

[REDACTED]

[REDACTED]

[REDACTED]

305. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

5. Its new prototype store in Boulder, CO [REDACTED]

[REDACTED]

306. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

307. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

308. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

309. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

310. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

311. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

312. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

313. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

314. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

315. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

6. [REDACTED]

316. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

317. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

318. [REDACTED]

[REDACTED]

319. [REDACTED]

[REDACTED]

320. [REDACTED]

[REDACTED]

321. [REDACTED]

[REDACTED]

[REDACTED]

322. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

G. Whole Foods invests in store improvements and renovations.

323. Whole Foods has a history of acquiring struggling stores, improving store operations, increasing sales volume and making them profitable. For example, in 1996, it purchased Fresh Fields Markets, a company that had lost approximately [REDACTED] during its history and had never earned a profit. Whole Foods paid approximately [REDACTED], and applied its skills, resources and capital to make the stores successful. Sud Decl. ¶ 34.

324. Whole Foods expects to do the same for the Wild Oats stores. Sud Decl. ¶ 34. In the past, it acquired Wild Oats stores that had been closed in Framingham, MA and Madison, NJ. It is reasonable to conclude that Wild Oats closed the stores because they were not financially successful. Whole Foods applied its skill and capital, and the stores have become successful. Sud Decl. ¶ 34.

325. Whole Foods' success in improving stores acquired from weakened companies has also been observed by suppliers. [REDACTED]

[REDACTED]

[REDACTED]

326. Suppliers expect that Whole Foods will similarly improve Wild Oats stores, which will enhance competition. [REDACTED]

[REDACTED]

327. [REDACTED]

[REDACTED]

328. Third parties recognize that Whole Foods will increase sales at Wild Oats stores.

[REDACTED]

1. Whole Foods has a comprehensive program to provide capital to stores.

329. [REDACTED]

[REDACTED]

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.

330. Whole Foods spent approximately [REDACTED] remodeling its [REDACTED] store in response to a new [REDACTED] and is planning an even larger expansion at the [REDACTED] store. [REDACTED]

331. Whole Foods remodeled its [REDACTED] store in response to competition from [REDACTED], not Wild Oats. [REDACTED]

332. Whole Foods doubled the size of its store in [REDACTED] in response to a planned [REDACTED] store that [REDACTED] is opening. [REDACTED]

333. Whole Foods remodeled its [REDACTED] store in response to competition from [REDACTED]

334. Whole Foods remodeled its stores in [REDACTED] and [REDACTED] in response to openings by [REDACTED]

335. Whole Foods is planning a major renovation of its store in [REDACTED] in response to a new [REDACTED] store. [REDACTED]

3. The FTC has no basis to conclude that non-price competition will be reduced by the merger.

H. The merger will not harm competition in any alleged geographic area.

1. Albuquerque, NM

336. Whole Foods examined the competitive landscape of Albuquerque, NM in a 2000 site study. NM. DX 633 at 5-8, 28-39. As part of its review, Whole Foods estimated every competitor's share of total area sales, including [REDACTED], which operated [REDACTED] area supermarkets with about [REDACTED], which operated [REDACTED] supermarkets with a [REDACTED] [REDACTED], which operated [REDACTED] supermarkets with about [REDACTED] which operated [REDACTED] supermarkets with about [REDACTED] Wild Oats, which operated 3 supermarkets with about [REDACTED], which operated [REDACTED] supermarket with about [REDACTED], which operated [REDACTED] supermarket with estimated about [REDACTED]

337. Today, Whole Foods has one store and Wild Oats has three stores in Albuquerque, NM. Scheffman Report, Appendix F ¶ 3. Wild Oats and Whole Foods face substantial competition in Albuquerque from many stores, including Albertsons, Smith's, Raley's, Lowes, Trader Joe's, Vitamin Cottage, Sunflower Market, Price Rite and Wal-Mart. Scheffman Report, Appendix F ¶ 6. Whole Foods also faces competition from John Brooks Supermarket and others. Robb Decl. ¶ 33.

338. Whole Foods regularly comp shops [REDACTED] [REDACTED] Wild Oats and others in Albuquerque to ensure prices at its stores remain competitive with the prices charged by other supermarkets. Paradise Decl. ¶¶ 25-28; JX 11 at 113 (Paradise Dep.)

(describing practice of visiting each competitor); *see also* DX 301 (comp shop chart for [REDACTED])

339. Raley's stores in Albuquerque carry organic and natural products in numerous departments, including meat, produce, grocery, vitamins and baked goods. Paradise Decl. ¶¶ 25, 27 (noting that Raley's natural foods departments is "like a store within a store"); *see* DX 483 (Raley's website). Raley's stores carry a large selection of natural and organic products – up to 100 organic produce products or more, depending on the season. Paradise Decl. ¶ 27; *see* Scheffman Report, Appendix F ¶ 11; DX 483.

340. Smith's, owned by Kroger, offers a variety of natural and organic products that compete with Whole Foods products, including produce, eggs, dairy, cereal and frozen foods. Paradise Decl. ¶ 28; *see* Scheffman Report, Appendix F ¶ 9.

341. Wild Oats tracks the competitive activity of many supermarkets and food retailers in Albuquerque. When Sunflower Market, owned by Mike Gilliland, opened in Albuquerque, [REDACTED] JX 33 at 151, 191 (Coblentz I.H.).

342. Whole Foods competes intensely with Trader Joe's in Albuquerque. Paradise Decl. ¶ 18. Trader Joe's sells many products similar to Whole Foods, including extensive natural and organic products. Paradise Decl. ¶ 18.

343. Whole Foods remodeled the Albuquerque store in response to Trader Joe's opening in March 2006, which required the expenditure of [REDACTED] [REDACTED] [REDACTED]. DX 357; Paradise Decl. ¶ 29; DX 385 (indicating entry by [REDACTED] was the catalyst to Whole Foods' efforts to remodel and reduce prices in

Albuquerque); Paradise Decl. ¶¶ 12, 29; JX 31 at 201 (Paradise I.H.) (noting that Whole Foods spent about ██████████ to remodel its Albuquerque store immediately.

344. In addition, Whole Foods adopted a competitive pricing strategy in anticipation of the ██████████ opening in Albuquerque that involved ██████████ ██████████ DX 363 (“[W]e will be adopting a competitive ██████████ from the ██████████ opening”); DX 252 (“Based on the price comparison we would get killed by ██████████ in [Albuquerque]”); DX 367 (Whole Foods in Albuquerque adopted strategies used against ██████████ after its opening in ██████████, which ██████████ significant volume from Whole Foods); *see* DX 390 (comp shop against ██████████). Whole Foods also completed a ██████████ ██████████ in anticipation of competing with ██████████ in Albuquerque. ██████████

345. ██████████ entry in Albuquerque caused Whole Foods’ sales to ██████████ ██████████ affected nearly all departments at the Whole Foods Albuquerque store. Although the FTC tried to differentiate ██████████ because it does not carry as much fresh produce, meat or seafood, the entry of ██████████ in Albuquerque caused Whole Foods to ██████████ in those departments too. Paradise Decl. ¶ 29; JX 31 at 198-99 (Paradise I.H.).

346. Whole Foods’ competition with ██████████ in Albuquerque is not a one-way street. Recently, ██████████ has responded to competition from Whole Foods by increasing its selection of meat, produce and prepared foods. Paradise Decl. ¶ 18.

347. Whole Foods is not, however, similarly constrained by Wild Oats. Wild Oats prices in Albuquerque ██████████. Paradise Decl. ¶ 30.

2. Boston, MA

348. Whole Foods commissioned a study of a potential site in Dedham, MA, a Boston, MA suburb in 2005. The report every competitor for the proposed site, including [REDACTED] which operated [REDACTED] with [REDACTED] which operated [REDACTED] with [REDACTED] which operated [REDACTED] with [REDACTED] which operated [REDACTED] with [REDACTED], which operated [REDACTED] with [REDACTED], which operated [REDACTED] with [REDACTED], which operated [REDACTED] with [REDACTED] and [REDACTED] Wild Oats, which operated [REDACTED] with [REDACTED] DX 173 at 9; *see also* DX 173 at 8-9, 16, 25, 36, 38-46.

349. Today, in the greater Boston metro area, there are two Wild Oats stores (in the suburbs of Saugus and Medford), and there are 16 Whole Foods stores. Scheffman Rep., App. F. at 6. Within 6 miles of the Saugus Wild Oats store, there is one Whole Foods store in Swampscott. Scheffman Report, Appendix F. at 6. Within 6 miles of the Medford Wild Oats store, there are 7 Whole Foods stores, but the closest one is 2.4 miles away in Fresh Pond. Scheffman Report, Appendix F. at 6-7.

350. Whole Foods' Swampscott and Fresh Pond stores compete for customers with many supermarkets, including (1) Shaw's/Star Market, operating [REDACTED] stores near Whole Foods in Swampscott and [REDACTED] stores near Whole Foods in Fresh Pond; [REDACTED] operating [REDACTED] stores near Swampscott and [REDACTED] stores near Fresh Pond; [REDACTED] operating [REDACTED] stores near the Medford Wild Oats and [REDACTED] stores near Whole Foods stores; [REDACTED], operating [REDACTED] stores near Swampscott and [REDACTED] stores near Fresh Pond; [REDACTED], operating [REDACTED] stores near Swampscott

and [REDACTED] stores near Fresh Pond; [REDACTED] operating [REDACTED] stores near the Saugus Wild Oats and [REDACTED] Whole Foods stores including Fresh Pond; and [REDACTED] operating [REDACTED] store near [REDACTED]. Scheffman Report, Appendix F. at 10-14; *see also* Gallo Decl. ¶ 37 (including [REDACTED] as competitor in Boston); DX 497 (listing Whole Foods' competitors by market). [REDACTED]

[REDACTED]

[REDACTED]

351. Whole Foods is expanding its [REDACTED] store to better compete with [REDACTED] [REDACTED] which introduced its private organic label, [REDACTED] specifically to compete with Whole Foods. Lannon Decl. ¶ 21; DX 270 (describing [REDACTED] media campaign promoting its private label). Upon learning of [REDACTED] new organic line, Whole Foods promptly added [REDACTED] organic products to its list of products to comp shop. Lannon Decl. ¶ 21; DX 270 (e-mail from Gallo, Whole Foods' Co-President and Chief Operating Officer, explaining that its inclusion is "to make sure they are not under pricing us on these items").

352. Supermarkets are stepping up efforts to compete for organic food customers. Scheffman Rep., App. F at 9 (*quoting* April 2006 Boston Herald article that describes actions by Roche Bros., Shaw's Supermarkets, and Stop & Shop to capture a greater share of the "fast-growing organics market."). Foodmaster Supermarket also promotes its commitment to natural and organic products, including high quality pre-packaged and prepared products. Scheffman Report, Appendix F at 11.

353. In particular, Shaw's has strengthened competition by announcing plans to remodel two stores to more directly compete against Whole Foods. DX 504 (January 2007 Boston Herald article *quoting* Shaw's president, Carl Jablonski, saying that "[i]t sounds like a

Whole Foods, looks like a Whole Foods, but it's a Shaw's"); *see also* DX 688

(*progressivegrocer.com* article reporting that Shaw's is renovating numerous stores to compete directly against Whole Foods); Lannon Decl. ¶ 21.

354. To remain competitive and prevent the loss of sales, Boston-area Whole Foods stores regularly comp shop competitors. Whole Foods Fresh Pond store compares its prices to those [REDACTED] in the market. *See e.g.*, DX 287; DX 289; DX 450; DX 453; DX 462. Whole Foods also comp shops supermarkets and other food retailers in the Boston area, including [REDACTED]. *See e.g.*, DX 340 (all competitors); DX 331 ([REDACTED]); DX 332 ([REDACTED]); DX 333([REDACTED]); DX 335 ([REDACTED]); DX 386 [REDACTED].

355. As directed by the North Atlantic Regional President, Whole Foods' stores in Boston, including those in Swampscott and Fresh Pond, have been comparing the prices of a "market basket" of products against the same basket of goods from the lowest price competitor. These exercises usually result in comparisons [REDACTED]. Lannon Decl. ¶ 25; JX 8 at 93-94, 96, 99, 100 (Lannon Dep.); DX 419 at 2; DX 81.

356. Whole Foods has been forced to take aggressive measures to compete with [REDACTED], including phasing in lower prices [REDACTED]. This aggressive pricing strategy was endorsed by Whole Foods' Co-President A.C. Gallo, despite his expectation that strong price-competition with [REDACTED] would [REDACTED]

357. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

358. Whole Foods in Boston does not *see* Wild Oats as a competitive threat, especially in regard to price, as demonstrated by the fact that no Boston Whole Foods store has ever requested the comparison of a market basket of products for Wild Oats. Lannon Decl. ¶ 25; *see also* Lannon Decl. ¶ 19 (“[O]ther than price checking Wild Oats’ stores a bit when it first arrived [in the area], we have paid them little attention.”) (Portland, ME).

3. Boulder, CO

359. Whole Foods evaluated the site that eventually became its store in Boulder, CO in 1997. As part of that analysis, Whole Foods analyzed each potential competitor in the area, including (1) [REDACTED], which operated [REDACTED] with [REDACTED]; (2) [REDACTED], which operated [REDACTED] with [REDACTED]; (3) [REDACTED], which operated [REDACTED] with [REDACTED]; (4) [REDACTED], which operated [REDACTED] with [REDACTED]; (5) [REDACTED], which operated [REDACTED] with [REDACTED], (6) Wild Oats, which operated [REDACTED] with [REDACTED], (7) [REDACTED], which operated [REDACTED] with [REDACTED], and (8) [REDACTED], which operated [REDACTED] with [REDACTED]. [REDACTED]

360. The site report also profiled each of these competitors, estimating, among other things, the weekly sales volume, square footage, sales per square foot and product mix. DX 635 at 73.

361. One of the stated purposes of the site study is to learn the likely sources of its sales. The site report projected that its greatest source of sales would come from [REDACTED], not Wild Oats. DX 635 at 75 (showing that about [REDACTED] of its sales would be taken from [REDACTED], while only [REDACTED] would come from Wild Oats).

362. Today, Wild Oats has three stores and Whole Foods has one store in Boulder, Co. Scheffman Report, Appendix F ¶ 46.

363. Whole Foods and Wild Oats compete with the following stores in Boulder:

[REDACTED]
[REDACTED]
[REDACTED]

364. In Boulder, Safeway tested its prototype “Lifestyle” supermarket by remodeling its existing supermarket; the remodeled supermarket included more space, a new décor package, new merchandising programs, expanded natural and organic offerings, full bulk sections, and aggressive sales and promotion activities to support the grand reopening. JX 33 at 140 (Coblentz I.H.). The remodel also included high quality fixtures and product cases, larger produce and an improved organic sections, a full service meat counter with organic poultry, Coleman beef, plenty of self service bars, an improved seafood department, a sit-down sushi bar, and a bakery with artisan breads. Paradise Decl. ¶ 21; *see also* DX 48 (remodeled Safeway stocked organic products that Whole Foods did not even carry); DX 357 (gathering intelligence about new Safeway Lifestyle format for Whole Foods’ Board of Directors); DX 480 (describing results of Whole Foods visit of Safeway Lifestyle in Boulder).

365. In addition to the changes in physical appearance, the Safeway Lifestyle remodel in Boulder expanded the range of products included in its private label organic "O" line, which was packaged like Whole Foods private label products. DX 234; DX 357.

366. The Safeway Lifestyle remodel has significantly impacted Whole Foods business in Boulder, CO. Paradise Decl. ¶ 46. DX 480. JX 31 at 43 (Paradise I.H.); Robb Decl. ¶ 34. In response to the Safeway remodel, Whole Foods implemented a comprehensive action plan, which required [REDACTED]

[REDACTED] (describing observations of a Safeway Lifestyle tour, which included Co-President and COO Walter Robb); DX 480 (describing potential strategic responses). Whole Foods invested about [REDACTED] to remodel its Boulder store by [REDACTED]

367. The Safeway Lifestyle store now has many advantages over the Boulder Whole Foods store, including more square footage and a better parking lot. DX 49 (e-mail from Whole Foods Co-President describing Safeway's competitive advantages as "[a]nother reason we need larger stores to compete."). The Safeway Lifestyles in Boulder also offers certain organic products that Whole Foods does not even carry, including yogurt, salsa, olive oil, oatmeal/hot cereal, and popcorn, making Whole Foods seem less committed to organics than Safeway in Boulder. DX 48.

368. Despite Whole Foods' best efforts, Safeway's Lifestyle store in Boulder took [REDACTED] from Whole Foods' Boulder store when it opened. Robb Decl. ¶ 34. Whole Foods' sales [REDACTED] per week after the Safeway Lifestyle store in Boulder opened. DX 204 at 5; *see also* Paradise Decl. ¶ 46; JX 11 at 103 (Paradise Dep.); JX 31 at 43, 123

(Paradise I.H.). Over time, Whole Foods sales recovered somewhat, although not to the level that would have been expected if the Safeway Lifestyle store had not opened. Paradise Decl.

¶ 47. JX 11 at 179-81 (Paradise Dep).

369. [REDACTED]

370. Whole Foods continues to compete vigorously with Safeway Lifestyle in Boulder, CO across both price and non-price dimensions. DX 368 (analyzing each of Safeway's competitive advantages, concluding that Safeway was succeeding, and suggesting a counter strategy); DX 50 (e-mail imploring coordinators in the region to visit the Boulder, CO Safeway, so that Whole Foods can formulate a sensible competitive response); DX 366 (describing Whole Foods' policy [REDACTED] Safeway "O" on all private label products); DX 207 at 13 (describing continued competition with Safeway Lifestyle in Boulder); JX 38, DX 480, DX 800 (e-mail describing promotional efforts and messages about differentiation needed to combat Safeway); Paradise Decl. ¶ 10.

371. Whole Foods regularly comp shops Safeway and Safeway Lifestyle stores in the Boulder area. DX 478 (January - March 2007 comp shop against Safeway); DX 768 (comp shop of Safeway and [REDACTED]); DX 228 (compares Whole Foods prices to comparable products listed in Safeway ad). Whole Foods will regularly change prices based on Safeway comp shops. DX 211 at 15 ("[Whole Foods store in Boulder] Pearl . . . [has] lowered prices in response to increased competition from Safeway"); DX 250 (e-mail

describing list of products Whole Foods must adjust to match Safeway); *see also* DX 266 (listing Safeway among competitors in Boulder);

372. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

373. The Whole Foods' store in Boulder does more business than its current parking lot can accommodate. Whole Foods decided to expand the store to better compete. JX 1 at 264-65 (Gallo Dep.); *see also* JX 11 at 190 (Paradise Dep.) (describing that remodeling efforts were primarily aimed at Safeway.). Today, Whole Foods is continuing its efforts to expand Boulder store to [REDACTED] in response to competitive events. Paradise Decl. ¶ 46.

374. [REDACTED]

[REDACTED]

[REDACTED]

375. Whole Foods regularly comp shops [REDACTED] in Boulder. JX 31 at 188 (Paradise I.H.); DX 478 ([REDACTED] and Wild Oats); DX 304 ([REDACTED]); DX 768 ([REDACTED]). Whole Foods monitors prices at [REDACTED] and strategically [REDACTED] to retain sales. DX 266.

376. Wild Oats and Whole Foods also face strong competition from [REDACTED] [REDACTED]. Robb Decl. ¶ 34. [REDACTED] operates over [REDACTED] stores throughout Colorado and promotes and offers a wide variety of natural and organic products. Robb Decl. ¶ 34. [REDACTED] [REDACTED].

377. [REDACTED] is also building a new 100,000 sq. feet flagship store in [REDACTED] [REDACTED]. This store is being built specifically to provide roomier aisles, expanded produce, organic foods, and vitamins. Robb Decl. ¶ [REDACTED].

4. Cleveland, OH

378. In 2000, Whole Foods reviewed all potential competitors as part of its evaluation of the site that became home to its store in Cleveland, OH. DX 160 at 5-7, 15, 61, 69-75. At that time, Wild Oats did not have a supermarket in Cleveland, but was planning to open two stores in the area. DX 160 at 5. The review by Whole Foods included (1) [REDACTED], which operated [REDACTED] [REDACTED]; (2) [REDACTED], which operated [REDACTED] with [REDACTED] [REDACTED]; (3) [REDACTED], which operated [REDACTED] with [REDACTED]; (4) [REDACTED], which operated [REDACTED] with [REDACTED]; (5) [REDACTED], which operated [REDACTED] [REDACTED] with [REDACTED]; and (6) [REDACTED], which operated [REDACTED] with [REDACTED]. DX 160 at 68.

379. The site study included an analysis of the grocery stores from which Whole Foods would gain sales. The study projected that Whole Foods would take the vast majority of its sales from other supermarkets, including about [REDACTED] of its sales to come from [REDACTED], [REDACTED] from

██████████, ██████████ from ██████████, and less than ██████████ from each of the remaining chains. DX 160 at 71.

380. Prior to opening, Whole Foods visited each of its potential competitors to gather market intelligence and ensure that its product mix was competitive. DX 84, DX 783, DX 784, DX 785 (January 2006 email organizing tour).

381. The 2000 site selection study accurately predicted the stores with which the Whole Foods that opened in 2007 would compete. Scheffman Report, Appendix F at 20-23.

382. Since the completion of the 2000 site report, new competitors have emerged to spark additional competition. ██████████ supermarket focused on high-quality perishables, opened a location ██████████ of the Whole Foods Cleveland store. Scheffman Report, Appendix F at 20-21. ██████████ purchased a number of ██████████ in Cleveland and remodeled them to include “high quality perishables,” expanded produce departments, and increased its selection of natural and organic foods overall. Scheffman Report, Appendix F at 23.

383. Mustard Seed Market and Café, with one of its two Cleveland stores near the Whole Foods’ store, advertises itself as “the largest retailer of natural and organic products in Northeast Ohio.” Scheffman Report, Appendix F at 21 (*quoting* Mustard Seed’s current web-site). Whole Foods also competes with ██████████ in Cleveland. Scheffman Report, Appendix F at 25; Gallo Decl. ¶ 38. Wild Oats, however, now only operates one store Cleveland. Scheffman Report, Appendix F at 20.

384. As part of its corporate initiative to systematically monitor its competitors’ prices, Whole Foods requires the Cleveland store to collect information about many competitors. In June 2006, Gallo identified ██████████ as competitors that were expected to impact Whole Foods’ 2007 margins in Ohio. DX 61; *see also* DX 497 (list

of Whole Foods' competitors by market, including Cleveland); DX 87 (list of Whole Foods' competitors in Mid-Atlantic region, including Cleveland). Consequently, in August 2006, these retailers were added to the systematic comp shop for the Cleveland store. DX 85.

385. Local price checking also demonstrates the constraint these supermarkets and other retailers impose upon Whole Foods. DX 799 (circulating comp shop and qualitative department assessments for [REDACTED] and [REDACTED], explaining that they will be used to help "exceed the service levels of our competition").

386. The number of competitors in Cleveland, OH is expected to grow. [REDACTED]

[REDACTED]

5. Denver, CO

387. In a 2006 site study, Whole Foods systematically examined future competitors in South Denver, CO, including (1) [REDACTED] which operated [REDACTED] with [REDACTED]; (2) [REDACTED], which operated [REDACTED] with [REDACTED]; (3) [REDACTED], which operated [REDACTED] with [REDACTED]; (4) [REDACTED], which operated [REDACTED] with [REDACTED]; (5) [REDACTED], which operated [REDACTED] with [REDACTED]; (6) [REDACTED], which operated [REDACTED] with [REDACTED]; (7) Wild Oats, which operated [REDACTED] with [REDACTED]; (8) [REDACTED], which operated [REDACTED] with [REDACTED]; and (9) [REDACTED] which operated [REDACTED] with [REDACTED]. [REDACTED]

388. Today, in Denver, Whole Foods and Wild Oats compete with [REDACTED]
[REDACTED]
[REDACTED] among others. Paradise Decl. ¶¶ 39, 41, 43; Robb Decl. ¶¶ 35, 40; Martin Decl. ¶ 17; *see* Scheffman Report, Appendix F ¶ 93.

389. Safeway, including Safeway Lifestyle, is a significant competitive force in Denver both because of strong management and sheer numbers. *See* JX 33 at 168 (Coblentz I.H.); Robb Decl. ¶ 35. [REDACTED], JX 31 at 157 (Paradise I.H.); *see also* DX 477 ([REDACTED] Wild Oats); [REDACTED]
[REDACTED].

390. [REDACTED]
[REDACTED]

391. [REDACTED] is also a formidable competitor in metropolitan Denver. Robb Decl. ¶ 35. It boasts a wide variety of natural and organic products at competitive prices. Robb Decl. ¶ 35. [REDACTED] also been aggressively expanding its offerings of organic, natural and fresh products. Paradise Decl. ¶ 19. JX 31 at 161 (Paradise I.H.). One recent King Sooper advertisement even claims that “nobody sells more organic produce in Colorado – Nobody.” Paradise Decl. ¶ 19; DX 365.

392. Price checking by [REDACTED] of Whole Foods confirms their competitive rivalry. [REDACTED] regularly comp shops Whole Foods and adjusts its prices accordingly. DX 359 at 2 ([REDACTED] walking Whole Foods’ Denver store and adjusting prices); Paradise Decl. ¶ 19. In fact, [REDACTED] now offers many of the same products sold at Whole Foods. Paradise Decl. ¶ 19.

393. Whole Foods regularly comp shops [REDACTED]. DX 359; Paradise Decl. ¶ 8. JX 31 at 157 (Paradise I.H.); DX 299 ([REDACTED]); DX 477 ([REDACTED] Wild Oats); DX 767 ([REDACTED]); DX 51 (price check of [REDACTED]).

394. These comp shops enable Whole Foods to monitor the competition and make appropriate adjustments to retain sales. Paradise Decl. ¶ 9 (noting generally that Whole Foods compares “various items from all departments to ensure that Whole Foods is competitive with other supermarkets in all areas of the grocery business.”). These comp shops have caused Whole Foods to reduce prices to prevent sales erosion. DX 358, DX 51 (price reduction [REDACTED] on specific items); Paradise Decl. ¶ 43.

395. Whole Foods and Wild Oats also compete with [REDACTED] in metropolitan Denver. Scheffman Report, Appendix F ¶ 96. [REDACTED] focuses on providing natural and organic products at reasonable prices. Scheffman Report, Appendix F ¶ 95. [REDACTED]

396. [REDACTED], another Denver area competitor, is a natural grocer with a focus on educating customers and offering a full range of organic products including produce, bulk and grocery items. Paradise Decl. ¶41. See Scheffman Report, Appendix F ¶ 95. Whole Foods comp shops [REDACTED] on a regular basis. DX 299; DX 477; DX767.

6. Evanston and Hinsdale, IL

397. Whole Foods currently has ten supermarkets in metropolitan Chicago, including one in nearby Evanston, Illinois and one in Willowbrook, Illinois. Bradley Decl. ¶¶ 14, 15. Wild Oats has one store in Evanston and one in Hinsdale, Illinois, approximately 3.5 miles from the Whole Foods store in Willowbrook. Scheffman Report, Appendix F ¶¶ 111, 124, 125.

398. The Evanston Whole Foods and Wild Oats stores compete with at least two other supermarket chains [REDACTED] as well as other food retailers. Both [REDACTED] each have [REDACTED] supermarkets within [REDACTED] miles of both the Whole Foods and Wild Oats stores in Evanston. Bradley Decl. ¶ 14.

399. The Whole Foods store in Willowbrook and the Wild Oats store in nearby Hinsdale compete against several other grocery retailers including [REDACTED] [REDACTED]. Martin Decl. ¶ 17; Scheffman Report, Appendix F ¶¶ 111, 124, 125. [REDACTED]

400. [REDACTED] In the Chicago area, [REDACTED] has launched a direct competitive move against Whole Foods by starting [REDACTED] within stores to emulate Whole Foods. [REDACTED]

[REDACTED] remodeled its stores to improve ambiance, including changing its lighting to create a feel that is more inviting. [REDACTED]

401. [REDACTED] changed the way it offers produce by imitating Whole Foods' pit merchandising approach to create better flow. [REDACTED] has also added organic sections, artisan bakeries, and in-house bake houses that bake hearth breads. [REDACTED]

[REDACTED]

[REDACTED]

402. [REDACTED]

[REDACTED]

[REDACTED] O Organics products include dairy items, cereals, beverages, bread, pasta, peanut butter, preserves, applesauce, salad dressing, pasta sauce, olive oil, snack foods, frozen fruits, vegetables and entrees, canned tomatoes, and canned beans. Scheffman Report, Appendix E ¶ 64. There are similarities in both product lines and the overall look between [REDACTED] O line and Whole Foods' 365 private label line. Bradley Decl. ¶ 16; JX 6 at 130-31 (Bradley Dep.).

403. [REDACTED]

[REDACTED]

[REDACTED]

404. Price checking by Whole Foods reflects vibrant competition in metropolitan Chicago. Whole Foods routinely price checks [REDACTED] to remain competitive with these stores in the Chicago area. [REDACTED]

[REDACTED]

[REDACTED]

7. Henderson and Las Vegas, NV

405. In a 2003 site study, Whole Foods examined the competitive landscape of the Henderson, NV (part of the Las Vegas metropolitan area) analyzing [REDACTED] competing stores among [REDACTED] different rivals, including (1) [REDACTED], which operated [REDACTED] with [REDACTED]; (2) [REDACTED], which operated [REDACTED] with [REDACTED]; (3) [REDACTED], which operated [REDACTED] with [REDACTED]; (4) [REDACTED], which operated [REDACTED] with [REDACTED]; (5) [REDACTED], which operated [REDACTED] with [REDACTED]; (6) [REDACTED], which operated [REDACTED] with [REDACTED]; (7) [REDACTED] which operated [REDACTED] with [REDACTED]; and (8) [REDACTED], which operated [REDACTED] with [REDACTED]. [REDACTED]

406. Whole Foods also evaluated its Las Vegas metropolitan-area competitors in a 2005 site report. DX 126 at 44-54. Whole Foods examined every competitor for the proposed site, including [REDACTED]

407. Whole Foods' two stores in the Las Vegas metropolitan area – the Las Vegas store that opened in August 2003 and the Henderson store that opened in April 2006 – are surrounded by competition today. Scheffman Report, Appendix F ¶¶ 155-57, 160-68. Competing within a six-mile radius of Whole Foods' Las Vegas store are [REDACTED]

[REDACTED]. Within six miles, Henderson Whole Foods competes with [REDACTED]

[REDACTED]

[REDACTED]

408. Whole Foods' Las Vegas and Henderson stores are under relentless competitive pressure from area supermarkets that are copying Whole Foods' product offerings and formats. Besancon Decl. ¶¶ 61-62, 68, 70. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

409. [REDACTED] performed major renovations to its Henderson-area stores, copying Whole Foods' Whole Body aisles and expanding natural and kosher food selections. Besancon ¶ 63; *see* Scheffman Report, Appendix F ¶ 164 ([REDACTED] improving selections of quality perishable items). Similarly, a [REDACTED] approximately [REDACTED] miles from Whole Foods' Henderson store converted [REDACTED] and expanded its organic produce selections; in response, Whole Foods upgraded its newly opened Henderson store, adding a sit-down BBQ venue serving beer and wine. Besancon Decl. ¶¶ 61-62.

410. [REDACTED] has also remodeled its Las Vegas stores to "make them look and feel more like [Whole Foods'] Las Vegas store." Besancon Decl. ¶ 68. In response to the expansion of organic and natural foods and floral and wine sections, Whole Foods is making upgrades of its own [REDACTED] Besancon Decl. ¶ 68; *see also* DX 721 at 100 [REDACTED]

[REDACTED]

[REDACTED]. Moreover, [REDACTED] near

Whole Foods' Las Vegas store have converted [REDACTED], "look[ing] very much like a Whole Foods' store" and carrying similar products. Besancon Decl. ¶ 70.

411. Whole Foods will soon face another serious competitor with a similar focus on high-quality perishables and prepared foods in Las Vegas: [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

412. Whole Foods regularly conducts "comp shops" or price-checks against Las Vegas competitors, including [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. Because Wild Oats is typically [REDACTED]

[REDACTED] Whole Foods and its competitors, Whole Foods comp shops local Wild Oats' stores less than once per quarter. Besancon Decl. ¶ 71; *see also* Besancon Decl. ¶ 64 ([REDACTED] ["Whole Foods' prices are rarely adjusted in response to Wild Oats."]).

413. The disparity in sales further supports the absence of competitive rivalry between Whole Foods and Wild Oats in the Las Vegas metropolitan area. While Whole Foods' Las Vegas store averaged approximately [REDACTED] Wild Oats' Las Vegas store averaged only about [REDACTED]. [REDACTED] The

comparative results are similar in Henderson, where Whole Foods' store averaged approximately [REDACTED] in weekly sales in 2006, while Wild Oats' store averaged only about [REDACTED].

Scheffman Report, Appendix F ¶¶ 157, 159.

8. Kansas City – Overland Park, KS

414. In preparation for its entry into Overland Park, Whole Foods produced in February 2002 a site study that included a comprehensive examination of the competitive landscape of the market. Most notably, Whole Foods methodically examined all future competitors in Overland Park, KS. DX 634 at 4-5, 22, 27-29, 31-32, 56, 68-69. Whole Foods studied and counted for the impact of every competitor at the proposed site, including [REDACTED] which operated [REDACTED] [REDACTED] with [REDACTED] which operated [REDACTED] with [REDACTED] which operated [REDACTED] with [REDACTED] which operated [REDACTED] with [REDACTED] which operated [REDACTED] with [REDACTED] which operated [REDACTED] with [REDACTED] and [REDACTED] Wild Oats, which operated [REDACTED] with [REDACTED]

415. As part of the analysis of competition for the proposed Overland Park store, Whole Foods incorporated information about potential competitors [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] Whole Foods projected that its new stores would compete directly against [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

416. Today, many supermarkets compete against Whole Foods and Wild Oats in the Kansas City – Overland Park area, including: [REDACTED] [REDACTED]. Martin Decl. ¶ 17; Robb Decl. ¶ 39; *see also* Paradise Decl. ¶ 53; JX 11 at 54-55 (Paradise Dep.); Scheffman Report, Appendix F ¶ 138. Each of these competitors seems to be constantly expanding the breadth of their natural and organic products. Robb Decl. ¶ 39.

417. [REDACTED]

[REDACTED]

[REDACTED]

418. Whole Foods considers [REDACTED] its most significant competitor in the Overland Park area; Whole Foods comp shops [REDACTED] stores regularly to monitor prices and its competitive strategies. Paradise Decl. ¶ 54. JX 31 at 136 (Paradise I.H.); *see* DX 304 ([REDACTED] comp shop; January - March 2007); *see* DX 479 ([REDACTED] comp shop); *see* DX 292 ([REDACTED] comp shop). [REDACTED] offers an extensive selection of natural and organic products, including meat, pork, poultry and produce. Paradise Decl. [REDACTED] [REDACTED] stores also feature an array of local products. DX 363 (forwarding competitive information about [REDACTED] for report to Board of Directors).

419. Whole Foods also comp shops [REDACTED] in the Kansas City – Overland Park area. JX 31 at 136 (Paradise I.H.).

420. Whole Foods competes aggressively against [REDACTED]. When the [REDACTED]

[REDACTED] Whole Foods Overland Park with substantial natural foods, Whole Foods [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

9. Los Angeles, CA and Pasadena, CA

421. In three site selection studies, Whole Foods examined competition in the Los Angeles metropolitan area. In April 2004, Whole Foods evaluated a site in Manhattan Beach, CA, a Los Angeles suburb, reviewing each neighboring competitor, including: [REDACTED] which operated [REDACTED] with estimated sales volume totaling approximately [REDACTED] [REDACTED] which operated [REDACTED] which operated [REDACTED] [REDACTED] which operated [REDACTED] which operated [REDACTED] [REDACTED] which operated [REDACTED] which operated [REDACTED] operated [REDACTED]. [REDACTED]
[REDACTED]
[REDACTED]

422. Later, in December 2004, Whole Foods conducted a similar exercise for Pasadena, CA, a suburb of West Los Angeles. That analysis also evaluated every local competitor, including [REDACTED] which operated [REDACTED] with [REDACTED] which operated [REDACTED] with [REDACTED] which operated [REDACTED] with [REDACTED] which operated [REDACTED] with [REDACTED] which operated [REDACTED] with [REDACTED] which operated [REDACTED]

[REDACTED] with [REDACTED] which operated [REDACTED] with [REDACTED]
[REDACTED] which operated [REDACTED] with [REDACTED] which operated [REDACTED]
[REDACTED] with [REDACTED] and [REDACTED] which operated [REDACTED] with [REDACTED]
[REDACTED].

423. Most recently, its 2006 site study considered a store in Venice, CA, another suburb of Los Angeles, CA. Whole Foods examined every competitor for the proposed site, [REDACTED] which operated [REDACTED] with [REDACTED] which operated [REDACTED] with [REDACTED] which operated [REDACTED] store with [REDACTED] [REDACTED] which operated [REDACTED] with [REDACTED] which operated [REDACTED] with [REDACTED] and [REDACTED] which operated [REDACTED] with [REDACTED]
[REDACTED]

424. Today, Whole Foods and Wild Oats have 5 and 3 stores, respectively, in the Los Angeles-Santa Monica-Pasadena, CA area. Scheffman Report, Appendix F ¶¶ 169, 240.

425. Metropolitan Los Angeles is teeming with competition from many supermarkets and other grocery suppliers. Robb Decl. ¶¶ 42, 44; DX 497. Whole Foods and Wild Oats stores compete with [REDACTED]
[REDACTED]

[REDACTED] all within a six mile radius of one of the stores. Scheffman Report, Appendix F ¶¶ 174, 175, 178, 180, 181, 185, 189, 190, 244, 251, 252, 254, 255. The Santa Monica, Brentwood, Westwood, and West Los Angeles are in such close proximity to each other that many of these competitors compete with all four Whole Foods locations. DX 129 at

19 (mapping each Los Angeles Whole Foods competitor within a three-mile radius).

426. Competition in metropolitan Los Angeles has evolved as supermarkets have increased their stock of natural and organic foods and remodeled stores to offer Whole-Foods-like ambiance. For example, Vons, a Safeway brand, carries a full roster of O private label organic Safeway products. Scheffman Report, Appendix E ¶¶ 60, 64. It has also developed the Natural Market format, a store-within-a-store concept that showcases natural and organic foods. DX 440.

427. In Pasadena, Vons performed major renovations to expand its organic produce; add natural and organic grocery section; upgrade the bakery; and add an Asian express bar, hot bar, and salad bar fixtures. Besancon Decl. ¶ 44. Similarly, in Los Angeles, Vons converted one of its stores into a Vons Pavilion's marketplace, an upscale format which focuses on high-quality produce and prepared foods. Besancon Decl. ¶ 50; DX 531 (describing high-quality and diverse roster of prepared foods). Vons has also expanded its prepared foods section through the Eaturna delivery program. Scheffman Report, Appendix F ¶¶ 182, 256.

428. Ralph's, which is part of Kroger's, has converted nine stores – including one located across from Whole Foods in Pasadena – into Fresh Fares, a format that carries the Naturally Preferred line of organic private label products. Scheffman Report, Appendix F ¶¶ 177, 253; Besancon Decl. ¶ 43. Fresh Fare stores are visually appealing, featuring dark wood flooring and enhanced lighting, and include a new wet organic produce rack, two aisles of natural and organic foods, coffee stations, Asian express bars, sandwich bars, and cheese fixtures. Besancon Decl. ¶ 43; Scheffman Report, Appendix F ¶¶ 176, 252; *see also* DX 531 (noting efforts by Fresh Fair to use chefs to improve the quality of prepared foods).

429. Supervalu plans to convert a number of Albertson's stores in Southern California to

Sunflower organic supermarkets. Scheffman Report, Appendix F ¶¶ 185, 245. Additionally, Albertson's, much like Vons, is moving to an organic store within a store format. DX 440. Currently, Albertson's has vastly expanded their organic offerings. [REDACTED]

430. To retain sales, Whole Foods must watch the actions of its competitors closely. [REDACTED]

431. Whole Foods also regularly performs local Los Angeles-area price checks [REDACTED]

[REDACTED] The Los Angeles stores often comp shop local competitors individually. [REDACTED]

[REDACTED] The Whole Foods' Pasadena stores also regularly performs comp shops on a similar roster of competitors. DX 754, 764, 765. Whole Foods [REDACTED] in response to the comp shops. Boardman Decl. ¶ 49.

432. Responses by Whole Foods to growing competition are not limited [REDACTED]. Whole Foods has responded and continues to respond to this intense competition by expanding [REDACTED] and changing the product offerings [REDACTED]

[REDACTED]

433. Wild Oats does not constrain Whole Foods in metropolitan Los Angeles. Michael Besancon, the Southern Pacific Regional President for Whole Foods, which includes metropolitan Los Angeles explained that “[a]s in Pasadena, [Whole Foods] has found that the Wild Oats prices [REDACTED] [Whole Foods] prices” Besancon Decl. ¶ 51 (also noting that Whole Foods does not view Wild Oats as a “significant” competitor). Wild Oats’ stores are old, require remodeling, renovations, and improvements. Whole Foods does not compare Wild Oats more than once per quarter and it “rarely” adjusts prices because of Wild Oats. *Id.*

434. Competition in metropolitan Los Angeles is expected to grow. [REDACTED] plans to open multiple stores in the Los Angeles area by the end of 2007. Scheffman Report, Appendix F ¶ 179; DX 538 (describing nine California locations that [REDACTED] has selected for their first store openings). [REDACTED]

[REDACTED] Whole Foods executives have expressed concern [REDACTED]

[REDACTED] (highlighting the methods used by [REDACTED] to prepare itself for the West Coast market including building a dummy store inside a Warehouse for test-group shoppers in Santa Monica, CA).

10. Louisville, KY

435. In a 2002 site study, Whole Foods systematically examined future competitors in Louisville, KY. DX 80 at 14, 16, 61-73. At the time it was conducted, Wild Oats did not have a supermarket in Louisville. DX 80 at 16 (not listing Wild Oats among current studied competitors). Whole Foods examined every competitor for the proposed site, including [REDACTED] which operated [REDACTED] with [REDACTED] [REDACTED] which operated [REDACTED] with [REDACTED] [REDACTED] which operated [REDACTED] with [REDACTED] which operated [REDACTED] with [REDACTED] which operated [REDACTED] with [REDACTED] which operated [REDACTED] with [REDACTED] which operated [REDACTED] with [REDACTED] and [REDACTED] which operated [REDACTED] [REDACTED]

436. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] The site study projected about [REDACTED] of its sales to come from [REDACTED] from [REDACTED] from [REDACTED] and less than [REDACTED] from [REDACTED] remaining chains. DX 80 at 71.

437. To put the Louisville store in the best position to compete, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

438. In January 2003, a Wild Oats store opened in Louisville. Scheffman Rep., App. F at 57. [REDACTED]

439. After opening in February 2004, Whole Foods Louisville faced direct competition from numerous supermarkets and other retailers, [as was projected by its site analysis]. Kenneth Meyer, Regional President for Whole Foods in the Mid-Atlantic, which includes responsibility for Louisville, KY explained that “[w]e know that our [Louisville] customers shop our competitors’ stores too and we will lose sales to them if we do not remain competitive. Meyer Decl. ¶ 16; *see also* Meyer Decl. ¶ 6. Thus, Whole Foods in Louisville must compete aggressively to retain sales. Gallo Decl. ¶ 35 (“We compete aggressively on price with each [Louisville] competitor[], and we will continue to do so.”).

440. [REDACTED]

441. Analysis of entry by other firms confirms competition between Whole Foods and other food retailers. Sales at Whole Foods in Louisville dropped by [REDACTED] after [REDACTED] [REDACTED], which caused Whole Foods to adopt a strategy [REDACTED]

442. Thereafter, Whole Foods “rigorously assessed” its store against these competitors. Meyer Decl. ¶ 14. It conducted “comp shops” or price-checks against them. Meyer Decl. ¶ 5 [REDACTED]

[REDACTED]

443. Whole Foods competitors in Louisville also comp shop or price check Whole Foods. Kroger, Costco, and Fresh Market send their personnel to assess Whole Foods regularly. Meyer Decl. ¶ 14 (noting that “any lack of attention to quality or competitive pricing on our [Whole Foods’] part would be immediately known to our competitors, and we [Whole Foods] would lose sales as a result.”); JX 10 at 125 (Meyer Dep.).

444. Competition in Louisville, KY is dynamic as supermarkets and superstores continue to adapt to capture their share of growing natural and organic food demand. Fresh Market advertises “premium-priced” perishables, but at a lower price. Scheffman Rep., App. F at 58; *see also* Meyer Decl. ¶ 11; JX 10 at 111-12 (Meyer Dep.) (noting that Fresh Market recruited three former Whole Foods employees and now its perishable look similar to Whole Foods). Meijers is now selling organic products as well; new Kroger stores in Louisville are equipped with energy conservation to appeal to ecologically conscious consumers. Scheffman Rep., App. F at 59-60.

445. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

446. By contrast, Whole Foods does not regard Wild Oats as a significant competitor, noting that it has “had little occasion to need to compete – or pay much attention at all, for that matter – to the Wild Oats store in Louisville. That store has not adapted to the marketplace and displays insufficient innovation or energy to cause us concern.” Meyer Decl.

¶ 12; JX 10 at 108-09 (Meyer Dep.). Kenneth Meyer described Whole Foods' view of Wild Oats when he explained that

Our experience with Wild Oats in Louisville, and most other areas in my region where we both operate, is that their [REDACTED], and that our true competition on price and other factors is the multitude of other grocery retailers in those areas – and not Wild Oats.

Meyer Decl. ¶ 13.

447. Whole Foods has made similar observations in different points in time. DX 221 (explaining that a tour of nearby Wild Oats revealed that the store “was in really bad shape,” that “they aren’t doing much of anything with the rest of their pricing,” and that “it was one of the worst Oats he [REDACTED] had ever seen.”). Whole Foods even eliminated a program aimed at matching Wild Oats prices because it proved to be unnecessary. This program, which was implemented shortly after the Whole Foods store opened, was dropped quickly “because so very few customers ever brought such lower Wild Oats prices to our attention.” Meyer Decl. ¶ 13.

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

449. But competition in Louisville is already intense and is expected to intensify. Gallo

Decl. 35 (competition in this area [Louisville, KY] is intense.”). Kroger plans to open a Marketplace store – which is like a supercenter – in Louisville, Kentucky that will have “expanded sections for organic and natural foods, wine and specialty cheeses.” Scheffman Rep., App. F at 60 (quoting a March 2007 article in The Courier-Journal). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

450. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

11. Omaha, NE

451. In 2003, Whole Foods analyzed a proposed site for a new store in Omaha, NE. The report analyzed each potential competitor, including [REDACTED] which operated [REDACTED] with [REDACTED] which operated [REDACTED] with [REDACTED] [REDACTED] which operated [REDACTED] with [REDACTED] [REDACTED] which operated [REDACTED] with [REDACTED] which operated [REDACTED] with [REDACTED] which operated [REDACTED] with [REDACTED] [REDACTED] which operated [REDACTED] with [REDACTED] [REDACTED] and [REDACTED] which operated [REDACTED] with [REDACTED].

452. Whole Foods opened only one store in Omaha, NE; Wild Oats also operates one store in the area. Scheffman Report, Appendix F ¶ 221. The Whole Foods and Wild Oats stores in the Omaha area compete with at least seven supermarket chains [REDACTED] [REDACTED] and other retailers offering natural foods including [REDACTED] and several farmer's markets. Bradley Decl. ¶ 18; Martin Decl. ¶ 17; Scheffman Report, Appendix F ¶ 224.

453. After Whole Foods opened its store in Omaha in September 2005, the nearby [REDACTED] supermarket responded with a major renovation and increased promotion of natural and organic foods. Bradley Decl. ¶ 18; Robb Decl. ¶ 43; *see also* DX 447; Scheffman Report, Appendix F ¶ 235; DX 211 at 12 ([REDACTED] is pricing aggressively against [Whole Foods] and has recently undergone a major renovation, adding areas with more of a WFM

458. Price checking practices of Whole Foods Omaha confirms competition with supermarkets. Whole Foods routinely price checks [REDACTED] in the Omaha area to remain competitive with these stores. Bradley Decl. ¶ 11; DX 286 [REDACTED] DX 297 [REDACTED] DX 325 [REDACTED] DX 468 [REDACTED].

12. Portland, ME

459. Whole Foods and Wild Oats both have one store in the Portland, ME area. Scheffman Report, Appendix F ¶ 307. Whole Foods and Wild Oats face substantial competition in Portland, ME from [REDACTED]

[REDACTED] feature locally grown produce and sell a significant amount of natural and organic foods, providing customers with a number of choices when it comes to purchasing healthy foods. Scheffman Report, [REDACTED]; Gallo Decl. ¶ 33.

460. The site report demonstrates that Whole Foods expected supermarkets, and not Wild Oats, would be its principal rivals. According to the Whole Foods Portland, ME site study, Whole Foods expected [REDACTED] of its average weekly sales would be captured from Wild Oats supermarkets other than Wild Oats, [REDACTED]. DX 171 at 6, 39; Lannon Decl. ¶ 23 (noting that Whole Foods expected sales to come from [REDACTED])

461. Today, Portland, ME shoppers have many choices for natural and organic foods. Gallo Decl. ¶ 33 (observing that [REDACTED] and others each sell “significant” natural and organic foods.). Many of the [REDACTED] stores in Portland have a department dedicated to selling their

private label organic product line, [REDACTED] in which customers can find natural meat, grocery, dairy and frozen food. Scheffman Report, [REDACTED]. All of the [REDACTED] stores in Portland have a signature “Wine Market” offering periodic wine tastings. Scheffman Report, [REDACTED]. In addition, two of the Portland [REDACTED] offer their branded [REDACTED] prepared foods service. Scheffman Report, [REDACTED]

462. [REDACTED] stores in Portland, in addition to having independent meat and fish counters, also “offer upscale prepared foods, including a line of natural single serve prepared foods called [REDACTED] Scheffman Report, [REDACTED]. [REDACTED] recently become a “Certified Organic Grocer” like Whole Foods, a distinction not enjoyed by Wild Oats. Scheffman Report, [REDACTED]; Gallo Decl. ¶ 33.

463. Despite the presence of Wild Oats in Portland, ME, Whole Foods considers [REDACTED] its primary competitor in the area. DX 277 (e-mail from Whole Foods North Atlantic Regional President explaining that “[w]e are focusing on [REDACTED] which are the true competitors in the market.”); Lannon Decl. ¶ 24 ([REDACTED] – not Wild Oats [is] by far Whole Foods’ primary competitor.”); see Gallo Decl. ¶ 33.

464. [REDACTED]
[REDACTED]
[REDACTED]

465. The rivalry in Portland between Whole Foods and [REDACTED] underlies the actions [REDACTED] took in response to Whole Foods entry into Portland, ME. In preparation for the Whole Foods 2007 entry, [REDACTED]
[REDACTED]

[REDACTED]

466. Whole Foods observed that [REDACTED] had expanded their organic offerings and doubled the size of their natural foods department. Lannon Decl. ¶ 24. Additionally, Whole Foods identified [REDACTED] as a competitor who is expected to impact Whole Foods' 2007 margins at the Portland store. DX 61.

467. The competition between Whole Foods and [REDACTED] also plays out in comp shops that each chain performs on the other, and the price adjustments that result. Whole Foods comp shops [REDACTED] regularly. DX 337. [REDACTED]

[REDACTED]

[REDACTED]

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

area.”); Gallo Decl. ¶ 33 (noting that “Whole Foods has not spent much time price-checking the Portland, Maine Wild Oats store because I believe, on average, the Whole Foods’ prices are [REDACTED] Portland Wild Oats store.”).

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

13. Portland, OR

470. Prior to opening its downtown Portland, OR store in March 2002, Whole Foods analyzed the Portland competitive environment in a 2000 site study. Megahan Decl. ¶ 9; DX 638 at 8, 38-40, 49-62, 78-79. For the Portland market, Whole Foods examined all [REDACTED] competing stores among [REDACTED] different rivals, including [REDACTED] which operated [REDACTED] [REDACTED] with total area sales of [REDACTED] which operated [REDACTED] [REDACTED] with total area sales of [REDACTED] which operated [REDACTED] with total area sales of [REDACTED] which operated [REDACTED] with total area sales of [REDACTED] which operated [REDACTED] with total area sales of [REDACTED] which operated [REDACTED] with total area sales of [REDACTED] which operated [REDACTED] with total area sales of [REDACTED] [REDACTED]

471. Whole Foods' Lake Oswego (an area in greater Portland) store opened in Fall 2006. Meghan Decl. ¶ 14. Again, in a 2004 site study completed prior to the store's opening, Whole Foods analyzed the surrounding competitive environment and individual competitors, including [REDACTED] which operated [REDACTED] with total area sales of [REDACTED] which operated [REDACTED] with total area sales of [REDACTED] which operated [REDACTED] with total area sales of [REDACTED] which operated [REDACTED] with total area sales of [REDACTED] which operated [REDACTED] with total area sales of [REDACTED] which operated [REDACTED] with total area sales of [REDACTED] which operated [REDACTED] with total area sales of [REDACTED] and [REDACTED] Wild Oats, which operated [REDACTED] with total area sales of [REDACTED]. DX 239 at 35, 37-45; *see also* DX 189 (June 2004 site report for East Portland, OR, analyzing Portland competitors); DX 190 (February 2006 site report for Tanasbourne, OR, analyzing Portland competitors).

472. Today, Wild Oats Lake Oswego store is not perceived by Whole Foods as a competitive threat. *See* DX 55 at 3; Meghan Decl. ¶ 24. This Wild Oats store has had no notable retail concepts and no meaningful effect on Whole Foods' prices in its downtown Portland store. Meghan Decl. ¶ 25

473. Whole Foods currently "faces stiff competition" from Portland supermarkets, which are offering a wider range of natural and organic products. DX 213 at 10; JX 2 at 110 (Robb dep.). Operating within just six miles from the downtown store are [REDACTED]

[REDACTED] In addition, [REDACTED] is about eight miles from the downtown store. Meghan Decl. ¶ 7. Similarly, Whole Foods' Lake Oswego store faces intense competition from a number of supermarkets within about six miles: [REDACTED] [REDACTED] and several individual stores including [REDACTED]

474. [REDACTED] is a strong competitor with Whole Foods in Portland, OR. The [REDACTED] located near Whole Foods' downtown Portland store has been completely remodeled, and the downtown store's sales for the time coincident with the [REDACTED] renovation are down by [REDACTED]. This decline in sales, attributable to competition from [REDACTED] interrupted an upward trend in the downtown store's sales performance. [REDACTED]

475. [REDACTED] has quickly expanded to [REDACTED] stores in the Portland area. It has an extensive selection of natural and organic products. Meghan Decl. ¶ 31. Whole Foods considers [REDACTED] to be a tough supermarket competitor. *Id.* at 27-29; DX 55; DX 512.

476. Whole Foods regards Wild Oats as an especially "weak" competitor in Portland. Robb Decl. ¶ 46; Meghan Decl. ¶ 26. While Portland-area competitors [REDACTED] [REDACTED], were all identified by Whole Foods as "key" competitors in the Pacific Northwest Region, Wild Oats was not so identified. DX 496; Meghan Decl. ¶ 21.

477. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

478. Whole Foods engages in comp shops against Portland competitors, which include

[REDACTED]

479. [REDACTED]

[REDACTED]

Whole Foods' competitors also examine Whole Foods' prices and practices. [REDACTED]

[REDACTED]

480. [REDACTED]

[REDACTED]

[REDACTED]

14. St. Louis, MO

481. Prior to its entry into St. Louis, Whole Foods conducted a comprehensive analysis of the competitors in the market. Whole Foods studied every competitor in the market and mapped the proximity of each competitor store to the proposed site. DX 104 at 10, 47, 49-60. Among the competitors reviewed were [REDACTED] which operated [REDACTED] area supermarkets with [REDACTED] of total area sales [REDACTED] which operated [REDACTED] area supermarkets with [REDACTED] of total area sales [REDACTED] which operated [REDACTED] area supermarkets with [REDACTED] of total area sales [REDACTED] which operated [REDACTED] area supermarkets with [REDACTED] of total area sales [REDACTED] Whole Foods, which already operated [REDACTED] area supermarket with [REDACTED] of total area sales; and [REDACTED] Wild Oats, which operated [REDACTED] area supermarket with [REDACTED] of total area sales. DX 104 at 10.

482. In analyzing the potential St. Louis site, Whole Foods projected future store volume as a function of market demographics and the competitive context. These projections accounted for all competitors in the market, and included store specific factors [REDACTED]

[REDACTED]

Today, Whole Foods and Wild Oats have one supermarket each in the St. Louis area. The Whole Foods store is commonly referred to in company documents as [REDACTED]

[REDACTED] The Whole Foods and Wild Oats stores in the St.

Louis area compete with at least [REDACTED] supermarket chains [REDACTED]

[REDACTED] specialty health, natural and gourmet stores [REDACTED]

[REDACTED], and [REDACTED] large farmer's market [REDACTED]

[REDACTED]

483. ██████████ supermarkets have well-developed images as upscale stores with strong service. ██████ stores have been aggressively expanding, remodeling, and relocating. Bradley ¶ 22; DX 104 at 10.

484. ██████████ have created organic and natural sets in their stores within the last eighteen to twenty-four months. ██████ stores began heavily promoting these new products beginning in January 2006. Bradley Decl. ¶ 22; *see also* Scheffman Report, Appendix F ¶¶ 323-24.

485. ██████████ has recently established a private label organic and all-natural product line called ██████████ throughout its Midwestern stores. The new line, which is merchandised through specialty displays, includes cereals, milk, pastas, peanut butter, soymilk, coffee and teas. Scheffman Report, Appendix F ¶ 326.

486. The combination of new, heavily promoted organic lines and aggressive pricing by ██████████ has contributed to the ██████ store having sales far below plan within the last year. Sales in the meat, seafood and produce departments of the ██████ store experienced the biggest negative impact as a result of this competition. DX 224; *see* Bradley Decl. ¶ 23; JX 6 at 80-81 (Bradley Dep.).

487. ██████████ entered the St. Louis, MO area in 2004 and currently has ██████ stores. ██████████ Whole Foods knew its customers would also shop ██████████ once opened. Whole Foods sought to give such customers less reasons to shop ██████████ by having a general rule to not be beat on price. DX 403. Nevertheless, ██████████ entry contributed to sales at the Whole Foods ██████ store dropping from double-digit comps (comparative sales for a particular period compared to the prior year) to single-digit comps. Bradley Decl. ¶ 23; JX 6 at 81 (Bradley Dep.); *see also* DX 402 at 2 (“The competitive openings impacted sales ██████████ and hit hardest ██████████”).

[REDACTED]

488. Whole Foods routinely price checks [REDACTED] in the St. Louis area to remain competitive with these stores. Bradley Decl. ¶ 11; Robb Decl. ¶ 47; DX 290 [REDACTED]; DX 294 [REDACTED] DX 330 [REDACTED] DX 464 [REDACTED].

15. West Hartford, CT

489. In August 2002, Whole Foods studied the possibility of opening a store in West Hartford, CT. DX 636. The study examined competition from each of the [REDACTED] other competing supermarkets surrounding the West Hartford site, including [REDACTED] which operated [REDACTED] area supermarket with [REDACTED] which operated [REDACTED] area supermarket with [REDACTED] which operated [REDACTED] area supermarket with [REDACTED] who operated [REDACTED] area supermarket with [REDACTED] Wild Oats, who operated [REDACTED] area supermarket with [REDACTED] [REDACTED] which operated [REDACTED] area supermarket with [REDACTED] and [REDACTED] which operated [REDACTED] area supermarket with [REDACTED]

490. The site survey analyzed many dimensions of competition of surrounding supermarkets and food retailers, [REDACTED] [REDACTED] The report projected that Whole Foods would capture [REDACTED] of its average weekly sales from non-Wild Oats supermarkets, such as [REDACTED] [REDACTED]

491. Whole Foods opened its store in West Hartford in October 2005. Scheffman Report, Appendix F ¶ 330. Currently Whole Foods and Wild Oats each have one store in West Hartford. Scheffman Report, Appendix F.

492. Whole Foods and Wild Oats face significant competition in West Hartford, including

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] These

competitors offer natural and organic products that will continue to compete with Whole Foods.

Gallo Decl. ¶ 34.

493. [REDACTED] offers locally grown produce, organic food and prepared food items. Scheffman Report, [REDACTED] [REDACTED] offers 100 products via it own brand of natural and organic foods. Scheffman Report, [REDACTED] [REDACTED] offers natural, organic and gourmet products through its [REDACTED] brand. Scheffman Report, [REDACTED] Several [REDACTED] [REDACTED] are undergoing renovations to include more natural and organic offerings. Scheffman Report, [REDACTED]

494. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

495. Whole Foods' competition within a variety of chain supermarkets is demonstrated by the comp shops it regularly performs on its competitors, including [REDACTED] [REDACTED] (comp shop with [REDACTED]); [REDACTED] (comp shop with [REDACTED])

16. Fairfield County, CT (potential competition)

499. Fairfield County, CT (as opposed to the town of Fairfield, CT) is an unevenly shaped area located in the southwestern corner of Connecticut that covers 626 square miles. DX 806. Within Fairfield County, there is one Wild Oats. DX 170 at 30. Whole Foods has two stores under construction in Fairfield County, one in Darien, CT (expected to open spring 2008), and the other in Fairfield, CT, (expected to open late 2008). DX 169; DX 170; Gallo Decl. ¶ 39.

500. Whole Foods conducted site selection studies for each store. In 2005, the site report for Darien, CT studied each potential competitor. DX 170 at 7-8, 14-16, 42, 44-52. The review included the following supermarkets and other stores: [REDACTED] which operated [REDACTED] area supermarkets with [REDACTED] which operated [REDACTED] area supermarkets with [REDACTED] which operated [REDACTED] area supermarket with [REDACTED] which operated [REDACTED] area supermarkets with [REDACTED] which operated [REDACTED] area supermarkets with [REDACTED] which operated [REDACTED] area supermarkets with [REDACTED] which operated [REDACTED] area supermarkets with [REDACTED] Wild Oats, which operated [REDACTED] area supermarket with [REDACTED] which operated [REDACTED] area supermarkets with [REDACTED] which operated [REDACTED] area supermarket with [REDACTED] which operated [REDACTED] area supermarket with [REDACTED] and [REDACTED] which operated [REDACTED] area supermarket with [REDACTED]

501. Whole Foods requested the analysis of many dimensions of competition for each local food retailer [REDACTED]

██████████ The site study projected that, in addition to taking sales away from its Greenwich, CT store, most of its sales would come from conventional supermarkets. ██████████ (projecting that about ██████████ its sales would be taken from ██████████ from each of ██████████ and ██████████ and less than ██████████ from each of the remaining chains.).

502. Whole Foods projected that it would take only ██████████ from Wild Oats, about ██████████ of the amount of sales Whole Foods was willing to cannibalize from its own Greenwich store. DX 170 at 8 (site report estimated that the Greenwich, CT store would lose ██████████ in sales to a new store in Darien, CT).

503. Whole Foods continued to monitor its competitors, estimating sales volume from prospective Darien competitors such as ██████████ DX 787. Whole Foods has also been qualitatively assessing its competitors and customer base. DX 801; DX 788; DX 789; DX 790.

504. Likewise, in 2005, Whole Foods conducted a site study for a Fairfield, CT, store location. Again, Whole Foods undertook a review of existing supermarkets and other retailers against which it would compete. DX 169 at 7-8, 13-14, 25, 36-46. The site report included an analysis of: ██████████ which operated ██████████ area supermarkets with ██████████ which operated ██████████ area supermarkets with ██████████ which operated ██████████ area supermarket with ██████████ which operated ██████████ area supermarkets with ██████████ ██████████ which operated ██████████ area supermarket with ██████████ which operated ██████████ area supermarket with ██████████ which operated ██████████ area supermarket with ██████████ ██████████

505. Once again, Whole Foods conducted significant analysis on every prospective

competitor, [REDACTED]

[REDACTED] Notably, the site report did not even list Wild Oats as a potential competitor and did not report about the competitive dimensions of its nearby store. DX 169.

17. Miami Beach, FL (potential competition)

506. In two site selection studies, reviewed competition metropolitan Miami. In April 2002, Whole Foods evaluated a site in Coral Gables, FL, a Miami suburb, reviewing each neighboring competitor, including: [REDACTED] which operates [REDACTED] supermarkets in the area with [REDACTED] [REDACTED] which operates [REDACTED] area supermarkets with [REDACTED] [REDACTED] which operates [REDACTED] area supermarkets with [REDACTED] Wild Oats, which operates [REDACTED] supermarket with [REDACTED]

507. In January 2004, Whole Foods again examined the Miami competitive market. A systematic study of the location, 8 miles north of Coral Gables, Whole Foods reviewed each neighboring competitor in downtown Miami, FL, including: [REDACTED] which operates [REDACTED] area supermarkets with [REDACTED] [REDACTED] which operates [REDACTED] area supermarkets with [REDACTED] Wild Oats, which operates [REDACTED] supermarket with [REDACTED] [REDACTED] which operates [REDACTED] area supermarket with [REDACTED]

508. Whole Foods also considered [REDACTED] as competitors in their mapping activities. DX 116 at 12, 22, 24, 40-48. [REDACTED] stores have two location in the downtown Miami area. *Id.*

509. Today, Whole Foods plans to open a store in Miami, FL in late 2009. This store will compete with several established supermarkets, including [REDACTED]

[REDACTED] Wild Oats' current competitors include [REDACTED]
[REDACTED]

18. Naples, FL (potential competition)

510. In 2004, Whole Foods evaluated the competitive landscape of Naples, FL to determine the suitability of a potential store location. DX 120 at 6-7, 36. At the time it was conducted, Wild Oats did not have a supermarket in Naples. DX 120 at 7, 36 (not listing Wild Oats among current studied competitors). Whole Foods examined every competitor for the proposed site, including [REDACTED] which operated [REDACTED] area supermarkets with [REDACTED] [REDACTED] which operated [REDACTED] area supermarkets with [REDACTED] [REDACTED] which operated [REDACTED] area supermarkets with [REDACTED] which operated [REDACTED] area supermarket with [REDACTED] which operated [REDACTED] area supermarket with [REDACTED] which operated [REDACTED] area supermarket with [REDACTED] which operated [REDACTED] area supermarket with [REDACTED]

511. Currently, Whole Foods plans to open a store in Naples, Florida in early 2008. This store will compete with stores operated by [REDACTED] [REDACTED] Wild Oats' store in Naples competes against [REDACTED]

512. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

513. [REDACTED]
[REDACTED]

[REDACTED]

514. [REDACTED]

[REDACTED]

19. Nashville, TN (potential competition)

515. In its 2004 site study, Whole Foods analyzed, systematically, each potential competitor in Nashville, TN, including [REDACTED] which operated [REDACTED] area supermarkets with estimated sales volume totaling approximately [REDACTED] which operated [REDACTED] area supermarkets with estimated sales volume totaling approximately [REDACTED] which operated [REDACTED] area supermarket with estimated sales volume totaling approximately [REDACTED] [REDACTED] which operated [REDACTED] area supermarket with estimated sales volume totaling approximately [REDACTED] [REDACTED] which operated [REDACTED] area supermarkets with estimated sales volume totaling approximately [REDACTED] which operated [REDACTED] area supermarkets with estimated sales volume totaling approximately [REDACTED] [REDACTED]

516. Whole Foods currently plans to open its store in Nashville in November 2007. Allshouse Decl. ¶ 12. Wild Oats currently has one store in Nashville. Scheffman Report, Appendix F ¶ 207.

517. After Whole Foods opens its Nashville store, Whole Foods and Wild Oats will compete with [REDACTED]

items under the [REDACTED] label introduced over [REDACTED] years ago. Allshouse Decl. ¶ 26; Scheffman Report, Appendix F ¶ 216. The number of natural or organic products available at [REDACTED] stores is expanding every day. Allshouse Decl. ¶ 26. [REDACTED] private label products include chicken, canned vegetables, dairy products, juices, paper goods and snacks. DX 67 (from [REDACTED] website); Scheffman Report, [REDACTED]

522. [REDACTED] is also a strong competitor in Nashville. Allshouse Decl. ¶ 19. [REDACTED] offers a wide range of organic produce, including organic private label products through [REDACTED] and [REDACTED] such as: shrimp, burgers, cereal, honey, rice, pasta sauce, pasta, canned vegetables and canned fruit. Allshouse Decl. ¶ 19; JX 4 at 31 (Allshouse Dep.).

523. The Nashville [REDACTED] also carries a large variety of natural and organic items. Scheffman Report, Appendix F ¶ 210; Allshouse Decl. ¶ 18. Generally, [REDACTED] have excellent rotisserie/prepared foods offerings. Allshouse Decl. ¶ 18. [REDACTED] have recently upgraded their perishable foods and seafood programs. Allshouse Decl. ¶ 18. In the produce department, [REDACTED] has created a “Whole Foods-type” feel with produce bins and wet racks that resemble those used at Whole Foods. Allshouse Decl. ¶ 18.

524. [REDACTED] has [REDACTED] stores in Nashville that compete with Wild Oats and will compete with Whole Foods. Allshouse Decl. ¶ 21; Scheffman Report, Appendix F ¶ 213. Recently, [REDACTED] opened an [REDACTED] downtown Nashville that carries a large number of natural and organic products as well as prepared foods. Allshouse Decl. ¶ 21; [REDACTED]
[REDACTED]

20. Palo Alto, CA (potential competition)

525. Whole Foods analyzed several sites as part of its aggressive, complex 2005 plan to add [REDACTED] stores in Santa Clara Valley, California. This analysis involved a systematic examination of all future competitors in the region. DX 141 at 8-10, 15, 56-59. [REDACTED]

[REDACTED] The site selection study reflected a regional approach to the Santa Clara Valley and, therefore, examined competition in the broader region and not by proposed site. Whole Foods examined every competitor in the Santa Clara Valley, including, among others [REDACTED] which operated [REDACTED] area supermarkets with [REDACTED] [REDACTED] which operated [REDACTED] area supermarkets with [REDACTED] which operated [REDACTED] area supermarkets with [REDACTED] which operated [REDACTED] area supermarkets with [REDACTED] and (5) [REDACTED] which operated [REDACTED] area supermarkets with [REDACTED] There was no Wild Oats stores in the region.

DX 141 at 9.

526. In reviewing competition with future competitors, Whole Foods accumulated a large collection of competitive intelligence on each store competing in the area, [REDACTED] [REDACTED] Whole Foods also estimate the sales volume and competitive impact of the opening of three new stores in the Santa Clara Valley, including a store in Mountain View. DX 141 at 10, 15. Whole Foods estimated its future sales volumes and the volume of sales drawn from each competitor. Whole Foods projected that its new stores would compete directly against [REDACTED] and would take the majority of its sales from conventional chain grocery stores. Specifically, Whole Foods estimated that [REDACTED] of

its additional sales would come from [REDACTED] stores and that [REDACTED] of its additional sales volume would come from [REDACTED]

527. Today, Whole Foods operates one store in Palo Alto, California. Whole Foods operates several more stores nearby, including Cupertino, CA and Los Altos, CA. The Palo Alto store was the first Whole Foods store in Northern California, built in 1989. JX 29 at 11-12 (Robb I.H.).

528. In metropolitan Palo Alto, CA, Whole Foods competes with stores operated by [REDACTED] Potential entry from Wild Oats would not impact competition in the Palo Alto area.

529. [REDACTED] is a particularly strong competitor in the region, and has converted [REDACTED] area stores also stock [REDACTED] private label organic products. [REDACTED] Whole Foods checks prices against [REDACTED]

21. Reno, NV (potential competition)

530. Wild Oats currently operates one store in Reno, Nevada. Whole Foods plans to open a store in Reno in late 2007. Robb Decl. ¶ 51. This store is projected to have an average weekly volume of nearly [REDACTED] during its first year, and an estimated [REDACTED] of area sales for the trade area. DX 125 at 12.

531. Competition for the sale of retail food in Reno, NV is robust. In a 2004 location analysis, Whole Foods systematically examined future competitors in the Reno market. DX 125. Whole Foods examined every competitor near the proposed site, including [REDACTED] which

operated █ area supermarkets with a █ which operated █ area supermarkets with █ which operated █ area supermarkets with █ which operated █ area supermarkets with █ which operated █ area supermarkets with a █ which operated █ area supermarkets with a █ which operated █ area supermarket with a █ which operated █ area supermarkets with a █ Wild Oats, which operated █ area supermarket with a █ and █ which operated █ area supermarket with a █ As of 2004, Wild Oats had the second smallest of area sales in metropolitan Reno. *Id.*

532. Wild Oats currently competes with █
█

Each of these stores now offers a variety of natural and organic products. Robb Decl. ¶ 51.

22. Salt Lake City, UT (potential competition)

533. In considering a potential site in Salt Lake City, UT, Whole Foods commissioned a site study that reviewed each competitor. DX 184 at 9-10, 16, 28, 40, 42-50. The analysis covered the following supermarkets and other stores: [REDACTED] which operated [REDACTED] area supermarkets with [REDACTED] which operated [REDACTED] area supermarkets with [REDACTED] which operated [REDACTED] area supermarkets with [REDACTED] which operated [REDACTED] supermarkets with [REDACTED] which operated [REDACTED] area supermarket with [REDACTED] which operated [REDACTED] area supermarket with [REDACTED] Wild Oats, which operated [REDACTED] area supermarkets with [REDACTED] which operated [REDACTED] area stores with [REDACTED] which operated [REDACTED] store with [REDACTED]

534. Whole Foods plans to open a store in Salt Lake City, UT [REDACTED] [REDACTED] In addition to Wild Oats, Whole Foods will compete with the following [REDACTED] supermarkets and food retailers in Salt Lake City [REDACTED] [REDACTED] Each of these stores offers a variety of natural and organic products and will provide strong competition to Whole Foods. Robb Decl. ¶ 52. Wild Oats' current competitors in Salt Lake City include [REDACTED] [REDACTED]

I. Competitive Effects in Overlap Markets Where the Wild Oats Store May be Closed

535. Dr. Murphy has not conducted any direct test of whether Wild Oats imposes unique constraints on Whole Foods that will disappear as a result of the proposed transaction. Murphy Report ¶ 63; 7/31 Hearing Tr. at 34.

536. One direct test of whether Wild Oats imposes unique constraints on Whole Foods that will disappear as a result of the transaction is to compare the prices Whole Foods charges in markets in which it is the only “premium natural and organic supermarket” to the prices Whole Foods charges in markets in which two or more “premium natural and organic supermarkets” compete.

537. Another direct test of whether Wild Oats imposes unique constraints on Whole Foods that will disappear as a result of the proposed transaction is to study the effect of Wild Oats banner entry or banner exit on Whole Foods’ prices. Murphy Report at ¶ 63.

538. Dr. Murphy did not conduct either of these two types of direct tests. Dr. Scheffman conducted the former and found no systemic or systematic difference in prices charged by Whole Foods.

539. There is no direct evidence of the effect of Wild Oats’ banner entry or banner exit on Whole Foods’ prices, margins or sales. Murphy Report at ¶ 63.

540. Dr. Murphy reached his conclusions without any economic analysis of the effect of Wild Oats banner exit on Whole Foods prices, margins or net sales. 7/31 Hearing Tr. at 35.

541. Dr. Murphy reached his conclusions without any economic analysis of the effect of Wild Oats banner entry on Whole Foods prices, margins or net sales. 7/31 Hearing Tr. at 28.

542. That is because there have not been any banner entry events by Wild Oats within the 5 mile radius identified by Dr. Murphy. Murphy Report ¶ 63; JX 26 at 169-70; 7/31 Hearing Tr. at 36-38.

543. Dr. Murphy excluded from his studies all Wild Oats stores that were smaller than 25,000 square feet. 7/31 Hearing Tr. at 29. Smaller, older Wild Oats stores are not competitively significant. 7/31 Hearing Tr. at 29. There were two banner exit events by Wild Oats that explicitly met Dr. Murphy's criteria of a store of at least 25,000 sq. ft. and within 5 miles of Whole Foods. DX 589; 7/31 Tr. at 89-92.

544. There were two additional banner exit events by Wild Oats that were just under the 25,000 square foot threshold or just over 5 miles away. DX 589; 7/31 Tr. at 91-94.

545. Dr. Murphy did not study directly the effect of any Wild Oats' exit event on the prices charged by Whole Foods. 7/31 Hearing Tr. at 89-94.

546. Dr. Murphy did not study directly the effect of any Wild Oats' exit event on the margins earned by Whole Foods. 7/31 Hearing Tr. at 89-94.

547. Dr. Murphy did not study directly the effect of any Wild Oats' exit event on the net sales generated by Whole Foods. 7/31 Hearing Tr. at 89-94.

548. Dr. Murphy chose not to study any Wild Oats exit events even though acknowledging that such events provide a direct test of whether Wild Oats constrains Whole Foods. Murphy Report ¶ 63.

549. Dr. Murphy did not study directly whether Wild Oats imposes any unique constraint on Whole Foods that will be lost as a result of the transaction. 7/31 Hearing Tr. at 89-94.

550. Dr. Murphy could have studied the effect of Wild Oats banner exit in Ft. Collins, Colorado on Whole Foods' prices. At his deposition on July 17, Dr. Murphy testified that he had begun such a study, and that he could finish it with one additional day of work. JX 26 at 183.

551. At the hearing in this matter, Dr. Murphy testified that he did not have sufficient post-exit data to complete his study of the Ft. Collins, Colorado exit by Wild Oats. 7/31 Hearing Tr. at 90. Although Dr. Murphy claimed that he could not study the effect of the Wild Oats exit in Ft. Collins because he did not have data after the exit, in fact he had price data for Whole Foods' Ft. Collins store encompassing the 5 1/2 months following Wild Oats' exit from Ft. Collins. DX 589; Murphy Report ¶ 55.

552. Dr. Murphy's testimony at the hearing conflicts with his deposition testimony, where he observed that, although the amount of data post-exit was relatively limited, one could learn something about the effect of Wild Oats' exit on Whole Foods' prices with just "a few months" of post-exit price data. JX 26 at 171-172.

553. Dr. Murphy's testimony at the hearing on his reasons for not studying the effect of Wild Oats' Ft. Collins exit is not credible. Dr. Murphy studied other events for which he had less post-event data when he chose to do so. For example, Dr. Murphy studied the effect of Whole Foods' entry on Wild Oats' prices in Portland, ME and Tualatin, OR when he had 6 months or less of post-entry data. Murphy Report, Ex. 5.

554. Uncontroverted evidence establishes that Whole Foods did not raise prices in Ft. Collins after Wild Oats' exit, and it was constrained from doing so by a King Sooper supermarket in the same parking lot. JX 31 at 239-42; Paradise Decl. ¶ 52; 7/31 Hearing Tr. at 90-91.

J. Analyses of the effect of Whole Foods Entry on Wild Oats' Margins, Net Sales and Prices are Neither Reliable nor Relevant

1. Margins are not prices

555. The central concern of the Merger Guidelines is with the impact of competition on prices. Murphy Report at ¶ 54; 7/31 Hearing Tr. at 21. Dr. Murphy's reliance on analyses of margins is not based on sound methodology in economics, accounting, and financial analysis. Scheffman Rebuttal Report ¶ 15 Any effects inferred from margins, however defined and estimated, are relevant only if a valid inference can be made about prices from margins. Reliable inferences about prices cannot be made from margins alone. Scheffman Rebuttal Report ¶ 16.

556. Dr. Murphy's analyses of margins are based on analyses of (his estimates of) gross margin, which is an estimate of the difference between a supermarket's revenues from sales of goods and the cost of goods sold, expressed as a fraction of revenues. Murphy Report ¶ 50. Gross margin would not include, for example, labor costs and lease costs, which are substantial costs for a supermarket. Scheffman Rebuttal Report ¶ 18.

557. Dr. Murphy makes inferences from changes in margin without attempting to control for product mix. Scheffman Rebuttal Report ¶ 28. This methodology is invalid because it may a fall in gross margin can be due entirely to changes in product mix. Scheffman Rebuttal Report ¶ 27. That is, because different products have different margins, a mere change in the mix of products sold at a supermarket can result in that store having a decline in margins that has nothing to do with changes in prices. Scheffman Rebuttal Report ¶ 26.

558. Dr. Murphy's margin analyses also do not account for changes in variable and fixed costs since

559. his analyses assume that unit costs are constant. Murphy Report ¶ 54. As Dr. Murphy admits, changes in margins can be a misleading indicator of price effects if unit costs in a

supermarket are not constant. Murphy Report ¶ 55; 7/31 Hearing Tr. at 25. Indeed, changes in costs can affect margins without any change in selling prices. Scheffman Report ¶¶ 29, 32.

560. For example, shrink occurs when a product is lost and does not go out for sale. 7/31 Hearing Tr. at 57; JX 26 at 43. Shrink may be expected to rise after significant competitive entry. 7/31 Hearing Tr. at 57. Wild Oats does not uniformly track partial shrink, which occurs when a product is substantially discounted for sale. Martin Suppl. Dec ¶ 3, 4, 5. Dr. Murphy deducted the impact of known shrink on margins before running his regressions. 7/31 Hearing Tr. at 58. Dr. Murphy was unable to deduct the impact of unknown or partial shrink on margins before running his regressions because Wild Oats did not systematically track the impact of unknown or impartial shrink. 7/31 Hearing Tr. at 59-60. Dr. Murphy's estimate of the change in margin attributable to Whole Foods' competitive entry did not remove from his analysis the margin effect of partial shrink that was due to a decline in quality as opposed to a response to competitive price reduction. 7/31 Hearing Tr. at 63-64. Partial shrink was at least as great as known shrink. Martin Suppl. Declaration ¶. 8. [REDACTED]

[REDACTED] It persisted because the store manager was excessively optimistic that business would return to prior levels. *Id.*

561. Dr. Murphy's estimates of the effect of Whole Foods' entry on Wild Oats' margins and prices overstate the impact on margins as a competitive response to entry and fail to account for the impact on margins due to reductions in the quality of goods sold.

2. Failure to Control for Competitor Behavior Responsive to and Independent of Whole Foods Entry.

562. 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 46.

563. Dr. Murphy did not have data on pricing or promotional strategies from firms other than the parties to the transaction. 7/31 Hearing Tr. 46-48.

564. Dr. Murphy's analyses of the effect of Whole Foods' entry on Wild Oats net sales, margin and prices do not control for the pricing or promotional strategies of all other supermarkets in response to Whole Foods' entry. 7/31 Hearing Tr. at 51-55, 56-57, 74; JX 26 at 233-235.

565. Instead, Dr. Murphy includes the responses of competitors' to Whole Foods' entry, and the effects caused by those competitors, as effects caused by Whole Foods. JX 26 at 233.

566. Where multiple firms enter simultaneously, Dr. Murphy's regression analysis does not permit one to tell which of the firms is causing how much of the effect on Wild Oats' margins, net sales, and prices. 7/31 Hearing Tr. at 52; JX 26 at 228.

567. New Seasons entered at the same time as Whole Foods in Tualatin, OR. 7/31 Hearing Tr. at 49-54; JX 26 at 229

568. Trader Joe's entered at the same time as a Whole Foods in Hartford, CT. 7/31 Hearing Tr. at 73.

569. King Sooper entered Ft. Collins at the same time as Whole Foods in Ft. Collins, CO. 7/31 Hearing Tr. at 71-72.

570. Dr. 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. 7/31 Hearing Tr. at 71-72, 73-74.

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

571. Fundamentally, Dr. Murphy's analyses study the wrong events. He analyzes the effects of Whole Foods' banner entry on Wild Oats when he should be looking at the price effects of Wild Oats exits. 7/31 Hearing Tr. at 23-24, 26; Scheffman Rebuttal Report ¶ 41. The effect of Whole Foods' banner entry on Wild Oats' prices, margins or sales does not directly test whether Wild Oats imposes any constraint on Whole Foods. 7/31 Hearing Tr. at 28-30; Murphy Report ¶ 63.

572. The effects of the removal of Wild Oats as a competitor could only be directly addressed by examining what happens to Whole Foods prices after a Wild Oats store exits. Scheffman Report ¶ 45. The extent to which Wild Oats adjusts its prices in the face of the events created by the opening of a Whole Foods store in its area is not informative of anything about the potential price effects of the proposed merger. Scheffman Rebuttal Report ¶ 44. It is the effect of the removal of Wild Oats as a competitor that is the concern of antitrust merger analysis. *Id.*

573. Dr. Murphy instead infers the price effect of a Wild Oats exit by equating that event with a Whole Foods entry in reverse. Murphy Report ¶ 82. That is, Dr. Murphy's "exit" analysis assumes that the effect of a Wild Oats exit would be exactly the same as a Whole Foods entry, albeit in the opposite direction. Dr. Murphy admits, however, that the effects observed using an analysis of this kind may not be exactly symmetric due to the fact that Whole Foods and Wild Oats are not identical competitors. In particular, Dr. Murphy acknowledges that one could expect the effects of

Wild Oats exit to be somewhat smaller owing to the greater size of Whole Foods in most overlap markets. Murphy Report ¶ 82; 7/31 Hearing Tr. at 78. On average, Whole Foods is three times larger than Wild Oats in terms of sales where the two firms compete head-to-head. Murphy Report at ¶ 82 n. 43. Since Whole Foods is larger than Wild Oats in terms of sales, one would expect the effects of Wild Oats' exit on Whole Foods to be smaller than the effect of Whole Foods' entry on Wild Oats. *Id.* Moreover, Wild Oats' prices ██████████ Whole Foods' prices, by as much as ██████████

574. The "prices" that Dr. Murphy does rely upon are really not prices at all. Scheffman Rebuttal Report ¶ 41. Dr. Murphy uses as his measure of "price" an estimate of average weekly revenue, which he then adjusted with a myriad of discounts. This adjustment had a material impact on his estimates, making the estimates strongly consistent with the conclusions he draws from his estimates. Scheffman Rebuttal Report ¶ 67.

575. Nonetheless, Dr. Murphy had more than two years of "price" data that was subpoenaed by the FTC for both Wild Oats and Whole Foods but failed to do analyses of these data that would be most useful to the issues in this case. Scheffman Report ¶ 47. Dr. Murphy did not use these data to attempt to analyze prices across stores, namely examining whether PNOS "monopoly" stores have higher prices than PNOS stores that compete with another PNOS. *Id.* Dr. Murphy also failed to use these data to assess what happened in areas in which Whole Foods and Wild Oats competed and where the Wild Oats store was closed, despite there being six such "events" in the period of data. *Id.*

576. Dr. Murphy studied 5 Whole Foods' entry events into Wild Oats "markets." 7/31 Hearing Tr. at 71. But Dr. Murphy's entire pricing analysis that informs his conclusions as to

L. Analyses of the effect of Other Competitors' Entry on Whole Foods' Margins, Net Sales and Prices are Not Relevant

579. Dr. Murphy's analysis of the effect of other firms' entry on Whole Foods' net sales and margins does not analyze the effect of Wild Oats on Whole Foods because Dr. Murphy chose to exclude any Wild Oats entry or exit events from the data he studied. 7/31 Hearing Tr. at 53-57.

580. Dr. Murphy's analysis of Whole Foods price response to entry by Earth Fare in certain North Carolina markets is not instructive because i) there are no Wild Oats in any market in which Earth Fare competes; and ii) there is no evidence demonstrating that Earth Fare and Wild Oats are equal or substantially equal competitors. 7/31 Hearing Tr. at 38.

M. There is no evidentiary basis for the FTC's "better buyer" claim.

581. The FTC urges that the merger be enjoined so that another buyer, not currently operating what it terms "premium natural and organic supermarkets," could buy Wild Oats instead and use it to increase competition against Whole Foods. FTC Reply Brief at 30-31.

582. There is no evidence that any such alternative buyer exists. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Whole Foods knows of no other buyer that has come forward – even when the price was lower, *id.*, and the FTC has offered no evidence that there is another buyer.

N. Third parties believe this merger will either have no negative impact on competition or will actually *increase* competition among supermarkets.

583. No single supplier or other third party has come forward to support the notion that Whole Foods and Wild Oats would have any ability to raise prices after the merger. The FTC has produced exactly zero such evidence. Plaintiff Opening Brief; Plaintiff Reply Brief.

584. To the contrary, grocery suppliers, including natural and organic manufacturers, believe competition is robust today, competition will be robust after the merger, and the merged company will lack market power, the ability to reduce output or otherwise harm consumers.

[REDACTED]

585. Contrary to what the FTC has claimed, suppliers support the “elimination of Wild Oats” by Whole Foods. [REDACTED]

[REDACTED]

586. [REDACTED]

587. [REDACTED]

[REDACTED]

588. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

589. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

590. [REDACTED]

[REDACTED]

[REDACTED]

591. [REDACTED]

592. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

- 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.**

593. Whole Foods' CEO John Mackey, like any competitive businessman, does not much care for his competitors. JX 28 at 53-54 (Mackey I.H.) ("We don't like Wild Oats. They are a competitor. We don't like Trader Joe's. We don't like Wegman's. We don't like HEB. We don't like Wal-Mart. We don't like Tesco. We don't like any of these guys. They are our competitors."). Mackey has used similar tough talk in describing other competitors, writing, for example, that "This 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" DX 276.

594. He also explained that tough talk is part of the culture at Whole Foods, "Business people like to [use] the war metaphors and all this macho type of descriptive language." JX 28 at 76.

595. Some of John Mackey's predictions have proved incorrect. JX 28 (Mackey I.H.) ("As you can see, some of my other earlier prognostications did not come true.").

596. Some of John Mackey's other comments reflect an effort to put "on a brave face" and spin the facts in Whole Foods' favor. JX 28 at 251 (Mackey I.H.).

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.

597. Although Whole Foods presents itself to the world as supermarket selling natural and organic foods, CEO John Mackey recognizes that it is, in reality, just another supermarket. Whole Foods' public statements often tout it as the "[w]orld's Leading Natural and Organic Foods Supermarket," but that is because "we find that's a better point to lead with than [we are] the world's 28th largest food/drug retailer." JX 28 at 31 (Mackey I.H.).

598. The FTC does not and cannot cite Mackey for any statement that Whole Foods' customers only shop at so-called premium natural and organic supermarkets. This is because Mackey believes, and has stated, that the majority of Whole Foods' customers cross-shop: "In the case of Whole Foods, the great majority of our customers don't shop exclusively at Whole Foods, they shop at Safeway, they shop at Trader Joe's, and they shop at Wal-Mart. They shop around." JX 28 at 37; *see also* DX 554 at 7 (Whole Foods' marginal customers shop other supermarkets).

599. Mackey points out that the same products that Whole Foods sells are available at other supermarkets, including Safeway and Kroger. "[Once w]e had products. You couldn't get those at Safeway or Kroger or Wal-Mart or Albertson's or Wegman's or HEB or Trader Joe's or anywhere else. . . . Today, unfortunately, regretfully, you can find these products everywhere, partly because we've been so successful." JX 28 at 32-33 (Mackey L.H.).

600. Mackey recognizes that other supermarkets are copying Whole Foods in a variety of ways in order to attract Whole Foods' customers. JX 28 at 272 (Mackey L.H.). ("Originally our products were differentiators. But that has been systematically undermined by competition. . . . We also differentiate on the basis of our store ambiance. . . . Now we are seeing supermarkets copy us in that regard. . . . We differentiate by putting the customers first. And supermarkets . . . have woken up. They do seem to care more about their customers.").

601. Mackey sees other supermarkets as "aggressively going after us." JX 28 at 240 (Mackey L.H.). Mackey explained that while Whole Foods "flew under the radar," Whole Foods business grew and became "a threat to the mainstream supermarket industry, and they started to pay attention to us;" stating, on multiple occasions, that "we [have] never face[d] more competition than we are facing today. It is a highly competitive market, and it is becoming more

competitive.” JX 28 at 41 (Mackey I.H.); *see also* DX 554 at 8 (explaining that conventional supermarkets are investing significant capital in remodeling stores and copying whole Foods; Mackey later states that “[w]e’re no longer differentiated on the basis of products.”).

602. Mackey expressed similar views in Whole Foods Second Quarter, 2007 Fiscal Year analyst conference call, noting that “[w]e’ve seen Safeway come out with your Lifestyle stores and Wal-Mart’s selling organic and Trader Joe’s is opening up more competitive markets and strong regionals like Wegmans and HEB. I mean Whole Foods faces more competition everywhere in [the] United States than we’ve ever faced before.”

603. But Mackey also described, objectively, the impact of increased competition to Whole Foods’ bottom line. In recent reports to the Board of Directors, Mackey described the [REDACTED] impact of competition on Whole Foods. For example, in September 2006, Mackey remarked that:

[REDACTED]

DX 204.

604. Mackey also explained that it would be necessary to improve the [REDACTED] [REDACTED] to succeed in the new competitive environment. Mackey explained [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

[REDACTED] DX 204.

605. In an October 2006 e-mail to the executive team describing how additional corporate savings could be used, he wrote: "I predict that there aren't any 'extra profit dollars.' They are all going to be spent being more price competitive with Trader Joe's, Wegmans, Safeway, Wal-Mart, etc." DX 11.

606. In February 2007, he described competition from specific conventional supermarkets by highlighting the situation in [REDACTED] and [REDACTED] remain the two most powerful conventional supermarket chains we compete against. We have increased the competition recently in [REDACTED] area with the opening of our new Fair Lakes store that is going head to head with a very successful [REDACTED] store." DX 212.

2. Mackey did not project a price increase post-merger.

607. Whole Foods plans to lower prices at Wild Oats stores, not raise them. JX 28 at 186-87 (Mackey I.H.) ("When we take over those Wild Oats stores and we transform them, their sales per square foot are going to go way up, their prices are going to go down in the stores that remain [REDACTED]").

3. Mackey did project improvement of Wild Oats stores.

608. Whole Foods' CEO, John Mackey, believes that Whole Foods can make Wild Oats stores' successful, "unlock [their] value," and more than double the sales per square foot within a couple of years. JX 28 at 66, 249 (Mackey I.H.).

609. Whole Foods has a successful track record of acquiring supermarkets that are losing money and transforming them into success stories. JX 28 at 197-98 (Mackey I.H.). Bread & Circus, Fresh Fields, and Nature's Heartland all were losing money when Whole Foods acquired them, and those stores are now profitable. The Mrs. Gooch's stores were marginally profitable but are far more so under Whole Foods' management.

610. Far from focusing the company's competitive energy against only Wild Oats, Mackey has helped direct high-level corporate officials in thinking about the new competitive environment against supermarkets. DX 204; DX 14 (e-mail from Mackey responding to suggestion that management should consider systematically comparing the prices of competitors such as [REDACTED], and others, "I do think a discussion of how the WFM leadership addresses the issue of competitive pricing is important.").

611. Whole Foods Co-Presidents A.C. Gallo and Walter Robb, who have responsibility for the day-to-day operations of the company, encounter strong competition from other supermarkets daily, Gallo Decl. ¶¶ 16-21; Robb Decl. ¶¶ 22-27, and routinely visit other supermarkets in order to assess that competition. This is apparent in every-day, ground-level documents. *See e.g.*, DX 1, DX 3, DX 5, DX 7, DX 18, DX 19, DX 20; *see generally supra* Section II.C.

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.

612. For example, in analyzing the effects of the merger, Dr. Scheffman relied on marketplace data. *See, e.g.*, Scheffman Report ¶¶ 289-337 (analysis of pricing).

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.

613. Whole Foods is considering the possibility of closing a number (not yet determined) of the Wild Oats stores that it acquires – either due to the proximity to existing Whole Foods stores or other factors (*e.g.*, size or design of the store, demographics of the area). Sud Decl. ¶ 47.

614. Whole Foods still does not have the store-level financial records it needs to assess whether to keep, close, or relocate a particular Wild Oats store. Gallo Decl. ¶ 10. Gene Kadish,

who prepared the estimates said they were not the product of a comprehensive analysis. Rather, he testified that they were "Ouija board, dart board" and "estimated guessestimates" because "there wasn't enough time to do a complete analysis." JX 7 at 197-99 (Kadish Dep.).

615. Nearly half of the stores listed for possible immediate closing in the Project Goldmine projection are less than 25,000 square feet. PX 553, DX 807. According to Dr. Murphy, stores this small are not of competitive significance. JX 26 at 78 (Murphy Deposition) (These small stores cannot influence competition because there is so much additional competition from other supermarkets in their respective markets.).

616. Industry participants agree that closing some Wild Oats stores is necessary and efficient. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

617. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

618. Store closings would have not have an impact on suppliers of natural and organic foods. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

619. Still, Whole Foods has not made final decisions on which Wild Oats stores will be closed. Sud Decl. ¶ 47; Gallo Decl. ¶ 10; Robb Decl. ¶ 12. Whole Foods is considering several alternatives to closing the stores, [REDACTED]

[REDACTED], Sud Decl. ¶ 47; Gallo Decl. ¶ 10; Robb Decl. ¶ 12; JX 11 at 229-231, 237 (Paradise Dep.); JX 31 at 229-236 (Paradise I.H.).

Q. The purchase price does not reflect a premium to eliminate Wild Oats as a competitor.

620. Whole Foods' offer for Wild Oats did not include any premium for the elimination of a competitor and it did not contemplate higher prices post-merger. Sud Decl. ¶ 50; DX 401 at 15-20 (Presentation to Whole Foods Board of Directors about the acquisition). Whole Foods created a financial model to evaluate the transaction. The model included the cost savings and efficiencies that Whole Foods expected to obtain based on its experience from prior acquisitions. It included anticipated cost savings for reducing Wild Oats' general and administrative expenses and the estimated proceeds from selling the Sun Harvest and Henry's stores. Most importantly, it included the expected improvement to the sales of former Wild Oats stores from Whole Foods' investment of its skill and resources in former Wild Oats stores. Sud Decl. ¶ 50; JX 3 at 27-28 (Sud Dep.). Wild Oats' sales per square foot of store space is approximately half that of Whole Foods (Mays Decl. ¶ 21), and the opportunity to improve financial performance of the Wild Oats stores to the level of Whole Foods stores is an important reason that the transaction is valuable to Whole Foods. Sud Decl. ¶ 33-34; JX 3 at 54 (Sud Dep.) ("The reason why this acquisition works is because based on our history, we feel strongly that

we can strongly enhance those stores, improve their ability to compete in the marketplace with other supermarkets, improve their sales, improve their profitability.”).

621. The final purchase price of \$18.50 per share was within the values calculated by the model. *Id.* Whole Foods’ investment advisors reviewed the transaction, and they opined that the price was fair and reasonable from a financial point of view. DX 401.

622. The financial model did not include any anticompetitive premium. It assumed that Whole Foods did not raise prices. Sud Decl. ¶¶ 50, 51.

623. The FTC’s claims that the purchase price reflects a premium to eliminate Wild Oats as a competitor is inconsistent with its claims that Wild Oats was somehow turning itself around. 8/1 Tr. at 71 (suggesting that \$760 million purchase price only makes sense if Whole Foods intended to preclude entry); cf. 8/1 Tr. at 76 (“Would you pay \$760 million for a flailing firm? I would not. There’s a turn-around story here.”).

624. By contrast, the defendants’ views have been consistent, that the purchase price reflected no premium and [REDACTED]. Sud Decl. ¶50 (Based on cost savings from reduced cost of goods and reduced general and administrative expenses together with projections for increased sales, Whole Foods and its bankers agreed that the purchase price was “fair and reasonable.”); JX 3 at 27-28 (Sud Dep.); compare generally Section IV.F.

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.

625. Whole Foods competes with other supermarkets by improving its stores, its products, its services and its customer experiences. JX 28 at 36-37 (Mackey I.H.). Its original store was approximately 10,000 square feet, but today its average store is 35,600 square feet, and

its stores in development average 54,500 square feet. Sud Decl. ¶ 18. It has evolved to attract a broader customer base by using the expanded space to offer more products, greater variety within product categories and prepared food venues. Sud Decl. ¶¶ 17, 20, 28. It has engaged in those strategies to compete with other supermarkets across the country, and not just in the few markets where it competes with Wild Oats. Sud Decl. ¶ 17-30.

626. Whole Foods has a budget of [REDACTED] per year for store improvements, which is intended to help Whole Foods stores stay competitive. Gallo Decl. ¶ 31. It intends to continue to invest in its stores so it can continue to enhance its ability to compete with other supermarkets.

627. The FTC's contention that the acquisition would lead Whole Foods to reduce its efforts to improve its stores and services does not make any sense. It would be contrary to Whole Foods' strategy over the last 15 to 20 years to invest in improved quality in markets where it competes only with other supermarkets where it competes only with other supermarkets, and it is contrary to the budget Whole Foods has established for future investments. Moreover, even if Whole Foods were to suddenly abandon its past practices, it would become even less differentiated from other supermarkets and would face even more intense competition from other supermarkets.

S. The testimony of Perry Odak is unreliable and biased.

1. Odak's testimony reveals his lack of experience and knowledge of the supermarket industry.

628. Odak testified that perishables accounted for over 60% of Wild Oats' revenues during his time at the company, when in fact, the actual percentage of Wild Oats' total sales attributable to perishable items is approximately [REDACTED]
[REDACTED]

629. Odak does not know how many products were carried in Wild Oats stores, as he testified that the typical Wild Oats stores have 44,000 SKUs of 9products, when in fact, they typically carry between [REDACTED]

[REDACTED]

630. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

631. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

2. This lack of experience and knowledge led to Wild Oats' decision not to renew his contract.

632. [REDACTED]

[REDACTED]

[REDACTED]

633. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

3. Odak is embittered toward Wild Oats and its current managements, which has made him a biased witness.

634. [REDACTED]

635. [REDACTED]

636. [REDACTED]

637. Odak was an extraordinarily hostile witness to Wild Oats at his June 29, 2007 deposition.

JX 16 at 8-9, 140-42, 150, 179-82, 204-07, 333.

V. SUPERMARKET REPOSITIONING AND ENTRY WILL CONTINUE TO EXERT ADDITIONAL COMPETITIVE PRESSURE ON THE COMBINED FIRM

A. Repositioning by supermarket and other retailers is ongoing.

638. Retailers have been repositioning their formats, services and product selection in order to respond to the growing consumer demand, to differentiate themselves from their competition (especially low-price operators such as Wal-Mart) and to better compete against supermarkets such as Whole Foods that have already been focusing on these products. Stanton

Report ¶¶ 21, 29-34; Scheffman Report, Appendix E ¶¶ 3-8; *see also* JX 28 at 33 (Whole Foods CEO Mackey explaining that “Our success has created more competition, it has bred more imitation, has caused all these supermarkets to try to want to steal Whole Foods’ mojo.”); 103 (“. . . Whole Foods no longer has this product differentiation to itself. . .”) (Mackey I.H.).

639. Conventional food wholesalers are beginning to carry more packaged natural and organic products, making them more accessible to other supermarkets. JX 28 at 103 (Mackey I.H.); Stanton Report ¶¶ 31-34.

640. Repositioning by supermarkets and other retailers – which has taken the form of, for example, store remodeling, improved décor, expanded natural and organic products – have cut into Whole Foods’ performance. JX 28 at 49, 122 (Mackey I.H.) (“customers continue to erode to our competitors and our same-store sales are on a downward trek as our ability to differentiate ourselves, as fast as we were trying to differentiate ourselves, it is increasing.”); *see also* JX 28 at 122-23 (“Whole Foods has to differentiate itself from its competitors. Our basis of differentiation is eroding. Our products are migrating to the mass en masse.”).

641. Specifically, Whole Foods’ comps (year-over-year sales comparisons) are flattening and now resemble those of many other supermarket chains. DX at 77 (Mackey I.H.).

642. This trend will likely continue as large, better capitalized supermarkets leverage their scale to obtain high-quality natural and organic foods at lower costs than Whole Foods. JX 28 at 103 (Mackey I.H.).

1. Delhaize America

643. Delhaize operates over 1,500 supermarkets under the Hannaford Bros., Bloom, Food Lion, Kash n' Karry, Harvey's, Bottom Dollar and Sweetbay banners. Stanton Report

¶ 35.

644. [REDACTED]

645. [REDACTED]

646. [REDACTED]

647. [REDACTED]

648. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

649. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

650. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

651. [REDACTED]

[REDACTED]

[REDACTED]

652. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

653. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

654. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

655. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

a. [REDACTED]

656. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

657. [REDACTED]

[REDACTED]

658. [REDACTED]

[REDACTED]

[REDACTED]

659. Hannaford has achieved organic retailer certification from an independent third-party certifier (QAI). Scheffman Report, Appendix E ¶ 25. [REDACTED]

[REDACTED]

660. [REDACTED]

661. [REDACTED]

662. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

663. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

664. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

b. [REDACTED]

665. [REDACTED]

[REDACTED]

666. [REDACTED]

[REDACTED]

667. [REDACTED]

[REDACTED]

[REDACTED]

668. Delhaize has been repositioning its Kash n' Karry stores into the Sweetbay format, which places a high emphasis on fresh food, services and quality. Scheffman Report, Appendix E ¶ 30-31. [REDACTED]

[REDACTED]

669. [REDACTED]

[REDACTED]

670. [REDACTED]

[REDACTED]

671. Bloom has launched a consumer lifestyle publication, which includes both food and other topics such as home-decorating, entertaining, health and wellness, travel and customized regional content. Stanton Report ¶ 37.

672. [REDACTED]

[REDACTED]

2. Safeway

673. Safeway is one of the largest supermarket chains in the United States. DX 592 at 4; Stanton Report ¶ 39; Scheffman Report Appendix E ¶ 60. Safeway operates over 1,500 supermarkets in 21 states and the District of Columbia. DX 592 at 5-6; Scheffman Report Appendix E ¶ 60.

674. Safeway operates supermarkets under the Safeway (Western and Mid-Atlantic states), Vons (Southern California), Pavilion, (Southern California), Dominick's (Chicago area), Genuardi's (Philadelphia area), Randall's (Texas), Tom Thumb (Texas), and Carr (Alaska) store banners. DX 592 at 5; Stanton Report ¶ 41; Scheffman Report Appendix E ¶ 60.

675. As of December 31, 2006, Safeway had remodeled 751 of its stores into a newly developed "Lifestyle" format. DX 592 at 20. [REDACTED]

[REDACTED] In total, Safeway has spent several billion dollars repositioning its stores into the Lifestyle format. Stanton Report ¶ 40. [REDACTED]

[REDACTED]

676. [REDACTED]

677. [REDACTED]

[REDACTED]

678. The Lifestyle store format “showcases [Safeway’s] commitment to quality, particularly in the perishables departments. The Lifestyle store has an earth-toned décor package, subdued lighting, customer flooring, unique display fixtures and other special features that impart a warm ambience that [Safeway] believes significantly enhances the shopping experience.”

DX 592 at 20. *See also* Scheffman Report Appendix E ¶ 60.

679. [REDACTED]

[REDACTED]

680. [REDACTED]

[REDACTED] *See also* Scheffman Report Appendix E ¶ 63 (citing a Bear Stearns Dec. 2006

report noting that Safeway is “not only responding to shifting consumer demand, but helping to drive demand”); Stanton Report ¶ 39 (Lifestyle format also offers consumers an “experiential factor”).

681. In addition to the physical improvements to each store, Safeway now offers consumers higher quality produce and organic products. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

682. As part of the evolution of the Lifestyle format, Safeway also launched its private label “O” organics line of USDA-certified organic food and beverage products in December 2005. DX 592 at 11; DX 593 at 6. Safeway now carries about 200 “O” brand organic SKUs. DX 592 at 11 (nearly 200 “O” brand organic SKUs); Stanton Report ¶ 39 (about 200 “O” brand SKUs with the introduction of the line of “O” baby food products in 2007); Scheffman Report Appendix E ¶¶ 61, 64 (more than 150 “O” brand organic SKUs). [REDACTED]

[REDACTED]

[REDACTED]

683. Within its first year – 2006 – Safeway’s “O” organic sales total about \$162 million. Stanton Report ¶ 39 (citing to Safeway CEO Steve Burd) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

684. In addition to launching the “O” organic brand products, Safeway recently introduced its “Eating Right” brand of products for health conscious consumers. DX 592 at 11.