

“Eating Right products combine great taste with nutritional efficacy and feature a unique nutritional icon system to help consumers identify product attributes that they seek.” DX 592 at 11.

685. [REDACTED]

686. [REDACTED]

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

687. The effect of the repositioning by Safeway has been evident to industry observers. A January 2007 HSBC Global Research report stated that “Whole Foods has already reduced prices on known-value items, like organic milk and bananas; but it is hard to see how gross-margins won’t be pressured once the soccer moms stop shopping at Whole Foods so often now that the same or equivalent products are available at Safeway.” See Scheffman Report Appendix E ¶ 63 (quoting the HSBC Global Research report).

688. [REDACTED]

[REDACTED]

689. [REDACTED]

[REDACTED]

690. [REDACTED]

[REDACTED]

691. [REDACTED]

[REDACTED]

[REDACTED]

3. Publix

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

693. Publix has added a large selection of organic and natural foods, including an entire line of private label organic foods called GreenWise. Scheffman Report, Appendix E ¶¶ 56-57. The GreenWise products include shelf-stable food products, dairy, poultry, snacks, juices and even an environmentally-friendly line of paper products. Stanton Report ¶ 56.

694. [REDACTED]

695. [REDACTED]

696. [REDACTED]

[REDACTED]

697. [REDACTED]

[REDACTED]

698. [REDACTED]

[REDACTED]

699. Publix has now created a separate supermarket format, also called GreenWise, that will have a heavier focus on natural and organic products in addition to the other supermarket categories. Stanton Report ¶ 57. Scheffman Report, Appendix E ¶¶ 58-59. The first GreenWise store is set to open in September 2007 and will provide an array of natural and organic foods, earth-friendly products, freshly prepared cuisine, and high-quality produce, dairy, frozen food, vitamins, grocery items and nutrition products. Stanton Report ¶ 57.

4. Kroger

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

701. Kroger sells a wide variety of natural and organic products, including shelf-stable groceries, produce, poultry, dairy, and beverages. It introduced its own line of private label natural and organic products under the "Naturally Preferred" label, which includes over 275 items in a variety of categories. Stanton Report ¶¶ 53-54. Kroger also offers a premium private label food line known as "Private Selection," which is designed to meet or beat national or regional gourmet and upscale brands. *Id.*

702. Many of the Kroger stores (approximately 1,600) feature dedicated natural and organic departments, such as the "Nature's Marketplace" section within Kroger-bannered stores. Stanton Report ¶ 54.

703. [REDACTED]

704. [REDACTED]

[REDACTED]

705. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

706. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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

5. SuperValu

708. SuperValu is one of the largest grocery distributors and supermarket operators in the nation. It operates supermarkets under the Albertson's, Shaw's, Star, Jewel-Osco, Cub, Acme and other banners, and distributes grocery products to over 2,000 independent

supermarkets across the country. Stanton Report ¶¶ 47-48; Scheffman report, Appendix E ¶ 76.

709. SuperValu, like many other supermarket companies, has recognized the importance of meeting the growing consumer demand for freshness, nutrition and organic products. Stanton Report ¶ 47.

710. SuperValu has recently established an aggressive remodeling campaign in order to expand its presence in natural, organic and premium foods. The company is spending approximately \$1 billion to remodel and construct new stores in order to customize and enhance the customer shopping experience. Stanton Report ¶ 49; Scheffman report, Appendix E ¶ 78.

711. The remodeling and new store campaign, called “Premium Fresh & Healthy,” places a strong emphasis on: the “Wild Harvest” concept, which is a store-within-a-store focused on natural and organic products; expanded perishables, including produce, meat, seafood, bakery and deli; “Shop the World,” which is an international food destination department; and expanded health and beauty care products to support a healthy lifestyle. Stanton Report ¶ 49.

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

713. The Wild Harvest product line (and also the name of a store-within-a-store concept) originated in the Shaw's division but is being rolled out to most of SuperValu's other banners as well. The product lines include offerings through the grocery, dairy, frozen foods, poultry and health and beauty aid sections of the stores. Stanton Report ¶¶ 48-50. The store-within-a-store concept focuses on offering a wide-assortment of natural and organic products within a dedicated portion of the store. In addition to the private label natural and organic lines and store-within-a-store concepts, these Shaw's and Star stores currently offer well over 100 varieties of organic produce. *Id.*

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

6. Wegmans

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

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

717. Wegmans is a very difficult competitor for Whole Foods today because it executes perishables as well or better than Whole Foods does. JX 28 at 47 (Mackey I.H.).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

718. For example, by opening two new stores within [REDACTED] of Whole Foods' [REDACTED] Whole Foods ascribed a [REDACTED] to Wegmans. [REDACTED] Wegmans also directly engages in price competition with Whole Foods by comparing its prices to Whole Foods' prices on shelf tags and advertisements. DX 72; DX 74. [REDACTED]

[REDACTED]

[REDACTED]

719. Wegmans is a very difficult competitor for Whole Foods today because it does perishables as well or better than Whole Foods does. JX 28 at 47 (Mackey I.H.)

7. Giant Eagle

720. Giant Eagle is a 220-store supermarket chain operating primarily in Pennsylvania and Ohio that offers many fresh, organic and natural products to its customers. It has introduced a line of private label natural and organic products under its "Nature's Basket" label and store-within-a-store concept, which includes a wide variety of products from grocery, dairy, frozen, bakery, deli and health and beauty aids. The stores

also carry a wide variety of organic fruits and vegetables, as well as natural meats and poultry.

Stanton Report ¶ 59.

721. Giant Eagle also focuses on providing a wide selection of premium products and services at its stores, including some newer stores that feature benefits like an in-house chocolatier and an international cheese shop with over 400 cheeses from around the world.

Stanton Report ¶ 59.

722. Giant Eagle has also opened two “Market District” stores that carry an extended selection of natural, organic and gourmet products. Stanton Report ¶ 6.

8. Wal-Mart.

723. Wal-Mart has expanded its selection of high quality organic and natural foods DX 6 at 3 (noting that many of the products that were once unique to Whole Foods are now being sold through low-price retailers like Wal-Mart [REDACTED] (Whole Foods Co-President directs company-wide attention to Wal-Mart as they expand selection of organics); DX 705 (Wal-Mart sale of organic foods [REDACTED] [REDACTED]).

724. Wal-Mart’s focus on natural and organic foods has amplified [REDACTED]
[REDACTED]
[REDACTED]

Wal-Mart is working with organic suppliers to identify the top 100 selling OG [organic] items which they want to private label and sell at their Wal Mart and Sams location at very aggressive pricing. They are trying to turn the ‘commodity’ natural and organic items into real commodities just like they did with conventional groceries. [Whole Foods] need[s] to be prepared [REDACTED] continue to differentiate ourselves.

██████████ (“Wal-Mart is rolling this OG program out nationwide ██████████
██████████ (Wal-Mart announced its intention to become a “premier retailer of fresh foods” in its October 2005 conference with market analysts.).

725. In an effort to steal sales from Whole Foods, Wal-Mart has been pushing Whole-Foods-like values, such as ethical sourcing of product, environmentally friendly growing methods and sustainable energy sources. Meyer Decl. ¶ 27; JX 10 at 86 (Meyer Dep.).

726. ██████████ efforts are materially affecting Whole Foods sales. DX 16 at 8 (noting that “[m]arket blurring” has led to increased competitive pressure from multiple directions, including other food retailers like ██████████ and ██████████ (noting that “if ██████████ continues to roll these formats out [] I will see my [region’s] margins erode.”); DX 384 (Whole Foods works on national plan to compete with, among others, ██████████); DX 739 (explaining that ██████████ new experimental ██████████ was obviously aimed directly at both Whole Foods and Central Market and has impacted [Whole Foods] about ██████████”); DX 396; DX 65 (describing ██████████ impact in ██████████); ██████████ (██████████ of Whole Foods shoppers who do not purchase nutritional supplements at Whole Foods are purchasing them from ██████████).

727. Whole Foods has been forced to find other ways to differentiate itself to retain consumers that now also consider ██████████ as a source of these goods. DX 15 (noting that even frequent Whole Foods shoppers split their purchases at other retailers like ██████████ ██████████); DX 421 (Mackey challenges Whole Foods to adapt to growing competition from large,

capitalized retailers like [REDACTED] and mass merchandisers, [REDACTED] more important to protect our market share than it is to protect our gross margins.”); DX 360.

9. Target (SuperTarget).

728. Whole Foods also shares a number of customers with Target, which has expanded its natural and organic products in response to growing demand. Market research confirms that a significant number of Whole Foods customers also shop other retailers like [REDACTED]. DX 2 at 20 (noting that retained Whole Foods customers – defined as those that made at least one shopping trip to Whole Foods in 2005 and 2006 – spent a greater share of their shopping dollars at [REDACTED] in 2006 compared to 2005).

729. Whole Foods price checks Target, among other large food retailers. DX 415; DX 327 (directive from Co-President and Chief Operating Officer, Walter Robb, to include [REDACTED] on the roster of competitors for which national comp shopping is to be conducted); DX 410.

10. Other supermarkets

730. There are a number of other examples of regional and national chains that have been repositioning their formats to increase their focus on freshness, quality, service, and natural and organic product offerings. As Dr. Stanton stated, “most supermarket retailers have introduced and/or expanded their natural and organic product offerings throughout the store – including produce, meats, dairy, beverages, shelf-stable food, and health and beauty aids. Virtually every major chain has developed a line of organic private label products.” Stanton Report ¶¶ 33, 66.

731. There are a number of other examples of regional and national chains that have been repositioning their formats to increase their focus on freshness, quality, service, and natural and organic product offerings. As Dr. Stanton stated, “most supermarket retailers have introduced and/or expanded their natural and organic product offerings throughout the store – including produce, meats, dairy, beverages, shelf-stable food, and health and beauty aids. . Virtually every major chain has developed a line of organic private label products.” Stanton Report ¶¶ 33, 66.

732. Counted among the chains increasing their offerings include, for instance, regional chains such as [REDACTED] and [REDACTED] as well as national retailers such as [REDACTED]. Stanton Report ¶¶ 62-64 [REDACTED]; DX 804 ([REDACTED] “recently repositioned itself as a destination for health and wellness in the [REDACTED]); DX 689 ([REDACTED] introduced its private label natural and organic line, known as [REDACTED] in September 2006).

733. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

734. Even small, independent retailers are repositioning in response to consumer demand. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

735. This type of extended organic produce selection is becoming commonplace at many supermarkets across the country. DX 803; [REDACTED]

B. The trends in supermarket and retail repositioning will continue

736. Supermarket repositioning will continue and will intensify in the erosion of Whole Foods' and Wild Oats' points of differentiation. The growth in demand for natural and organic products is continuing, and all supermarkets will continue to respond to that strong consumer growth. Stanton Report ¶¶ 3, 33, 66-83.

737. It is easy for supermarkets to reposition their formats or merely add or expand to their product offerings of organic foods, private label organics, natural products, high-quality perishables, etc. The necessary distribution channels and supply chains are already developed, and most of the food suppliers and manufacturers are continuing to introduce and develop natural and organic product lines. Stanton Report ¶¶ 77, 82-83.

738. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

739. As natural and organic products continue to grow in popularity, they will earn more shelf space and visibility in supermarkets. The result is that chains like Whole Foods will be continuously facing more and more competition from virtually every supermarket and grocery store in its areas. Stanton Report ¶ 76.

740. Supermarket chains do not need to reformat or reposition all of the stores within their chain in order to react to changing consumer demand for natural and organic products. They can focus their strategy on localized areas (or on new formats) to offer targeted or specific differentiation in response to localized competition or consumer demand. Stanton Report ¶¶ 78, 83.

VI. THE TRANSACTION WILL MAKE WHOLE FOODS A MORE EFFICIENT SUPERMARKET, WHICH WILL LOWER ITS COSTS AND ENABLE IT TO OFFER LOWER PRICES AND ENHANCED SERVICE

A. Whole Foods has improved the prices, quality, and performance of the stores it has purchased previously

741. Whole Foods has grown, in part, through acquisitions. In each acquisition it has made, it has invested in the operations of acquired stores and has improved their performance. Gallo Decl. ¶ 12; Robb Decl. ¶ 11.

742. Whole Foods' general approach in acquiring another company's grocery store operations is to use the acquisition to learn more ways to: (1) operate more efficiently; (2) improve merchandising techniques and product selection; (3) operate in new communities; (4) utilize ideas from new team members. Gallo Decl. ¶ 12.

743. Walter Robb, Co-President and Chief Operating Officer of Whole Foods, explained that Whole Foods would likely improve service and output of Wild Oats stores, just as it had in prior transactions:

I have been directly involved in a number of prior transactions in which Whole Foods has achieved savings similar to the savings that would be achieved through the proposed transaction with Wild Oats In each of these transactions, Whole Foods took over a number of stores, invested in them, and improved their performance. In each of the above transactions, Whole Foods was able to substantially increase sales volumes, and provide better value and service to the customers.

Robb Decl. ¶ 11; *see also* Gallo Decl. ¶ 12; Sud Decl. ¶ 34.

744. Whole Foods' success in transforming previously underperforming stores into productive ones has not gone unnoticed in the industry. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1. Wellspring Grocery.

745. Whole Foods purchased Wellspring Grocery ("Wellspring") in 1991. After purchasing Wellspring, which had store locations in Durham and Chapel Hill, North Carolina, Whole Foods invested in improvements to the perishable operations at each store. Gallo Decl.

¶ 11.

2. Bread & Circus.

746. In 1992, Whole Foods purchased Bread & Circus, which operated a chain of stores in the northeastern United States. DX 797. Prior to the acquisition, Bread & Circus was not profitable. JX 28 at 23 (Mackey I.H.).

747. After acquiring Bread & Circus, Whole Foods' leadership recognized that the perishable operations at Bread & Circus were better executed and had higher sales than Whole

Foods' perishable departments. Gallo Decl. ¶ 11; JX 1 at 49-51 (Gallo Dep.); *see also* Robb Decl. ¶ 11.

748. Whole Foods implemented a series of changes to improve its performance in perishables in all of its stores, using the knowledge gained from Bread & Circus's operations. Gallo Decl. ¶ 11; JX 1 at 49-53 (Gallo Dep.). Whole Foods also adopted the product coordinator structure that Bread & Circus had in its stores, a structure Whole Foods continues to use. Robb Decl. ¶ 11; JX 1 at 51-53 (Gallo Dep.)

3. Mrs. Gooch's.

749. In 1993, Whole Foods acquired Mrs. Gooch's, a chain of stores located in southern California. DX 797. After taking over the operations of the Mrs. Gooch's stores, Whole Foods invested in the stores and improved their performance. Robb Decl. ¶11. Whole Foods was able to increase sales volumes at these stores and provide better value and services to customers. *Id.*

4. Fresh Fields.

750. Whole Foods purchased Fresh Fields in 1996. Fresh Fields operated twenty-two stores in the Washington DC, Baltimore, MD, Philadelphia, PA, Chicago, IL, and New York/New Jersey/Connecticut areas. DX 797. Fresh Fields, in each of its years of operations before being acquired, never made a profit and had lost approximately \$35 million. Sud Decl. ¶ 34; Lannon Decl. ¶ 9; JX 28 at 23, 189 (Mackey I.H.). After acquiring Fresh Fields, Whole Foods remodeled a number of Fresh Fields' stores and improved the quality of products and services at each of those stores without raising prices. Sud Decl. ¶ 34; Gallo Decl. ¶ 13; JX 1 at 77-78 (Gallo Dep.).

5. Bread of Life.

751. In 1997, Whole Foods purchased Bread of Life, a chain of stores located in Florida. DX 797. Whole Foods took over these stores, invested in them, and improved their performance. Robb Decl ¶ 11. Whole Foods was able to substantially increase sales volumes at these stores and provide better value and service to customers. *Id.*

6. Nature's Heartland.

752. In 1998, Whole Foods purchased Nature's Heartland, a chain of stores located in Massachusetts. Gallo Decl. ¶ 14. Whole Foods took over the stores, invested in them, and trained store team members. *Id.* Whole Foods was able to increase sales volumes dramatically at these stores, and, as a result, the stores became profitable. *Id.*

7. Food for Thought.

753. In 2000, Whole Foods purchase Food for Thought, a chain of stores located in northern California. DX 797. Whole Foods took over these stores, invested in them, and improved their performance. Robb Decl ¶ 11. Whole Foods was able to substantially increase sales volumes at these stores and provide better value and service to customers. *Id.*

8. Harry's.

754. In 2001, Whole Foods acquired Harry's, which operated three stores in the Atlanta, Georgia area. Allshouse Decl. ¶ 11. Whole Foods invested over [REDACTED] in the stores, and increased sales volumes dramatically at the stores from 2002 through 2004. Whole Foods also was able to improve the quality of the food and the in-stock conditions at the Harry's stores. *Id.*; Meyer Decl. ¶¶ 37-38 (Whole Foods invested significant money, improved the quality of the acquired stores, added staff to improve customer service, passed savings from increased efficiencies on to customers).

B. Whole Foods has in the past transformed underperforming Wild Oats stores into productive supermarkets

755. In 2002, Whole Foods subleased a failed Wild Oats store in Madison, New Jersey that, based on its previous price checking, had charged higher prices than Whole Foods' nearby store in Milburn, New Jersey. Lannon Decl. ¶ 6. After investing about [REDACTED], hiring staff, and integrating the store into the Whole Foods system, it was reopened with improved quality and service at prices lower than those charged by the former Wild Oats store. Lannon Decl. ¶¶ 5-7 (prices were matched to the Whole Foods store in nearby Milburn, NJ, which had found the Wild Oats store to have higher prices); Sud Decl. ¶ 34.

756. Whole Foods also subleased a former Wild Oats store in Framingham, Massachusetts, undertook major renovations, and converted it into a profitable store. Lannon Decl. ¶ 8; Sud Decl. ¶ 34.

C. Wild Oats [REDACTED] current and future competitive position must be discounted.

1. [REDACTED]

757. [REDACTED]

[REDACTED]

Wild Oats received financing of \$115 million in 2004 [REDACTED]

[REDACTED]

758. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

759. [REDACTED]

[REDACTED]

760. Wild Oats received financing of \$115 million in 2004 [REDACTED]

[REDACTED]

761. [REDACTED]

[REDACTED]

762. [REDACTED]

[REDACTED]

2. [REDACTED]

763. Roger Davidson, who became the Senior Vice President of Marketing and Merchandising at Wild Oats in October 2006, determined that [REDACTED]

[REDACTED]

[REDACTED]

764. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

765. [REDACTED]

[REDACTED]

[REDACTED]

766. [REDACTED]

[REDACTED]

[REDACTED]

767. [REDACTED]

[REDACTED]

[REDACTED]

768. [REDACTED]

[REDACTED]

[REDACTED]

769. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

770. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

D. Whole Foods will improve the performance of Wild Oats stores.

771. While Whole Foods has been developing larger stores, Wild Oats has not, investing little in the development of their stores. Sud Decl. ¶¶ 31, 33, 61. Wild Oats management has not made the necessary investment in its stores to enable them to compete effectively in the marketplace. *Id.* ¶ 33. Whole Foods planned to improve the physical infrastructure of Wild Oats stores with planned investments of [REDACTED] at the time of the acquisition's announcement in order to improve their performance. *Id.*

772. Wild Oats is hindered by excessive corporate costs. Whole Foods expects to be able to reduce these costs by about [REDACTED], which will make these stores more efficient and more competitive. Sud Decl. ¶ 57; *see also* JX 31 at 247 (Foster I.H.) (Whole Foods expects to eliminate significant general and administrative costs and improve the profitability of Wild Oats stores by applying managerial expertise resulting in a better consumer experience).

773. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

E. The acquisition will enable Whole Foods to lower prices and expand output.

774. Whole Foods' competitors are for the most part larger, better capitalized and have more resources, particularly with respect to real estate and sheer number of stores, than does Whole Foods. In addition, these competing supermarkets, due to the fact that they have a vastly greater number of stores and deal in much higher volume, have better purchasing power than Whole Foods and are able to obtain a lower cost for goods from their suppliers. The transaction will allow Whole Foods to expand in order to compete more effectively with its larger, better capitalized competitors. JX 3 at 34, 151-153 (Sud Dep.).

775. Whole Foods expects to lower prices in acquired Wild Oats stores. A.C. Gallo, Co-President and Chief Operating Officer, explained one message to be advertised after the merger's announcement:

[W]e could use the merger with WO to tell some of our stories one of which could be we have great prices. The concern in any merger is that prices may go up in acquired stores. In fact, we know that [REDACTED] we will be bringing down quite a few prices.

DX 58; DX 274; Meyer Decl. ¶ 39 (explaining that he understood that Whole Foods planned to lower prices at acquired Wild Oats stores).

776. The acquisition will enable Whole Foods to generate significant efficiencies, including purchasing efficiencies gained through expanded distribution, the elimination of general administrative costs, and improved intellectual capital. DX 401 (Project Goldmine presentation to the Board of Directors). Paradise Decl. ¶ 64. It will allow several Whole Foods regions to expand their regional staff, particularly in smaller regions where it has operated without a full complement of coordinators, thus making Whole Foods more efficient. Paradise Decl. ¶ 61. The acquisition will also create cost efficiencies by spreading Whole Foods' general and administrative costs over

more stores. Paradise Decl. ¶ 62. The acquisition will also enhance Whole Foods' ability to reach more customers. It will add many new stores in areas where Whole Foods does not currently have stores. Sud Decl. ¶ 36. For example, the acquisition will significantly increase the number of stores in the Rocky Mountain region. Paradise Decl. ¶ 59. It will also make Whole Foods stores more convenient to many current customers who will have a new store closer to them. Paradise Decl. ¶ 63. *See also* JX 41 at 247, 257 (the acquisition would enable Whole Foods to expand its footprint by adding stores in its Florida, Rocky Mountains, and Pacific Northwest regions where it does not currently have many stores, which will reduce costs and improve operational efficiency.); Sud Decl. ¶ 37.

777. The acquisition will also lead to purchasing efficiencies. With more stores, Whole Foods will be able to obtain greater volume discounts from its suppliers. Paradise Decl. ¶ 65; Sud Decl. ¶ 38. The lower purchasing costs in turn will allow Whole Foods to become more price competitive. Sud Decl. ¶ 38.

778. The acquisition will also allow Whole Foods to obtain cost efficiencies. Whole Foods is decentralized and therefore has relatively low general and administrative overhead expenses. In contrast, Wild Oats has more significant corporate overhead, which Whole Foods expects to eliminate, thus reducing those overhead costs by [REDACTED]. Sud Decl. ¶ 137.

779. Whole Foods plans to invest in a number of Wild Oats' stores and improve the quality of the stores and the products and services that they offer. Robb Decl. ¶ 15; Gallo Decl. ¶ 9; Paradise Decl. ¶ 57; Sud Decl. ¶ 32.

F. The acquisition will allow Whole Foods to compete better with larger supermarkets

780. [REDACTED]

781. Whole Foods may not close all the smaller Wild Oats stores. It is considering alternative formats for [REDACTED]

[REDACTED] JX 41 at 98 (Foster I.H.); JX 11 at 229-231, 237 (Paradise Dep.); JX 31 at 229-236 (Paradise I.H.). These formats are being considered to

[REDACTED] JX 41 at 102 (Foster I.H.).

VII. THE BALANCE OF THE EQUITIES FAVORS DENIAL OF THE PRELIMINARY INJUNCTION

782. Under the merger agreement, either party may terminate the agreement after August 31, 2007. Sud Decl. ¶ 45. If the transaction has not closed by that date, one or both of the parties may terminate the merger agreement. Sud Decl. ¶ 45. Therefore, if the tender offer is not consummated on or before August 31, 2007, there is a very real risk that that transaction will not occur at all. Wild Oats' obligation to sell to Whole Foods will expire on August 31, 2007. DX 811. Whole Foods' financing commitments also expire on that date, as does Whole Foods' agreement to sell to a third party the Sun Harvest and Harry's stores currently owned by Wild Oats. Therefore, the merger is unlikely to occur, no matter what the legal merits, if it is not consummated on or before August 31, 2007.

783. [REDACTED]

784. The proposed merger will enhance Whole Foods' ability to compete against its much larger supermarket rivals, so entry of a preliminary injunction would substantially burden its private interests.

785. There is no other prospective buyer for Wild Oats, so entry of a preliminary injunction would substantially burden its private interests.

786. The public interest in competition and effective enforcement of the antitrust laws weighs in favor of denial of the preliminary injunction, since the merger promises to have procompetitive effects and entry of the injunction would likely prevent it from being consummated.

VIII. CONCLUSIONS OF LAW

A. **The FTC has not proven a "likelihood of ultimate success" on the merits that the effect of the proposed merger "may be substantially to lessen competition." 15 U.S.C. §§ 18, 53(b).**

787. Section 13(b) of the FTC, which empowers the FTC to seek to enjoin a violation of Section 7 of the Clayton Act, requires "a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, [the issuance of a preliminary injunction] would be in the public interest." 15 U.S.C. § 53 (b)(2). To obtain an injunction under

Section 13(b) of the FTC Act, the FTC must make “a proper showing that, weighing the equities and considering the Commission’s likelihood of ultimate success, such action would be in the public interest.” 15 U.S.C. §53(b).

788. To meet its burden under Section 13(b) the FTC first must demonstrate at least a “reasonable probability” of success on the merits at a full hearing. *FTC v. Arch Coal, Inc.* 329 F. Supp. 109, 116 (D.D.C. 2004).

789. The FTC’s burden is “not insubstantial,” as explained by Judge Bates in *Arch Coal*:

Given the stakes, the FTC’s burden is not insubstantial, and “[a] showing of a fair or tenable chance of success on the merits will not suffice for injunctive relief.” *Tenet Health Care*, 186 F.3d at 1051; *see Fruehauf Corp. v. FTC*, 603 F.2d 345, 351 (2d Cir.1979) (“mere possibility” will not justify preliminary injunction). Because the public interest in effective enforcement of the antitrust laws is of primary importance, a showing of likely success on the merits will presumptively warrant an injunction. *See Heinz*, 246 F.3d at 726; *University Health*, 938 F.2d at 1225; *Staples*, 970 F.Supp. at 1091. Conversely, absent a likelihood of success on the merits, equities alone will not justify an injunction. *See FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1508 (D.C.Cir.1986).

FTC v. Arch Coal, 329 F.Supp.2d at 116.

790. The D.C. Circuit elaborated on this standard on *FTC v. H. J. Heinz Co.*, 246 F.3d 708, 714-15 (D.C. Cir. 2001) where it explained that the requisite likelihood of success necessitated at least “questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals.” But however the Section 13(b) standard is explained, the FTC must demonstrate a likelihood of success on the merits, *i.e.*, that the effect of the Whole Foods/Wild Oats merger, under Section 7 of the Clayton Act “may be substantially to lessen competition or tend to create a monopoly” in properly defined relevant geographic and product markets. *United States v. Philadelphia National Bank*, 374 U.S. 321

(1963); *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001); *United States v. Baker-Hughes Inc.*, 908 F.2d 981, 982-83 (D.C. Cir. 1990).

791. The Clayton Act deals in “probabilities, not ephemeral possibilities,” so the FTC must establish that a lessening of competition is “sufficiently probable and imminent” that injunctive relief is warranted. *United States v. Marine Bancorporation*, 418 U.S. 602, 622-23 (1974), quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962); *FTC v. Arch Coal*, 329 F. Supp. 2d at 115.

792. The FTC has not proven that it is likely to prevail on the merits of an administrative proceeding and subsequent appeal to the Court of Appeals. Considering the voluminous factual record taken as a whole, the FTC has not “raise[d] questions going to the merits so serious, substantial, difficult, and doubtful as to make them fair ground for thorough investigation, study, deliberation, and determination by the FTC in the first instance and ultimately by the Court of Appeals.” *FTC v. Heinz*, 246 F.3d at 714-15.

793. The failure of proof is not for a lack of trying. The parties produced millions of pages of documents and tens of millions of data points during its investigation and in this litigation. The FTC had months to develop facts sufficient to meet its burden under Section 13(b) but it could not do so.

1. The FTC is not likely to prove that the relevant product market is premium natural and organic supermarkets.

794. Proof of the relevant product and geographic markets is a “necessary predicate of any claim under § 7 of the Clayton Act. *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1072 (D.D.C. 1997).

795. The relevant product market is determined according to the “reasonable interchangeability of use” or cross-elasticity of demand between the products sold by the merging

parties and their “substitutes.” *Brown Shoe v. U.S.*, 370 U.S. at 325; *U.S. v. Baker-Hughes*, 908 F.2d at 223.

796. In other words, definition of the relevant product market looks to where customers are likely to turn in the event of a price increase or decline in quality in the goods sold by the merging firms. *Brown Shoe v. U.S.*, 370 U.S. at 325; *U.S. v. Baker-Hughes*, 908 F.2d at 223.

797. For the reasons set forth herein, taken both individually and collectively, the FTC has failed to prove a likelihood of establishing a relevant product market.

a. The FTC failed to allege or prove what products are at issue.

12. The FTC has failed to prove a likelihood of success in establishing a relevant product market because the product market alleged in its complaint -- “premium natural and organic supermarkets” -- is not a collection of products but rather a collection of firms. While some case law recognizes so-called cluster markets, each of those cases defined the relevant product market with respect to products. See, e.g., *FTC v. Staples, Inc.*, 970 F.Supp. 1066, 1078 D.C. 1997 (“the sale of consumable office supplies through office supply superstores”).

b. Unique rivalry or closeness between the merging firms is not a factor in establishing product market definition.

13. The FTC has failed to prove a likelihood of success in establishing its alleged relevant product market because its analysis erroneously assumes that uniqueness or closeness between the merging firms is relevant to market definition.

14. The FTC incorrectly cites Section 2.21 of their own Horizontal Merger Guidelines, for the proposition that uniqueness or closeness is relevant. But Section 2.21 is part of competitive effect analysis which, according to the Guidelines, presumes an appropriately defined market.

15. Even if the FTC had established unique rivalry or closeness between the merging firms, which they have not, the failure to follow their own Guidelines and the circularity of their reliance on uniqueness, make it unlikely that the FTC will establish their alleged relevant product market.

b. In pursuing this case, the FTC has ignored its past enforcement practices and its Horizontal Merger Guidelines.

(1) The alleged product market is inconsistent with FTC precedent.

798. Review of the FTC's prior supermarket merger enforcement matters reveals that in all 18 of such matters since the 1992 FTC Horizontal Merger Guidelines were adopted, until this merger, the FTC concluded that the relevant product market was at least as broad as the retail sale of food and grocery items in supermarkets. Its failure to use that market definition here, without any explanation for its sudden departure from long-standing policy, makes it less likely to prevail at a full hearing on the merits. *Cf. United States v. Long Island Jewish Medical Center*, 983 F. Supp. 121, 138 (E.D.N.Y. 1997); *United States v. Central State Bank*, 817 F.2d 22, 23 (6th Cir. 1987); *FTC v. Foster*, Memorandum Op. ¶ 181, No. CIV-07-352 JB/ACT (D.N.M. May 29, 2007). ("*Western Refining*").

(2) The alleged product market is inconsistent with the FTC's Horizontal Merger Guidelines.

799. The FTC's Horizontal Merger Guidelines require analysis of where customers would turn for goods in the event of an increase in price or a decline in quality that reflects a lessening of competition. Horizontal Merger Guidelines § 1.0 (rev. 1997).

800. The Guidelines call for an examination of how consumers would respond to a small but significant and non-transitory increase in price ("SSNIP") by a hypothetical monopolist seller of the

products of the merging firms narrowly defined. Guidelines § 1.11. The FTC did not perform this SSNIP test nor did it analyze how customers respond to changes in prices.

801. The failure to follow their own Guidelines makes it unlikely that the FTC will be able to establish a relevant product market as required by Section 7.

- c. **The alleged product market seems to have been constructed for this case alone, because it does not reflect the reality of everyday competition.**

802. The relevant product market alleged in the FTC's complaint is nothing more than an attempt to describe, in a highly subjective fashion, some of the attributes of Whole Foods as Wild Oats stores. This is not a proper basis for defining a relevant product market. *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1121 (N.D. Cal 2004) ("Judicial experience cautions against the use of qualitative factors to define narrow markets"). There is a significant risk of *ad hoc* decisionmaking when courts focus on store attributes rather than consumer behavior. William Blumenthal & David Cohen, *Channels of Distribution as Merger "Markets": Interpreting Staples and Cardinal*, Antitrust Rep., Nov. 1998, at 13.

803. The FTC's product market definition does not accurately reflect where customers shop today, and the FTC fails to demonstrate whether customers would have alternatives to turn to in the event of a price increase or decline in quality, which is the determinative question for product market. *Brown Shoe v. U.S.*, 370 U.S. at 325; *U.S. v. Baker-Hughes*, 908 F.2d at 223.

804. The fact that the large majority of Whole Foods and Wild Oats customers today shop frequently at other supermarkets for the same products that they buy at Whole Foods and Wild Oats, and that other supermarkets now sell many and an increasing variety of natural and organic products, demonstrates that the relevant product market for evaluating this merger includes, at a minimum, all supermarkets. If, after the merger, Whole Foods raised its prices or

permitted its quality to decline, customers would easily shift their purchases of natural and organic products from Whole Foods to other supermarkets.

805. The strong evidence of price-checking among Whole Foods, Wild Oats, and other supermarkets further demonstrates active and vigorous competition among them, proving that they are in the same relevant product market. *See FTC v. Heinz*, 246 F.2d at 708, 718.

806. The evidence that Whole Foods considers the locations of all other local supermarkets when assessing where to locate a new store further proves that Whole Foods operates in the same product market as other supermarkets. *FTC v. Staples*, 970 F. Supp. at 1079.

807. Much of the FTC's argument about product market focuses on vague attributes that Whole Foods claims to have, such as offering a "third place," where customers can relax outside of work or home. Aside from the fact that many other entities claim to offer such a haven, including coffee shops and cafes, attributes as vague as this cannot be the basis of market definition. *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1159 (N.D. Cal. 2004).

808. The FTC's product market definition also fails because it has not shown how to apply the characteristics it attributes to premium natural and organic supermarkets. First, the attributes include vague terms such as "focus on perishables," without providing any way to measure what "focus" is or how much "focus" is necessary. Second, the FTC says that stores "generally" have the attributes, but that no every store will have every attribute. The FTC says that they attributes may be mixed in different ways to be a premium natural and organic supermarket, yet it provides no objective way to determine what mixtures are sufficient.

809. Further, the FTC has not established which Whole Foods and Wild Oats stores have the attributes. The failure is particularly acute because of the variation among Wild Oats stores.

810. Similarly, the FTC has failed to establish that other grocery stores in the alleged geographic markets do not have the attributes and therefore are not within the alleged product market. It discusses various supermarket chains in general terms, but it has not submitted evidence applying the alleged attributes of premium natural and organic supermarkets to any other the other stores.

811. The FTC also has not proven that Earth Fare and New Seasons have the attributes, even though the FTC asserts that they are the only two other premium natural and organic supermarkets. That failure is important because Dr. Murphy has analyzed price effects from the entry of Earth Fare stores in North Carolina, asserting that the study shows that Whole Foods responds to premium natural and organic supermarkets but not other grocery stores. However, because the FTC has not shown that Earth Fare actually has the attributes, Dr. Murphy's study says nothing about the product market definition or the competitive effects of this matter.

812. Some of the FTC's evidence tends to show that some customers prefer to shop at Whole Foods or Wild Oats rather than at other supermarkets. Preferences are not sufficient to establish relevant product markets, since, without more, they do not inform the inquiry into whether sufficient customers would switch in the event of a price increase or quality decline so that the price increase or quality decline would be unprofitable. *FTC v. Arch Coal*, 329 F. Supp. 2d at 122; *United States v. SunGard Data Sys.*, 172 F. Supp. 2d 172, 191-92 (2001); *United States v. Gillette Co.*, 828 F. Supp. 78, 83 (D.D.C. 1993).

813. The fundamental error in the FTC's reasoning and the focus of its proof on product market is that it addresses whether Whole Foods has *any* customers who are so dedicated to that store's product array and other qualities that they would not switch *any* of their purchases to

another supermarket if Whole Foods began to compete less vigorously. The question for antitrust analysis is, instead, whether *enough* customers would switch *enough* of their purchases that a post-merger price increase or quality decline would be unprofitable for Whole Foods. The defendants' evidence persuasively answered this question in the affirmative: customer willingness to switch some or all of their purchases to other food retailers would likely render unprofitable any post-merger effort by Whole Foods to increase prices or reduce quality.

814. Critical loss accurately captures the FTC's *Guidelines* test for defining relevant markets when evaluating whether to challenge a merger. *Tenet Healthcare v. FTC*, 186 F.3d 1045, 1053 (8th Cir. 1999); Department of Justice/Federal Trade Commission Horizontal Merger Guidelines 57 Fed. Reg. 41552 § 1.21 (1992). The Commission, in fact, frequently applies this test. *See, e.g.*, Statement of the FTC Concerning Royal Caribbean Cruises, Ltd./P&L Princess Cruises plc and Carnival Corp./P&L Princess Cruises plc, File No 021 0041, text at n.9 (October 4, 2002), available at <http://www.ftc.gov/os/2002/10/cruisestatement.htm>. Critical loss analyses are also often relied upon by courts in merger cases. *See, e.g.*, *Tenet Health Care v. FTC*, 186 F.3d at 1050, 1053; *FTC v. Arch Coal*, 329 F. Supp. 2d at 122-23.

815. The evidence does not support a finding of a separate market for “premium natural and organic supermarkets.”

d. The FTC has no support for its eleventh hour assertion that there could be markets comprised of individual departments at premium and natural organic supermarkets.

816. During its closing argument, the FTC asserted that Whole Foods and Wild Oats “can and do price discriminate” in the produce, seafood and meat categories, citing to an analysis conducted by Dr. Murphy in support of this assertion. 8/1 Hearing Tr. at 23 – 33, 48. Neither the facts of this case, the case law, the *Horizontal Merger Guidelines*, nor even Dr. Murphy's own

testimony support the existence of price discrimination markets (or even the parties' ability to price discriminate in the first place).

817. The *Horizontal Merger Guidelines* define "price discrimination" product markets as those in which a hypothetical monopolist could *identify* and *price differently* to targeted buyers who would not defeat the price increase by substituting to other products in response to a SSNIP. Stated another way, price discrimination requires "charging different buyers different prices for the *same* product." *Horizontal Merger Guidelines* § 1.12 (rev. 1997) (emphasis added). The case law definition is identical to that used in the Merger Guidelines. *FTC v. Owens-Illinois, Inc.*, 681 F. Supp. 27, 48 (D.D.C. 1988) (price discrimination defined as the ability to "raise prices to those purchasers who will not readily switch to alternative [products], but *not* raise prices to elastic end users." (emphasis added).

818. Although the FTC alleged in its closing argument that Whole Foods and Wild Oats "can and do price discriminate" (referring either to the produce, seafood and meat departments or to some sub-group of products within those departments), it in fact has *no* evidence that price discrimination happens or is even possible.

819. Whole Foods, like all supermarkets, posts the price of each product in its stores for all to see. The prices do not change for particular customers or groups of customers, nor is there any mechanism that would make such a pricing structure possible. As is demonstrated in the record, Whole Foods does not even use "loyalty" or "frequent shopper" cards to monitor and track which customers are purchasing which products. Sud Decl. ¶ 13. It has no ability to "charge different buyers different prices for the same product," as the Guidelines and case law require. *Horizontal Merger Guidelines* § 1.12 (rev 1997).

820. The FTC's expert economist, Dr. Murphy, explicitly rejected the notion that there

were separate product markets for individual items within categories like produce and seafood. In his expert report, Dr. Murphy states “consumers do not typically choose retailers of the goods in question on a product-by-product basis; rather, they typically purchase an array of products from a single source. I therefore approach market definition by considering the collection of products provided by each of the individual retailers at issue and consider substitution by consumers across these collections.” Murphy Report ¶ 97. At trial, he explained that his margin analysis was not meant to suggest that produce or seafood sold through Whole Foods or Wild Oats was a “separate relevant product market,” and explained that “I didn’t think we’d want to define separate markets product-by-product.” 7/31 Hearing Tr. at 87 – 88.

821. That the FTC has refined its definition of the relevant product market on a number of occasions during the short duration of this litigation – and again during closing arguments – is further evidence that the FTC is unlikely to establish a relevant product market. It may not matter what the product market is called, as the FTC argued in closing (citing “Romeo & Juliet” but not *legal precedent*), but it does matter for purposes of a preliminary injunction whether the FTC has a consistent methodology for defining a relevant product market and the factual support for applying that methodology. Here they have neither.

822. These shifting product market definition attempts undermine the FTC’s likelihood of success in establishing a product market. In *United States v. Oracle Corp.*, the court noted that the government had shifted its product market definition on several occasions during the course of the trial, ultimately settling on a definition (as in this case) comprised of ten fairly vague product “characteristics.” The *Oracle* court found such shifting and vague characteristics insufficient for

the government to meet its burden of proving a relevant product market. *United States v. Oracle Corp.* at 1159.

2. The FTC is not likely to prove its relevant geographic markets injunction.

823. “The government has the burden of proving the relevant geographic market.” *FTC v. Tenet Health Corp.*, 186 F.3d 1045, 1052 (8th Cir. 1999).

824. The FTC is unlikely to prove that the relevant geographic markets are the arbitrary areas alleged in their complaints or discussed in their briefs. As with their product market allegations, the FTC’s approach to geographic market allegations fails to conform to the case law and their own *Horizontal Merger Guidelines*. Moreover, the FTC’s shifting position on the relevant geographic markets further undermines their likelihood of success.

825. The relevant geographic markets must be established with careful attention to the nature and circumstances of the particular market in question. *United States v. Connecticut National Bank*, 418 U.S. 656 (1974).

826. Metropolitan areas, drawn to reflect overall commercial activity in an area, cannot be used to define geographic markets for individual products or services without a particularized showing that they are appropriate for that individual product or service. *U.S. v. Connecticut National Bank*, 418 U.S. 656. The FTC has made no effort to make such a particularized showing of the relevance of metropolitan areas to market definition in a supermarket merger, and its reliance on metropolitan areas is therefore inadequate as a matter of law.

827. The FTC’s reliance on a single factor used by Whole Foods to determine a store’s draw area – circles showing a six-mile radius around each store, reflects only one of many factors Whole Foods uses in estimating the area from which it draws its customers. Moreover, Whole Foods uses different criteria for this assessment, depending on the nature and circumstances of the

relevant market. The FTC's reliance on this single factor, without any evidence of its applicability to the individual market in question, is legally insufficient to prove the contours of the relevant geographic markets. *U.S. v. Connecticut National Bank*, 418 U.S. 656.

828. Draw areas do not establish relevant geographic markets, since they show where customers shop today, not where they might shop in the event of a price increase or quality decline. *FTC v. Freeman Hospital*, 69 F.3d 260, 263 (8th Cir. 1995).

829. The FTC's Horizontal Merger Guidelines require analysis of where customers would turn for goods in the event of an increase in price or a decline in quality that reflects a lessening of competition. Horizontal Merger Guidelines § 1.0 (rev. 1997).

830. The Guidelines call for an examination of how consumers would respond to a small but significant and non-transitory increase in price ("SSNIP") by a hypothetical monopolist seller at the locations of the merging firms. Guidelines § 1.21. The FTC did not perform this SSNIP test nor did it analyze how customers respond to changes in prices.

831. The failure to follow their own Guidelines makes it unlikely that the FTC will be able to establish a relevant geographic market as required by Section 7.

832. The fact that the FTC has changed its position on the relevant geographic market so frequently suggests a lack of attention to or lack of confidence in its definition, and decreases even further the likelihood that it would prevail at a full hearing on the merits.

833. The FTC failed to offer the individualized proof of local conditions and market circumstances that is legally required to establish the relevant geographic markets. *FTC v. Staples*, 970 F. Supp. at 1073; *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34, 45 (D.D.C. 2002).

834. The weight of all of the evidence is that relevant geographic markets vary with each store location, and the consequence is that each relevant geographic market must be separately proved on the basis of the facts and circumstances of that particular locale. *See U.S. v. Connecticut National Bank*, 418 U.S. 656.

835. The FTC's inability to offer evidence to prove the relevant geographic market is, without more, sufficient grounds for denying the preliminary injunction. *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 49 (D.D.C. 1998).

3. The FTC's inability to prove that the merger is likely substantially to *lessen* competition.

836. After the relevant markets have been delineated, the Court must examine whether the proposed merger will have anticompetitive effects within those markets. On this issue, as with product and geographic market, the FTC maintains the burden of proof. *U.S. v. Baker Hughes*, 908 F.2d 981.

837. Highly relevant to the effects analysis is evidence from past marketplace events that inform whether prices are likely to rise, or quality suffer, if the merger is consummated. *See, e.g., FTC v. Heinz*, 246 F.3d at 718.

838. Importantly, the documents of both companies and the testimony of their supermarket operators repeatedly demonstrate, in city after city, that Wild Oats' prices ██████████ ██████████ Whole Foods' prices. Wild Oats does not operate as a competitive constraint on Whole Foods today, so its disappearance from the marketplace would not reduce the competitive pricing pressure on Whole Foods. *See, e.g., FTC v. Heinz*, 246 F.3d at 718; *FTC v. Staples*, 970 F. Supp. at 1087-88.

839. Wild Oats is neither a maverick firm under the Merger Guidelines, nor the type of low-priced, aggressive competitor that Chief Judge Hogan found Office Depot to be in *FTC v. Staples*, 970 F. Supp. at 1083.

840. Post-merger, Whole Foods will continue to face direct competition from the full range of other supermarkets and food retailers, as it does today, and it is these stores that constrain its pricing and influence to offer high levels of quality in products, service, and general customer experience. Under the Clayton Act, that is the end of the inquiry. 15 U.S.C § 18.

841. Dr. Scheffman's cross-sectional pricing analysis is further evidence that Wild Oats does not constrain Whole Foods' pricing today. Dr. Scheffman's pricing analysis is completely consistent with the testimony of defendants' operators, with market research conducted in the ordinary course of business, and with the overwhelming weight of documenting evidence. Dr. Murphy's cross sectional analysis of margins confirms Dr. Scheffman's in that he finds no statistically significant evidence of a constraining effect on Whole Foods by Wild Oats. Therefore, application of the *Staples* comparative pricing test, although repeatedly urged by the FTC here, actually proves that the merger is not likely to lessen competition. *FTC v. Staples*, 970 F. Supp. 1066.

842. [REDACTED]

[REDACTED] This is further evidence that the merger is not likely to lessen competition. *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974); *FTC v. Arch Coal*, 329 F. Supp. 2d at 153.

843. Relevant to evaluation of Wild Oats' competitive vigor are its financial condition and performance, *United States v. International Harvester Co.*, 564 F.2d 769, 775-65 (7th Cir. 1977); *FTC v. Arch Coal*, 329 F. Supp. 2d at 154-55; the [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] All of these factors indicate that Wild Oats exerts little competitive influence on the marketplace today, and that its influence would likely decline in the future if the merger does not take place.

844. Firms already in the relevant markets or in adjacent markets are likely to respond if Whole Foods raises its prices or degrades its quality, since such a move by Whole Foods would create a competitive opportunity for another firm to enter and serve former Whole Foods customers. Repositioning is a common response of other firms to a weakening of the competitive vigor of a newly merged firm. Here, where repositioning by other supermarkets is already ongoing, it likely would accelerate post-merger if Whole Foods creates a competitive opportunity by relaxing its competitive efforts.

845. Under the FTC's theory of the case, Wild Oats and Whole Foods would each enjoy a series of local monopolies around the country, in the cities where neither the other, nor any third premium natural and organic supermarket, competes against them. The FTC's failure to prove that prices are different in these "monopoly" cities is fatal to its case. *See U.S. v. Long Island Jewish Medical Center*, 983 F. Supp. at 138.

846. Also relevant to evaluation of the merger under the Clayton Act is the fact that Whole Foods is likely to improve the efficiency of its operations by integrating the assets of Wild Oats into its supermarket network.

4. The FTC's two potential competition claims are, respectively, legally insupportable and unproved.
 - a. The Clayton Act does not prohibit a merger because it fails to enhance competition

847. The FTC contends that, if Whole Foods does not purchase Wild Oats, another supermarket chain could purchase Wild Oats and use it as a “springboard” into what it terms the market for “premium natural and organic supermarkets.” There is no precedent for a merger challenge under the Clayton Act based on a claim that another buyer would be more procompetitive than the actual buyer. Nor does the language of the Clayton Act authorize such a claim: it prohibits only transactions that may tend “substantially to *lessen* competition.” 15 U.S.C. § 18 (emphasis added).

848. The argument that another buyer would be more procompetitive is also [REDACTED]

- b. As to the geographic markets in which it alleges harm to potential competition, the FTC fails to establish the initial element of a potential competition claim.

849. The initial element of a claim that a merger will lessen potential competition is that the relevant markets are already, prior to the merger, highly concentrated and uncompetitive. *U.S. v. Marine Bancorporation*, 418 U.S. at 625.

850. The FTC’s “potential competition” allegations, which were completely ignored during the two-day preliminary injunction hearing, fail for the same reasons that the FTC’s allegations regarding the 18 overlap areas fail. Namely, the FTC cannot prove the existence of a relevant product or geographic markets in which potential competition would be harmed.

851. Even if one assumes that the FTC could prove the existence of its alleged product and geographic markets, these claims must fail. Because it failed to prove that prices are higher or quality is lower in the so-called “monopoly” markets today, it has not shown that the elimination of Whole Foods as a potential future entrant into those monopoly markets would harm competition. This, the FTC failed to establish the initial element of its claim that the

merger will lessen potential competition in seven cities – that the relevant markets do not behave competitively today.

5. Attention to purported intent evidence, including the statements of John Mackey, cannot distract from analysis of relevant marketplace conduct (*i.e.*, everyday competition), which the Court has determined is the relevant inquiry.

a. The statements of John Mackey have been misinterpreted and misused.

852. The colorful, combative language used by John Mackey, like comments of many CEOs, does not reflect market realities as reliably as business documents showing how a company actually conducts its business. *See* P. Areeda & H. Hovenkamp *Antitrust Law* § 1506 (2d ed. 2003); G. Manne & W. Williamson, *Hot Docs and Cold Economics*, 47 *Ariz. L. Rev.* 609, 646 (2005).

853. For this reason, the Supreme Court in the *Twombly* case dismissed statements made by the CEO of one of the defendants that the plaintiff had relied upon as evidence of anticompetitive effects. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1973 n.13 (2007). Appellate courts as well have dismissed remarks such as these as well, as not reliably probative of actual market effects. *See A. A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1402 (7th Cir. 1989); *Morgan v. Ponder*, 893 F.2d 1355, 1359 (8th Cir. 1989).

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

854. Given Mr. Odak's bleak record as CEO of Wild Oats, his testimony about the characteristics of the competition faced by Wild Oats was not persuasive.

855. Mr. Odak also appears somewhat embittered towards Wild Oats, from his disagreements with the board of directors, and his testimony is unpersuasive for this reason as well.

B. The public interest and the balance of the equities do not favor issuance of an injunction.

856. Section 13(b) of the FTC Act authorizes entry of a preliminary injunction only upon a showing that the FTC is likely to prevail in a full hearing on the merits, and that the balance of the equities warrants entry of the injunction. 15 U.S.C. § 53(b).

857. The FTC has the burden of proving that entry of a preliminary injunction is in the public interest. *See FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C.Cir. 1980).

858. A preliminary injunction is a drastic remedy, so the FTC's burden on this issue is "properly a heavy one." *FTC v. Occidental Petroleum Corp.*, 1986-1 Trade Cas. (CCH) ¶ 67,071 at 62,516 (D.D.C. 1986).

859. In deciding whether entry of a preliminary injunction is in the public interest, the Court must weigh the equities, both public and private. *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1082 (D.C. Cir. 1981); *FTC v. Great Lakes Chemical Corp.*, 528 F. Supp. 84, 98 (N.D. Ill. 1981).

860. As a practical matter, Whole Foods is unlikely to be able to acquire Wild Oats if a preliminary injunction is entered, the private equities also weigh in favor of not entering the injunction. *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072 (D.C.Cir. 1981); *FTC v. Swedish Match*, 131 F. Supp. 2d . 151, 172 (D.D.C. 2000); *see also FTC v. Nat'l Tea*, 603 F.2d 694, 697 (8th Cir. 1979). Entry of a preliminary injunction would likely doom the transaction. *See FTC v. Occidental Petroleum*, 1986-1 Trade Cas. (CCH) ¶ 67,071 at 62,516 (D.D.C. 1986).

861. Entry of an injunction would likely deny Whole Foods and consumers the efficiencies likely to be achieved as a result of the merger.

862. Entry of an injunction would likely deny Wild Oats the sale it seeks, [REDACTED]

[REDACTED]

863. Because as a practical matter, Whole Foods is unlikely to be able to acquire Wild Oats as a preliminary injunction is entered, and given the merger is likely to enhance competition by making Whole Foods a stronger competitor against its much larger rivals, the public equities also weigh in favor of not entering the injunction. *FTC v. Weyerhaeuser*, 665 F.2d at 1087; *see also FTC v. Elders Grain, Inc.*, 868 F.2d 901, 904 (7th Cir. 1989).

IX. CONCLUSION

The FTC's motion for a preliminary injunction is denied.

Respectfully submitted,

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