
2. Other supermarkets have advantages over Whole Foods in size, scope, and distribution, which will continue to exert pressure on Whole Foods.

264. A number of supermarket competitors have superior warehousing capabilities, distribution systems, size and scale compared to both Whole Foods and Wild Oats, and are therefore able to purchase products (including natural and organic products) in a more efficient and cost-effective manner. JX 28 at 103 (Mackey I.H.).

265. For instance, [REDACTED] regularly sells products directly to some of its larger customers, such as [REDACTED]

[REDACTED] These customers are able to take large volumes directly from the manufacturer without the need to go to purchase through a distributor. [REDACTED]

[REDACTED]

266. Retailers with their own warehousing and distribution capabilities, such as Kroger, Safeway, Wal-Mart, Costco, etc., are “very efficient in distributing products” and “tend to take lower margins” than firms that purchase through a third-party distributor. [REDACTED]

[REDACTED]

267. Unlike some of its more efficient competitors, Whole Foods purchases through a distributor and its costs tend to be higher: “The anomaly of Whole Foods is a preponderance of the products that I ship to Whole Foods go through a distributor, who also takes a markup on those products. So to the consumer, the price of my products would tend to be a little higher in a Whole Foods than in a Kroger, Safeway, or a Wal-Mart.” [REDACTED]

3. Whole Foods and Wild Oats face more intense competition than at any other time.

268. Competition from other supermarkets is more intense than ever, as supermarkets have improved operations and have increased offerings of natural and organic products. 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 (“After a total slump by the supermarket industry over the past 5 years, we are seeing a comeback by the survivors. Safeway, Giant Eagle, Giant, Stop & Shop, Harris Teeter, Food Lion, Publix are all opening stores lots of new stores and remodeling existing ones on the East Coast. Every time they open a new store or remodel an existing one with better perishables and natural foods we are hit.”); Robb Decl. ¶ 6; JX 28 at 32-33, 240, 272 (Mackey I.H.); Gallo Decl ¶ 18; *supra* Section II.D.

E. Other food retailers will continue to take sales from Whole Foods and Wild Oats.

1. [REDACTED] offers price and non-price competition, including an eclectic product mix and high quality products.

269. Despite its smaller size, [REDACTED] competes vigorously with Whole Foods nationwide. *See e.g.*, DX 276 (October 2006 e-mail from Mackey explaining that “[t]his is exactly the ‘war’ that I have wanted with [REDACTED]. Take the gloves off in [REDACTED] and put up our own comparisons in our stores –making sure to show lots of products that they don’t sell that we do.”). Entry by [REDACTED] significantly impacts Whole Foods’ market share. DX 209 at 6 (noting that [REDACTED] is targeting Whole Foods stores, which is causing Whole Foods to lose market share to [REDACTED] even where Whole Foods is already aggressively pricing); DX 204 at 3. ([REDACTED] continues to take some market share away from [Whole Foods] I [John

Mackey] expect them to continue to aggressively expand throughout the United States and expect that within 10 years all of our stores will have to compete head to head with them.”); DX 738 (noting that Whole Foods has a [REDACTED] where it encounters [REDACTED]).

270. Whole Foods developed a corporate strategy to specifically compete with [REDACTED] [REDACTED] DX 292 (noting that Whole Foods needs a strategy to “stop or minimize the loss of business that we have been experiencing whenever [REDACTED] opens near our stores”); DX 508 (explaining process for selecting items and providing list of them for Known Value Items list); DX 510 (explaining that price competition with [REDACTED] ensures competitive prices against competing because [REDACTED] has such low prices).

271. Whole Foods decided to [REDACTED] to retain sales and combat the perception that [REDACTED]. DX 27 (noting that Whole Foods’ strategy is to [REDACTED]); DX 29 (Private Label “365” band priced to match or beat [REDACTED] private label products); DX 252 (example of national comp shop against [REDACTED] in December 2005); DX 97 (national comp shop against [REDACTED]); DX 251 (compares Whole Foods regular and organic private label products systematically against [REDACTED]; DX 285; DX 419 (the [REDACTED] institutes price-matching against [REDACTED]; *see also* DX 251 (National comp shop against [REDACTED] for organic and private label products), DX 262 (e-mail from Gallo explaining that competition with [REDACTED] necessitated a price matching strategy); DX 425 (e-mail discussing need to match [REDACTED] prices in [REDACTED]); DX 420 ([REDACTED]); DX 405 (e-mail discussing need to match [REDACTED] prices in [REDACTED]); DX 407 (analysis of impact of [REDACTED] openings in [REDACTED], and [REDACTED], on nearby Whole Foods); DX 219 ([REDACTED] region).

272. This competition is manifested, in part, in the way Whole Foods prices its private label products to compete with [REDACTED]. Whole Foods private label faces significant competition from [REDACTED]. DX 27 (because Whole Foods private label acts as the “entry point for crossover shoppers,” it faces competition from [REDACTED] and supermarket brands.); DX 275 (Whole Foods private label are priced to counter competition from [REDACTED]); DX 431 (pricing private label products against [REDACTED] ensures competitiveness against other competitors); DX 430 (pricing private label to counter [REDACTED]); DX 29 (describing strategy to [REDACTED] on private label products); DX 71 ([REDACTED]); DX 69 ([REDACTED]); DX 433. Boardman Decl. ¶ 4, 5, 16, 17.

273. For example, throughout the East Coast, [REDACTED] has engaged Whole Foods by posting signs with direct Whole Foods / [REDACTED] register receipt comparisons. Whole Foods required all of its stores to post responsive signs targeting [REDACTED] monitor [REDACTED] pricing weekly, and change signs and lower Whole Foods prices if [REDACTED] lowered its prices. Meyer Decl. ¶¶ 24, 32; JX 10 at 61-63 (Meyer Dep.); DX 75 (describing regional plan to combat [REDACTED]); DX 76 ([REDACTED] and competitive advertising); DX 91 (describing competition with [REDACTED] in [REDACTED]).

274. In the [REDACTED], Whole Foods has experienced lower gross margins because prices have been reduced to compete with [REDACTED]. DX 242.

2. Tesco, a new class of competitor, will redefine the sale of high-quality perishables.

275. Imminent entry by Tesco into the United States market under the banner “Fresh & Easy”) will challenge all supermarkets in the sale of high quality perishables. [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]; DX 39 (discussing threat posed by Tesco); DX 272 (newspaper article reporting Tesco's entry into U.S.); DX 536 (trade article reporting that the supermarkets are concerned about Tesco's entry); DX 537 (L.A. Times article reporting Tesco's entry and its positive impact on competition). Published reports indicate that Tesco's format will be between Trader Joe's and Whole Foods because it will offer similar products at lower prices in convenient, neighborhood stores. Besancon Decl. ¶ 25-27; DX 536; DX 537.

276. High level Whole Foods executives have analyzed the likely effect of Tesco and concluded that Tesco will invigorate competition (Co-President and Chief Operating Officer Walter Robb noted that the entry of Tesco may "fundamentally alter the food retailing landscape in this country."). DX 238; *see also* DX 217 (analyzing a preliminary list of over thirty Tesco store locations). Although Whole Foods typically has "A" real estate sites, [REDACTED]. Mays Decl. ¶ 22; DX 489; DX 583.

3. Mass merchandisers like Costco have focused on selling high-velocity natural and organic foods, which is attracting Whole Foods consumers.

277. Costco, a mass merchandiser / club store, has also expanded the roster of natural and organic products it carries. DX 7 at 1 ("[T]he days of waiting for new vendors and new products to come to [Whole Foods] first are over. Costco and Safeway are changing that landscape forever."); DX 372 (Costco is enlarging its organic offering to compete specifically against Whole Foods). Thus, Whole Foods has been forced to price check Costco. *See e.g., id.* (Whole Foods comp shop of Costco in the Rocky Mountain region).

278. For Whole Foods, the "new era of competition" includes mass merchandisers and Wal-Mart. DX 370 (Whole Foods Regional Presidents are apprised of the contours of the "new era of competition," which includes Costco, Wal-Mart, and Trader Joe's in addition to

conventional supermarkets); *see also* DX 748 at 3 (noting that “[t]he brands that [Whole Foods] has grown up with and developed over the years are now conventional brands you find integrated in Costco, Wal-Mart, and HEB.”); DX 8 at 14 (counting club stores such as BJ’s and Costco and mass market stores like Target and Wal-Mart among its competitors); DX 97 (suggesting corporate strategy to compete with Costco).

279. In focusing on the prices of its competition, Whole Foods has formally added [REDACTED] to its list of competitors to comp shop. DX 14 (“It would be terrific education to see the prices of [REDACTED] WFMI [REDACTED] Oats [REDACTED]. Whole Foods tries to [REDACTED] against [REDACTED] where possible, which is virtually impossible given these competitors’ lower cost structure. DX 255 (Mass merchandisers use same vendors for some items but get better prices); DX 268 (difficulty of matching [REDACTED] on [REDACTED] due to [REDACTED] lower distribution costs); DX 293 (comp shop against [REDACTED] in [REDACTED] region).

280. Customers are cross-shopping between Whole Foods and mass merchandisers like Costco and Wal-Mart. Even frequent Whole Foods customers split purchases between Whole Foods and other stores such as Safeway, Costco, and Wal-Mart, and Trader Joe’s. DX 15 at 15.

F. [REDACTED]

281. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

282. Wild Oats' current management recognizes that [REDACTED]

[REDACTED]

283. Third parties recognize that Wild Oats is far from a powerful influence in the industry. [REDACTED] (explaining that Wild Oats [REDACTED]

[REDACTED]

284. In many areas, Wild Oats is viewed [REDACTED]

[REDACTED]

[REDACTED]

1. [REDACTED]

285. [REDACTED]

[REDACTED] Wild Oats has had cumulative income net losses of \$102 million in the last six years; \$53 million of this was incurred in the last three years. These net losses amount to approximately \$3.50 per share. Mays Decl. ¶ 5; DX 494 (2006 Wild Oats 10-K).

286. [REDACTED]

[REDACTED]

[REDACTED] While organic foods has grown at about 15-20% per year in the last five years, Wild Oats sales have grown significantly lower (between 2.9 and 8.1 growth). [REDACTED]

[REDACTED]

287. Wild Oats has had a working capital deficit in each of the last five years. DX 494 at 14.

288. [REDACTED]

[REDACTED]

289. Perry Odak was hired, in part, by Wild Oats to sell the company, but he failed. JX 28 at 66, 83 (Mackey I.H.) (“if you look at that guy’s track record, every company he has

ever worked for he has sold. He was brought in to sell Wild Oats. Obviously they weren't able to do it or else they would have already been sold").

2. [REDACTED]

290. [REDACTED]
[REDACTED]
[REDACTED]

291. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

292. [REDACTED]
[REDACTED]
[REDACTED]

293. The Wild Oats Board decided not to renew Perry Odak's employment contract in 2006 [REDACTED]
[REDACTED]

294. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

295. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

3. [REDACTED]

296. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

297. Wild Oats closed more stores than it opened during Odak's tenure as CEO, DX
807 (Wild Oats Response to Spec. 2 of FTC Second Request).

298. [REDACTED]

[REDACTED]

299. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

300. Wild Oats hired Cheri Zeeb to serve as the VP of Real Estate (in October 2006) to create a real estate department and strategy for Wild Oats. JX 17 at 7-8 (Zeeb Dep.). [REDACTED]

[REDACTED]

301. [REDACTED]

[REDACTED]

302. [REDACTED]

[REDACTED]

4. [REDACTED]

303. [REDACTED]

[REDACTED]

304. [REDACTED]

[REDACTED]