

453. An analysis of a single day's pricing, even if otherwise will done, cannot provide any reliable conclusions. Professor Murphy's analysis of the entry of Earth Fare in competition with Whole Foods in certain North Carolina markets graphically demonstrates this fact.
454. Had Dr. Scheffman's pricing study reviewed prices on any of numerous days spanning a period of months, he would entirely have missed the localized reductions in Whole Foods' prices that were caused by Earth Fare entry.
455. Further, Dr. Scheffman's use of "in-register" prices in his pricing study would have made his study unreliable even had he assessed pricing over an appropriate span of time. Many price reductions by PNOS are in the form of discounts and promotions not captured by "in-register prices, such as "buy one, get one" free and "10% off of all purchases in excess of \$50" offers.
456. Dr. Scheffman's pricing study is unscientific and entitled to no weight whatever.

IV. THE RELEVANT GEOGRAPHIC MARKETS ARE LOCAL AREAS IN WHICH WHOLE FOODS AND WILD OATS COMPETE OR WILL COMPETE

457. Plaintiff and Defendants agree that local areas are the appropriate geographic markets for analyzing the competitive effects of the proposed acquisition. Professor Murphy and Dr. Scheffman evaluated the impact of the acquisition in geographic markets in which the parties closely compete. Murphy Report (PX02878) ¶¶ 105-07 (PX02878); Murphy Supp. Rebut. Report (PX02883) ¶8; Scheffman Report, App. F (PX02062) ¶1.
458. Defendants' business records and testimony establish that they focus on customers within a distance of three to six miles of their stores when selecting site locations and making other competitive assessments. PX02212 ("3 miles is a general area that we commonly use to compare our stores trade areas"); PX01011 (charting all stores within six miles of Whole Foods in a competitive analysis document); PX00186 at 007 (focusing on customers within a 16 minute driving distance of store); Bradley Dep. (JX 6) at 44:24-45:12; Megahan Dep. (JX 9) at 28:19-21; Meyer Dep. (JX10) at 90:16-18; Lannon Dec. ¶ 23; Besancon Dec. ¶¶ 42, 44, 46, 57, 61, 63, 65, 68-70; Megahan Dec. ¶¶ 7, 8, 25, 28; Martin Dec. ¶ 25; Allshouse Dec. ¶¶ 14; Robb Dec. ¶¶ 36, 38; Paradise Dec. ¶¶ 26-30, 33-37, 39-43, 45-46, 51, 54; PX04733, at 005; PX01374.
459. The Commission's expert, Professor Kevin Murphy, identified relevant geographic markets by analyzing overlaps of store trade areas, using a six mile radius around each store as its trade area. Murphy Report (PX02878) ¶¶ 105-8; Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 012-026.

460. The geographic market definitions proposed by the Federal Trade Commission appropriately represent the area of effective competition between or among premium natural and organic supermarkets in each locality. According to Professor Murphy, “As a matter of logic, there would be competitive interaction in those areas where there is meaningful overlap between the circles around the stores of different participants in the relevant market. The union of these circles approximates the geographic area that will be competitively impacted by this proposed acquisition, and thus represents the relevant geographic market within which the competitive impact of this proposed acquisition can be evaluated.” Murphy Supp. Rebut. Report (PX02883) at ¶ 8.
461. Defining the geographic markets based on the overlapping of trade areas in this manner is consistent with Professor Murphy’s econometric analysis. July 31, 2007 AM Tr. Mot. Hr’g at 43:18-44:1 (Murphy test.). (“[T]he markets you get are not sensitive exactly to the distance that you use. So whether you use five or six, you’re going to get the same markets. And that’s the sense to which six miles was an appropriate distance to use. Had there been a different configuration of markets, in some hypothetical world you might have had to address the question of whether five or six made more sense. But in the markets that we had, they led to the same results, so both lead to acceptable geographic market definitions.”).
462. Defendants’ documents and testimony suggest that a larger trade area might be appropriate in a few instances. *See, e.g.* Gallo Dep. (JX 1) 138:25-139:4 (competitive area tends to be smaller in urban areas; larger in suburban areas); Kadish Dep. (JX 7) at 119:10-19 (Whole Foods will consider physical characteristics of terrain such as rivers in assessing an area); Meyer Dep. (JX10) at 90:13-15 (highway access may lead to a broader area); Lannon Dec. ¶ 10 (most customers for Whole Foods’ [REDACTED] store come from a 10-15 mile driving radius); Lannon Dep. (JX8) 197:3-5 (customers of Whole Foods’ [REDACTED] store come from a 20 mile radius); Robb Dep. (JX 2) at 91:14-16 [(REDACTED)]; PX00920 (Wild Oats considered stores within a ten mile radius).
463. In each instance, if the trade area, and consequently the geographic market, were expanded, no additional premium natural and organic supermarket competitors would be included in the larger area. *See* Murphy Supp. Rebut. Report (PX02883) Exhibit 2 at 012-026. Professor Murphy testified that for “a large number of the markets – of the 18 markets I identify, I think it’s something like 14 – . . . they’re very much invariant to different assumptions. . . . [T]here are other markets where the existence and type of effects that would occur are not sensitive to those assumptions. What would vary is the precise number of [the Defendants’] stores that would be included in those markets. But the economic analysis would not be substantively changed.” Murphy Dep. (JX 26) at 68:22-69:15; July 31, 2007 AM Tr. Mot. Hr’g at 109:16-110:1 (Murphy test.) (Professor Murphy testified that one would have to go “a long ways,” “definitely think more than ten

miles,” and “certainly” more than a state in some instances before you picked up another premium natural supermarket.).

464. The proposed merger will eliminate Whole Foods’ only premium natural and organic supermarket competitor in defined areas within the following 17 localities: Albuquerque, NM; Boston, MA; Boulder, CO; Hinsdale, IL (suburban Chicago); Evanston, IL (suburban Chicago); Cleveland, OH; Denver, CO; West Hartford, CT; Henderson, NV; Kansas City-Overland Park, KS; Las Vegas, NV; Los Angeles, CA; Louisville, KY; Omaha, NE; Pasadena, CA; Portland, ME; and St. Louis, MO. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 012-023, 025-026. The proposed merger will reduce the number of competitors from three to two in a defined area within Portland, OR. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 024. (For convenience, we will refer to each defined relevant market by the city of which it is a part.)

465. In Albuquerque, NM, the transaction will reduce the number of premium natural and organic supermarket retailers from two to one. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 012. Whole Foods currently operates one premium natural organic supermarket in the Albuquerque, NM, geographic market at 5815 Wyoming Blvd. NE, Albuquerque, NM 87109. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 012; Whole Foods Response to Specification No. 2 (PX02052). Wild Oats currently operates three premium natural organic supermarkets in the Albuquerque, NM, geographic market. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 012. The Wild Oats in the Albuquerque, NM geographic market are located at the following addresses: 6300 A San Mateo NE, Albuquerque, NM 87109; 2103 Carlisle Boulevard NE, Albuquerque, NM 87110; and 11015 Menaul Boulevard NE, Albuquerque, NM 87112. Wild Oats Response to Specification No. 2 (PX04846). There are no other premium natural and organic supermarkets in the Albuquerque market. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 012.

466. [REDACTED]

467. In Boston, MA, the transaction will reduce the number of premium natural and organic supermarket retailers from two to one. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 013. Whole Foods currently operates 11 premium natural organic supermarkets in the Boston, MA, geographic market. The Whole Foods in the Boston, MA, geographic market are located at the following addresses: 15 Washington Street, Brighton, MA 02135; 115 Prospect Street, Cambridge, MA 02139; 181 Cambridge Street, Charles River Plaza, MA 02114; 200 Alewife Brook Parkway, Cambridge, MA 02138; 916 Walnut Street, Newton, MA 02459; 647 Washington Street, Newtonville,

MA 02458; 340 River Street, Cambridge, MA 02139; 331 Paradise Road, Swampscott, MA 01907; 15 Westland Avenue, Boston, MA 02115; 278 Washington Street, Wellesley Hills, MA 02481; and 400 Cambridge Road, Woburn, MA 01801. Whole Foods Response to Specification No. 2 (PX02052). Wild Oats currently operates two premium natural and organic supermarkets in the Boston, MA geographic market. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 013. The Wild Oats in the Boston, MA geographic market are located at the following addresses: 2151 Mystic Valley Parkway, Medford, MA 02155 and 375 Broadway (Route 1), Saugus, MA 01906. Wild Oats Response to Specification No. 2 (PX04846). There are no other premium natural and organic supermarkets in the Boston, MA geographic market. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 013.

- 468. In the Boston, MA, area, the Wild Oats locations are located in close proximity to the Whole Foods stores. For instance, Whole Foods is located about one and a half miles from the Wild Oats store in Medford. Additionally, the Whole Foods store in Swampscott is about 5 miles from the Wild Oats store in Saugus. Lannon Dec. ¶ 19.
- 469. In Boulder, CO, the transaction will reduce the number of premium natural and organic supermarket retailers from two to one. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 014. Whole Foods currently operates one store in the Boulder, CO market at 2905 Pearl Street, Boulder, CO 80301. Whole Foods Response to Specification No. 2 (PX02052). Wild Oats currently operates three premium natural organic supermarkets in the Boulder, CO, geographic market. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 014. The Wild Oats in the Boulder, CO, geographic market are located at the following addresses: 2584 Baseline Road, Boulder, CO 80303; 1645-1651-1655 Broadway, Boulder, CO 80302; and 303 Marshall Road, Superior, CO 80027. Wild Oats Response to Specification No. 2 (PX04846). Wild Oats also operates store under the Ideal Market banner on Apline Avenue, Boulder, CO 80304. Wild Oats Response to Specification No. 2 (PX04846). There are no other premium natural and organic supermarkets in the Boulder, CO, geographic market. Murphy Supp. Rebut. Report (PX02883) ¶ 8, Exhibit 2 at 014.
- 470. Wild Oats planned to open its flagship store in Boulder at 1601 29th Street, Boulder, CO 80401. However, that store has not yet opened and Whole Foods does not plan to operate the 29th Street store if the transaction is consummated. PX00038.

471. [REDACTED]

472. In Hinsdale, IL, the transaction will reduce the number of premium natural and organic supermarket retailers from two to one. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 017. Whole Foods currently operates three premium natural organic supermarkets in the Hinsdale, IL geographic market. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 017. The Whole Foods in the Hinsdale, IL geographic market are located at the following addresses: 7245 Lake Street, River Forest, IL 60305; 201 W. 63rd Street, Willowbrook, IL 60527; and 151 Rice Lake Square, Wheaton, IL 60187. Whole Foods Response to Specification No. 2 (PX02052). Wild Oats currently operates one premium natural organic supermarket in the Hinsdale, IL geographic market at 500 E. Ogden Avenue, Hinsdale, IL 60521. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 017. Wild Oats Response to Specification No. 2 (PX 04846). There are no other premium natural and organic supermarkets in the Hinsdale, IL geographic market. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 017.

473. [REDACTED]

474. In Evanston, IL, the transaction will reduce the number of premium natural and organic supermarket retailers from two to one. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 017. Whole Foods currently operates three premium natural and organic supermarkets in the Evanston, IL, geographic market. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 017. The Whole Foods in the Evanston, IL, geographic market are located at the following addresses: 1640 Chicago Avenue, Evanston, IL 60201; 3300 N. Ashland, Chicago, IL 60657; and 6020 N. Cicero Avenue, Chicago, IL 60646. Whole Foods Response to Specification No. 2 (PX02052). Wild Oats currently operates one premium natural organic supermarket in the Evanston, IL, geographic market at 1101-1137 Chicago Avenue, Evanston, IL 60202. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 017. Wild Oats Response to Specification No. 2 (PX04846). There are no other premium natural and organic supermarkets in the Evanston, IL geographic market. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 017.

475. [REDACTED]

476. In Cleveland, OH, the transaction will reduce the number of premium natural and organic supermarket retailers from two to one. Murphy Supp. Rebut. Report (PX02883) at ¶ 8,

Exhibit 2 at 015; DX160 at 5 (defining the trade area as three miles for 180 degrees to the west and 7 ½ miles to the east to the Cuyahoga/Geauga County line). Whole Foods currently operates one premium natural and organic supermarket in the Cleveland, OH, geographic market at Cedar & Warrensville Rd, Cleveland, OH 44118. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 015; Whole Foods Response to Specification No. 2 (PX02052). Wild Oats currently operates one premium natural and organic supermarket in the Cleveland, OH, geographic market at 27249 Chagrin Blvd., Cleveland, OH 44122. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 015; Wild Oats Response to Specification No. 2 (PX04846). There are no other premium natural and organic supermarkets in the Cleveland, OH, geographic market. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 015.

477. In Denver, CO, the transaction will reduce the number of premium natural and organic supermarket retailers from two to one. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 016. Whole Foods currently operates four premium natural and organic supermarkets in the Denver, CO, geographic market. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 016. The Whole Foods in the Denver, CO, geographic market are located at the following addresses: 444 South Wadsworth Boulevard, Lakewood, CO 80226; 2375 E. First Ave, Denver, CO 80206; 9366 South CO Boulevard, Ste B, Highlands Ranch, CO 80126; and 7400 E. Hampden Ave, Tamarac-Denver, CO 80237. Whole Foods Response to Specification No. 2 (PX02052). Wild Oats currently operates six premium natural and organic supermarkets in the Denver, CO, geographic market. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 016. The Wild Oats in the Denver, CO, geographic market are located at the following addresses: 900 E 11th Avenue, Denver, CO 80218; 870 S Colorado Blvd., Glendale, CO 80246; 8194 S. Kipling Parkway, Littleton, CO 80127; 5910 S. University, Littleton, CO 80121; 1111 S. Washington Street, Denver, CO 80210; and 14357 W. Colfax Avenue, Lakewood, CO 80401. Wild Oats Response to Specification No. 2 (PX04846). There are no other premium natural and organic supermarkets in the Denver, CO, geographic market. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 016.

478. [REDACTED]

479. [REDACTED]

480. [REDACTED]

481. In West Hartford, CT the transaction will reduce the number of premium natural and organic supermarket retailers from two to one. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 026. Lannon Dec. ¶ 10 (80% of the customers who shop at the Whole Foods in West Hartford, CT, come from a surrounding 10-15 mile drive radius). Whole Foods currently operates one premium natural and organic supermarket in the West Hartford, CT, geographic market at 50 Raymond Road, West Hartford, CT 06107. Whole Foods Response to Specification No. 2 (PX02052); Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 026. Wild Oats currently operates one premium natural and organic supermarket in the West Hartford, CT geographic market at 340 North Main Street, West Hartford, CT 06117. Wild Oats Response to Specification No. 2 (PX04846). Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 026. There are no other premium natural and organic supermarkets in the West Hartford, CT, geographic market. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 26.

482. In Henderson, NV the transaction will reduce the number of premium natural and organic supermarket retailers from two to one. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 018; Bensacon Dec. ¶ 59 (noting that Wild Oats is located approximately 4 miles from the Whole Foods store). Whole Foods currently operates one premium natural and organic supermarket in the Henderson, NV, geographic market at 100 S. Green Valley Parkway, Henderson, NV 89012. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 018; Whole Foods Response to Specification No. 2 (PX02052). Wild Oats currently operates one premium natural and organic supermarket in the Henderson, NV, geographic market at 517 N. Stephanie Street, Henderson, NV 89104. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 018; Wild Oats Response to Specification No. 2 (PX04846). There are no other premium natural and organic supermarkets in the Henderson, NV, geographic market. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 018.

483. In Kansas City-Overland Park, KS, the transaction will reduce the number of premium natural and organic supermarket retailers from two to one. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 019. Whole Foods currently operates one premium natural and organic supermarket in the Kansas City-Overland Park, KS, geographic market at 7401 West 91st Street, Overland Park, KS 66212. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 019; Whole Foods Response to Specification No. 2 (PX02052). Wild Oats currently operates three premium natural and organic supermarkets in the Kansas City-Overland Park, KS, geographic market. Murphy Supp.

Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 019. The Wild Oats in the Kansas City-Overland Park, KS, geographic market are located at the following addresses: 5101 Johnson Drive, Mission, KS 66205; 6621 W. 119th Street, Overland Park, KS 66209; and 4301 Main Street, Kansas City, MO 64111. Wild Oats Response to Specification No. 2 (PX04846). There are no other premium natural and organic supermarkets in the Kansas City-Overland Park, KS, geographic market. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 019.

484. [REDACTED]

485. In Las Vegas, NV, the transaction will reduce the number of premium natural and organic supermarket retailers from two to one. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 018; DX 126 at 5, 6 (focusing on customers within a three mile radius and 8-16 minute drive time to assess the competitive conditions in the area). Whole Foods currently operates one premium natural and organic supermarket in the Las Vegas, NV, geographic market at 8855 West Charleston Boulevard, Las Vegas, NV 89117. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 018; Whole Foods Response to Specification No. 2 (PX02052). Wild Oats currently operates one premium natural and organic supermarkets in the Las Vegas, NV, geographic market at 7250 W. Lake Mead Boulevard, Las Vegas, NV 89128. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 018; Wild Oats Response to Specification No. 2 (PX04846). There are no other premium natural and organic supermarkets in the Las Vegas, NV, geographic market. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 018.

486. [REDACTED]

487. Los Angeles, CA the transaction will reduce the number of premium natural and organic supermarket retailers from two to one. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 20. Whole Foods currently operates six premium natural and organic supermarkets in the Los Angeles, CA, geographic market. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 020; Besancon Dec. ¶ 48 (noting that the Wild Oats stores in the Los Angeles area are located about 1 to 1 ½ miles from the Whole Foods stores). The Whole Foods in this market are located at the following addresses: 11737 San Vicente Boulevard, Los Angeles, CA 90049; 239 North Crescent Drive, Beverly Hills,

CA 90210; 6350 West 3rd Street, Los Angeles, CA 90036; 2201 Wilshire Boulevard, Santa Monica, CA 90403; 11666 National Boulevard, Los Angeles, CA 90066; and 1050 S. Gayley St., Westwood, CA 90024. Whole Foods Response to Specification No. 2 (PX02052). Wild Oats currently operates two premium natural and organic supermarkets in the Los Angeles, CA, geographic market. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 020. The Wild Oats in this geographic market are located at the following addresses: 1425 Montana Avenue, Santa Monica, CA 90403; and 500 Wilshire Boulevard, Santa Monica, CA 90401. Wild Oats Response to Specification No. 2 (PX04846). There are no other premium natural and organic supermarkets in the Los Angeles, CA geographic market. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 020

488. In Louisville, KY, the transaction will reduce the number of premium natural and organic supermarket retailers from two to one. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 021; DX 80 at 27 (focusing on up to a 16-minute drive time and a three mile radius to assess the competitive conditions in the area). Whole Foods currently operates one premium natural and organic supermarket in the Louisville, KY, geographic market at 4944 Shelbyville Road, Louisville, KY 40207. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 21; Whole Foods Response to Specification No. 2 (PX02052). Wild Oats currently operates one premium natural and organic supermarkets in the Louisville, KY geographic market at 4600 Shelbyville Road, St. Matthews, KY, 40207. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 021; Wild Oats Response to Specification No. 2 (PX04846). There are no other premium natural and organic supermarkets in the Louisville, KY, geographic market. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 021.

489. [REDACTED]

490. In Omaha, NE the transaction will reduce the number of premium natural and organic supermarket retailers from two to one. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 022. Whole Foods currently operates one premium natural and organic supermarket at 10020 Regency Circle, Regency-Omaha, NE 68114. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 022; Whole Foods Response to Specification No. 2 (PX02052). Wild Oats currently operates one premium natural and organic supermarkets in the Omaha, NE geographic market at 7831 Dodge Street, Omaha, NE 68114. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 022; Wild Oats Response to Specification No. 2 (PX04846). There are no other premium

natural and organic supermarkets in the Omaha, NE geographic market. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 022.

491. [REDACTED]

492. In Pasadena, CA, the transaction will reduce the number of premium natural and organic supermarket retailers from two to one. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 020. Whole Foods currently operates two premium natural and organic supermarkets in the Pasadena, CA, geographic market. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 020. The Whole Foods in the Pasadena, CA, geographic market are located at the following addresses: 331 North Glendale Avenue, Glendale, CA 91206; and 3751 East Foothill Boulevard, Pasadena, CA 91107. Whole Foods Response to Specification No. 2 (PX02052). Wild Oats currently operates one premium natural and organic supermarket in the Pasadena, CA geographic market at 603 S. Lake Avenue, Pasadena, CA 91106. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 020; Wild Oats Response to Specification No. 2 (PX04846). There are no other premium natural and organic supermarkets in the Pasadena, CA, geographic market. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 020.

493. [REDACTED]

494. In Portland, ME, the transaction will reduce the number of premium natural and organic supermarket retailers from two to one. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 023; DX 171 at 4 (Whole Foods profiled a 12-mile radius of a potential site for a store). Whole Foods currently operates one premium natural and organic supermarket in the Portland, ME, geographic market at 127 Marginal Way, Portland, ME 04101. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 023; Whole Foods Response to Specification No. 2 (PX02052). Wild Oats currently operates one premium natural and organic supermarket in the Portland, ME, geographic market at 87 Marginal Way Portland, ME 04101. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 023; Wild Oats Response to Specification No. 2 (PX04846). There are no other premium natural and organic supermarkets in the Portland, ME, geographic market. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 023.

495. [REDACTED]

496. In St. Louis, MO, the transaction will reduce the number of premium natural and organic supermarkets from two to one. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 025; DX 104 at 5, 29-30 (focusing on customers with a 3, 8, and 16-minute drive time of the store and 3 and 10-mile radii). Whole Foods currently operates one premium natural and organic supermarket in the St. Louis, MO, geographic market at 1601 S. Brentwood Boulevard, St. Louis, MO 63144. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 025; Whole Foods Response to Specification No. 2 (PX02052). Wild Oats currently operates one premium natural and organic supermarket in the St. Louis, MO, geographic market at 8819-8833 Ladue Road, St. Louis, MO 63124. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 25; Wild Oats Response to Specification No. 2 (PX04846). There are no other premium natural and organic supermarkets in the St. Louis, MO, geographic market. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 025.

497. [REDACTED]

498. In Portland, OR the transaction will reduce the number of premium natural and organic supermarket retailers from three to two. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 024. Whole Foods currently operates two premium natural and organic supermarkets in the Portland, OR, geographic market. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 024. The Whole Foods in this market are located at the following addresses: 7380 SW Bridgeport Road, Lake Oswego, OR 97224; and 1210 NW Couch Street, Portland, OR 97209. Whole Foods Response to Specification No. 2 (PX02052). Wild Oats currently operates four premium natural and organic supermarkets in the Portland, OR, geographic market. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 024. The Wild Oats in this geographic market are located at the following addresses: 3535 NE 15th Avenue, Portland, OR 97212; 6344 SW Capitol Highway, Portland, OR 97239; 2825 E. Burnside Street, Portland, OR 97214; and 7485 SW Bridgeport Road, Tualatin, OR 97062. Wild Oats Response to Specification No. 2 (PX04846). New Seasons Market is also a premium natural and organic retailer in the Portland, OR, geographic market. New Seasons currently operates seven stores in this relevant market. Murphy Supp. Rebut. Report (PX02883) at ¶ 8, Exhibit 2 at 024.

499. [REDACTED]

500. The proposed transaction will also eliminate future competition in seven local areas in which Whole Foods and Wild Oats had planned to compete with one another. These areas are located within: Fairfield County, CT; Miami, FL; Naples, FL; Nashville, TN; Palo Alto, CA; Reno, NV; and Salt Lake City, UT. PX04357. (For convenience, we will refer to each defined relevant market by the city of which it is a part.)

501. Whole Foods plans to open two stores in the Fairfield County, CT, area in 2008 and 2009, respectively. PX04357 at 001. The future stores will be located at the following addresses: Interstate Hwy 95 at Leroy Avenue, Darien, CT 06820; and Kings Hwy at Garsmere Avenue, Fairfield, CT 06824. PX04357 at 001. Whole Foods Response to Specification No. 2 (PX02052). Wild Oats currently operates one store in Fairfield County at 399 Post Road West, Westport, CT, 06880. PX04357 at 001. Wild Oats Response to Specification No. 2 (PX04846). The trade areas of these Whole Foods and Wild Oats stores would overlap, but would not overlap with the trade area of any other premium natural and organic supermarket.

502. Whole Foods plans to open one store in the Miami, FL, geographic market in 2007. PX04357 at 002. The planned store will be located at Red Road & San Remo Drive, Coral Gables, FL 33146. Whole Foods Response to Specification No. 2 (PX02052). Wild Oats currently operates one store in the market at 11701 South Dixie Highway, Pinecrest, FL 33156. Wild Oats Response to Specification No. 2 (PX04846). The trade areas of these Whole Foods and Wild Oats stores would overlap, but would not overlap with the trade area of any other premium natural and organic supermarket.

503. Whole Foods plans to open one store in the Naples, FL, area in 2008. PX04357 at 003. The planned store is to be located at Tamiami Trail, Naples, FL 34108. Whole Foods Response to Specification No. 2 (PX02052). Wild Oats currently operates one store in the area at 6424 Naples Boulevard, Suite #601, Naples, FL 34109. Wild Oats Response to Specification No. 2 (PX04846).

504. [REDACTED]

[REDACTED]

505. Whole Foods plans to open one store in the Nashville, TN area in 2007 at Hillsboro Circle, Nashville, TN 37215. PX04357 at 004; Whole Foods Response to Specification No. 2 (PX02052). Wild Oats currently operates one store in the area at 3909 Hillsboro Pike, Nashville, TN 37203. Wild Oats Response to Specification No. 2 (PX04846).

506. [REDACTED]

507. Whole Foods plans to open one store in the Palo Alto, CA, geographic market in 2008. Whole Foods Response to Specification No. 2 (PX02052). It currently operates 7 stores in the market. PX04357 at 005. Wild Oats plans to open two stores in the same area. Wild Oats Response to Specification No. 2 (PX04846); PX04357 at 005. The trade areas of these Whole Foods and Wild Oats stores would overlap, but would not overlap with the trade area of any other premium natural and organic supermarket. PX04357 at 005.

508. Whole Foods plans to open one store in Reno, NV in 2007 at 5695 S. Virginia & Del Monte, Reno, NV 89502. PX-4357 at 006; Whole Foods Response to Specification No. 2 (PX02052). Wild Oats currently operates one store in the market at 5695 S. Virginia, Reno, NV 89502. Wild Oats Response to Specification No. 2 (PX04846).

509. [REDACTED]

510. Whole Foods plans to open one store in Salt Lake City in 2008 at 400 So. 700 East, Salt Lake City, UT 84102. Whole Foods Response to Specification No. 2 (PX02052). Wild Oats currently operates two stores in the area at 645 East 400 South, Salt Lake City, UT 84101 and 1131 Wilmington Avenue, Salt Lake City, UT 84106. PX04357 at 007; Wild Oats Response to Specification No. 2 (PX04846).

511.

[REDACTED]

V. THE MERGER WILL REDUCE COMPETITION BECAUSE IT WILL COMBINE THE TWO CLOSEST COMPETITORS IN HIGHLY CONCENTRATED MARKETS

A. Market Share and Concentration

512. Mergers that significantly increase market concentration are presumptively unlawful because the fewer the competitors and the larger the respective market shares, the greater the likelihood that a single firm or group of firms could raise prices above competitive levels. *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986); Merger Guidelines (PX01310) § 2.0.

513. Concentration typically is measured by market share and by the Herfindahl-Hirschman Index (“HHI”). The HHI is calculated by summing the squares of the market shares of each market participant, so that greater weight is given to market shares of larger firms, consistent with their relative importance in competitive interactions. Merger Guidelines (PX01310) § 1.5.

514. Where the pre-acquisition HHI exceeds 1800 points, it “is presumed that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise.” Merger Guidelines (PX01310) § 1.51.

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

516. The combined share of Whole Foods and Wild Oats creates a strong presumption that the proposed transaction is anticompetitive, injurious to consumers, and illegal.

B. Other Evidence Confirms That Anticompetitive Harm Will Result From the Acquisition

525. Professor Murphy conducted a rigorous econometric analysis of the impact that various competitor openings have had on the prices, margins and sales volume of Whole Foods and Wild Oats. Murphy Report (PX02878).
526. Store closings do not typically constitute appropriate “natural experiments” for econometric study of the price impacts of structural changes in the market because: (a) there is little incentive for the surviving incumbent(s) to endanger customer goodwill by sharply or noticeably increasing prices immediately upon the exit of a competitor; (b) the fact that stores typically close because they were unable to succeed in the face of competition implies that closing stores would have stopped being competitively significant in the marketplace at some earlier time that is unknown to the analyst. Murphy Dep. (JX 26) at 173:14-76:16; July 31, 2007 AM Tr. Mot. Hr’g at 91:15-92:13 (Murphy test.).
527. Entry by Whole Foods into a local market where Wild Oats currently operates has a substantial effect on Wild Oats. Margins, prices and sales at the Wild Oats store fall substantially, with sales falling by roughly [REDACTED], margins falling by [REDACTED] and [REDACTED]. No other putative competitors have similar effects on either Whole Foods or Wild Oats. Murphy Report (PX02878) ¶ 7.
528. The econometric evidence shows that banner entry by Whole Foods into markets where Wild Oats was already present caused Wild Oats to reduce prices. On average during the first year, prices were [REDACTED] and remained roughly [REDACTED] lower in the [REDACTED] after entry. Murphy Report (PX02878) ¶ 81.
529. Conceptually, the closure of the Wild Oats stores is essentially the reverse of the entry experiment with a move from having both firms present to having one firm present rather than a movement from one present to both present. However, we might expect the effects of Wild Oats exit to be somewhat smaller owing to the greater size of Whole Foods in most of the overlap markets. Murphy Report (PX02878) ¶ 82.
530. The entry of [REDACTED] into direct competition with Whole Foods provides an alternative estimate of the effect of Wild Oats exit. Murphy Report (PX02878) ¶ 83.
531. A price study by Professor Murphy showed that entry by [REDACTED] caused Whole Foods’ prices to decline [REDACTED] in June through August 2005. Murphy Supp. Rebut. Report (PX02883) ¶¶ 4-5. The significant effect that [REDACTED] entry had on Whole Foods’ pricing is corroborated in high level Whole Foods planning documents. PX00131 at 019; DX 8 at 19; PX03206 at 019.
532. The Earth Fare price study and the documents demonstrate how effects on price can be substantially higher than effects on margins, which Professor Murphy found to be in the range of [REDACTED] percent. Murphy Report (PX02878) ¶¶ 83, 143 and Exhibit 4 (PX02882).

533. Econometric analysis indicates that Whole Foods margins are about 7-tenths of a percentage point (-.0070) lower in markets where there are two Whole Foods stores than in markets where there is one Whole Foods store and one Wild Oats store. This estimated margin difference implies a 1.1% price drop, assuming constant unit costs. The p-value for the estimate of 0.1625. Murphy Report (PX02878) ¶ 66.
534. A p-value represents the chance that the estimated difference can be obtained when the actual difference is zero. Murphy Dep. (JX 26) at 146:4-6.
535. Econometric evidence indicates that Whole Foods' margins are significantly higher in markets where Whole Foods operates two stores than in markets where Whole Foods and Wild Oats each operate one store. The estimated effects on gross margins are 2.1 percentage points higher for produce items and 1.9 higher for seafood. The effect for meat is 1.8 percentage points. The fact that margins are higher in produce, seafood and meat when the two stores in an area are jointly owned by Whole Foods is consistent with the more unique nature of Whole Foods and Wild Oats in these departments. In contrast, the effect for groceries – where the two sellers are less differentiated from others – is essentially zero. Murphy Report (PX02878) ¶ 67.
536. To the extent that this econometric experiment replicates the change in ownership structure contemplated by the proposed acquisition, it implies that Whole Foods' prices likely would rise by more than █████ overall, and by about or more than █████ in the █████ in markets where now separate Whole Foods and Wild Oats stores would come under common ownership. Murphy Report (PX02878) ¶ 66; July 31, 2007 AM Tr. Mot. Hr'g at 135:16-24 (Murphy test.).

b. Evidence of the Constraining Effect on Whole Foods from PNOS Competition

537. █████, a regional premium natural and organic supermarket, is “a good analogy to use to try to understand what the effect of PNOS competition was.” July 31, 2007 AM Tr. Mot. Hr'g at 126:14-16 (Murphy test.).
538. Professor Murphy's analysis of the █████ episode demonstrates that Whole Foods changes the prices it charges at particular stores in response to competitive pressures felt uniquely at that store, and that prices do vary systematically across stores within a region. Murphy Supp. Rebut. Report (PX02883) ¶ 2.
539. In 2005, Whole Foods operated five stores in North Carolina, located in Raleigh, Durham, Chapel Hill, Cary, and Winston-Salem. Whole Foods responded to █████ entry by selectively cutting local prices. Murphy Supp. Rebut. Report (PX02883)

¶ 3; *see also* PX01005 at 005 (“We have been very successful keeping ██████████ from getting established in Chapel Hill and Raleigh. We have upped our execution and been very aggressive with our pricing.”); PX01006 at 004 (“The regional team did a nice job getting the Chapel Hill, Raleigh and Durham stores ready to compete by . . . taking an aggressive price stance. . . . We have heard from ██████████ that they were surprised by our aggressive pricing and that their coming to the Triangle was probably a mistake.”); PX04827 at 002-003.

540. There were virtually no price differences among stores in North Carolina prior to ██████████ entry in June 2005. But in mid-June, precisely when ██████████ opened in Chapel Hill, prices in Whole Foods’ Chapel Hill store fell sharply. By the beginning of July, Whole Foods’ prices in Chapel Hill were more than ██████████ below the prices in the benchmark stores. Importantly, Whole Foods’ prices in Raleigh and Durham – where ██████████ had not yet opened – did not fall at that time. Murphy Supp. Rebut. Report (PX02883) ¶ 4 and Exhibit 1 (PX02882).
541. Whole Foods’ prices in Raleigh and Durham did fall 11 weeks later, precisely when ██████████ opened in Raleigh-Durham. Murphy Supp. Rebut. Report (PX02883) ¶ 5 and Exhibit 1 (PX02882).
542. Whole Foods cut prices in the Raleigh and Durham stores by about ██████████, on average, and for some months thereafter the price reductions in the three “competing” Whole Foods stores moved in near lock-step. Murphy Supp. Rebut. Report (PX02883) ¶ 5 and Exhibit 1 (PX02882).
543. Although the size of price cuts dissipated over time, perhaps reflecting the weakening of ██████████ as a competitive threat – it exited the Chapel Hill market in January of 2007 – consumers in Chapel Hill enjoyed the benefits of substantial price reductions for roughly a year after the advent of competition in that market. Murphy Supp. Rebut. Report (PX02883) ¶ 5 and Exhibit 1 (PX02882).
544. These episodes, including the eventual closure of ██████████ Chapel Hill store, illustrate the types of local market price wars that Whole Foods will be able to avoid by acquiring Wild Oats. Murphy Supp. Rebut. Report (PX02883) ¶ 6.
545. The econometric evidence relating to ██████████ is reflected in Whole Foods’ contemporaneous documents. Those documents showed that Whole Foods executives planned to match ██████████ sales prices and to make strategic price cuts that would “really punish ██████████ and make a statement about any competition that thinks about competing with US.” The documents recommended specific ██████████ on particular items. Murphy Supp. Rebut. Report (PX02883) ¶ 2; PX03206 at 019; PX04665; PX04667; PX04668; PX04697; PX04699; PX04700; PX04805; PX04821; PX04818; PX04840.

c. Unique Price and Non-Price Competition Has Occurred, and Would Continue, but for This Acquisition

546. The episode with Earth Fare has been repeated many times with Wild Oats, and will occur again in Boulder and other local markets if Wild Oats remains an independent competitor. PX00773. Although Whole Foods claims a total absence of any meaningful localized competition with Wild Oats, the expert testimony highlighted above, Whole Foods rationale for the deal, and the competition described below belie that. PFF 517-32, 533-39, 545-89.
547. In a report to its Board, Whole Foods said that margins in Louisville, Kentucky, were low “because we are having to match some ridiculously low special pricing at Wild Oats.” PX01008 at 002.
548. In another report to the Board, Whole Foods reported on price competition with [REDACTED] [REDACTED] opened . . . [its [REDACTED] store] on May 19, 2004. . . . We have put in place a competitive pricing strategy to beat [REDACTED] to the punch. . . . [REDACTED] is now trying desperate measures such as buy one get one free promotions and 20% and 50% off with very limited success. . . . The [REDACTED] store [in [REDACTED]] is still operating in a desperation mode heavily discounting product to try and drive sales” PX00016 at 005-006.
549. Whole Foods had to reduce prices in Boulder, Colorado, to match advertised “Buy One Get One Free” promotions at Wild Oats. PX00187; *see also* PX00039 (Whole Foods matching Wild Oats prices in Evanston).
550. Both Whole Foods and Wild Oats respond to competition from one another by improving product service and other aspects of product quality when they face nearby competition from each other. This non-price competition will be lost in the local markets in which Whole Foods would close Wild Oats stores. Murphy Report (PX02878), ¶ 9. *See also* PX01314 at 008; PX01337 at 002.
551. Whole Foods remodeled its Boulder, Colorado, store in anticipation of competition from Wild Oats’ new store. “WILD OATS: Competitive Intrusion @ 29th Street [in Boulder]. We’ve known about it for awhile, so we’ve been remodeling in preparation for it We’re also focusing on competitive pricing.” PX00015 at 001; PX00007; PX00078 (big labor expense planned in anticipation of Wild Oats opening).
552. Whole Foods anticipated competition on many elements: “Eleven months from now we will have a serious competitor coming in across the street from our highest volume store in the region. This means we must go to war. Craftsmanship, execution, retail pricing strategies, customer service, and quality is how we will win against Wild Oats in Boulder.

It will be my commitment not to let them take our market share away. We will work with producers in every category to make sure we are not under sold. In my opinion there is nothing we cannot do to be competitive” PX01314 at 008.

553. A Whole Foods’ document acknowledged that without competition from a premium natural and organic supermarket, “we potentially become slow and lazy. Our prices go up and our customer service goes down.” PX001337 at 002.
554. Whole Foods and Wild Oats in competition with each other increased their spending on remodeling and updating stores, expanding product offerings, and adding customer service and amenities in competition with one another. This competition would be eliminated by the proposed acquisition.
555. Whole Foods expanded its store in anticipation of competition from Wild Oats: “Wild Oats is opening their 40,000 square foot flagship store three blocks south of us. Our expanded store, opening 12 months after their scheduled opening, will put another nail in the Oats coffin.” PX00018 at 001; DX204 at 2 (Mackey report to the Board stating that expansion of Boulder store will “severely cripple” Wild Oats’ 29th Street store); PX00026 (in an “organic war” with Wild Oats).
556. Wild Oats also anticipated price competition with Whole Foods in Boulder. PX00025 (“When we open 29th Street I do not want Whole Foods to have a lower retail on any items in our top 400”).
557. In stark contrast, after the merger agreement, Whole Foods immediately benefitted in its Boulder store from the lack of competition against Wild Oats new flagship. DX 202 at C16 (“We had been gearing up for a battle with Wild Oats in Boulder in Q2, but of course as of today that has now changed.”).
558. In 2002, Whole Foods exhorted its team to “beat Oats”: “Colorado, New Mexico Wild Oats – ATTACK! We can beat them on all fronts. . . . Stay aggressive with pricing, quality, variety/specialty and customer service.” PX01313 at 001, 007.
559. A.C. Gallo, Co-President and COO of Whole Foods, in 2006 boasted to CEO John Mackey: “We will just have to keep kicking [Mr. Odak’s] ass wherever we compete and let the customers decide. I can’t wait until we open our Portland store next year and squash them with both higher quality and lower prices.” PX01312 at 001.
560. [REDACTED] . DX 487.
561. Wild Oats’ employees were instructed to “[p]rice check on WFMI perishables to look for price increase opportunities.” PX01316.

562. Wild Oats anticipated price competition with Whole Foods: “After WF opens [in Reno, Nevada], we would probably do [REDACTED].” PX01317.
563. Wild Oats competed with Whole Foods on price and promotions: “Perhaps we could drop an aggressive fresh flyer or two into WF zip codes [in [REDACTED]] in the coming weeks? . . . As you can see, the heaviest effected [sic] departments are Seafood, Produce, Meat These departments are at least 15% down from August. . . . During the time of September 1st through October 4th, we ran bounce back coupons. Save \$5 off an order of \$20 or more, and save \$10 of an order of \$40 or more. . . . We have also started a 10% off student discount program at the begin [sic] of September.” PX01315 at 001-002.
564. Wild Oats aimed to keep its prices competitive with Whole Foods. Perry Odak testified that “we [at Wild Oats] knew that from a competitive standpoint that we could not price above Whole Foods and expect that we’re going to build the business, so we as a pricing policy strove, where Whole Foods was a competitor, to price at parity with Whole Foods on a market basket.” Odak IH (JX 37) at 39:25-40:5; *see also* PX02102 (“We will invest [REDACTED] with Whole Foods in Grocery & Holistic Health.”); PX01238 at 003; PX00032; PX00035; PX00040.
565. Wild Oats believed it had more pricing discretion to raise prices when Whole Foods was not a local competitor. Perry Odak, the former CEO of Wild Oats, testified that “where there was less competition you had more pricing room, so if Whole Foods wasn’t your major issue or the Whole Foods pricing was above you, you could, you know, be more comfortable in terms of moving prices up. But that also went for temporary price reductions. If you were worried about the competition, *i.e.*, Whole Foods in many cases or most cases, you, you know, passed those price promotions on [to consumers] most of the time penny for penny. If you were less worried about or it was not an issue either because Whole Foods was above you or not in the marketplace, you had the opportunity to pocket some of that money” Odak IH (JX 37) at 64:7-66:10.
566. In the fall of 2006, Perry Odak directed Chad Smith, Wild Oats’ Director of Pricing, to evaluate stores where they could [REDACTED]. Smith IH (JX 38) at 139:2-140:5. The list consisted entirely of stores in markets [REDACTED]. PX01372 ([REDACTED]); PX01374 (maps prepared by Wild Oats depicting three-mile radius around Wild Oats stores); PX04401 (maps depicting six-mile radius around the specific Wild Oats stores selected by Odak). The list also noted locations where [REDACTED]. PX01372. In two cities where Wild Oats did not think [REDACTED] ([REDACTED]), Wild Oats ultimately [REDACTED]. Smith IH (JX 38) at 140:6-14. In one of the cities where Wild Oats had information that Whole Foods [REDACTED], Wild Oats [REDACTED]. *Id.* at 144:3-17.

567. Roger Davidson, Wild Oats' Senior Vice President for Marketing, sent CEO Greg Mays an email showing that Wild Oats would respond to Whole Foods' entry in Portland, Maine, (in February 2007) with "[REDACTED]" and non-price competition in the form of increased [REDACTED] and additional services such as nutritionists and naturopaths, provided free of charge. PX00763 at 001.
568. Wild Oats developed a plan in 2005, called "Whole Foods Competitive Marketing Plan." PX00469. In the slide entitled "Competitive Tactics: Pricing," the report states: "Objective: [REDACTED] WFMI and Wild Oats regarding [REDACTED] [REDACTED] [REDACTED]." *Id.* at 009.
569. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
570. Wild Oats 2007 Business and Financial Plan called for the company to "Reduce Retail Pricing. Wild Oats Grocery and Natural Living ([REDACTED] on WFMI). [REDACTED] investment needed [REDACTED] with WFMI." PX00458 at 005.
571. Wild Oats' Senior Vice President for Merchandising & Marketing Roger Davidson told his Director of Pricing Schematics Chad Smith to "[REDACTED] [REDACTED]." PX01202.
572. On [REDACTED], Wild Oats' Senior Vice President for Merchandising & Marketing Roger Davidson told his Director of Pricing Schematics Chad Smith to implement [REDACTED] [REDACTED] PX01203.
573. In an April 2005 presentation for a Project Greenspace meeting, Wild Oats depicted itself as "1 of 2 National Natural & Organic Chains. Wild Oats and Whole Foods brands dominate the Natural and Organic channel. Wild Oats established its brand position via an extensive and authentic 'all-natural' and 'organic' offering targeting a broadening health/well-being consumer segment." PX01332 at 102.
574. In its 2005 10-K, Wild Oats stated: "We directly compete with Whole Foods Markets, Inc. in 18 states and in British Columbia. We believe our natural foods supermarket concept is differentiated from that of Whole Foods through our higher product standards and more competitive pricing." PX00612 at 012.

582. Whole Foods aggressively opened stores in areas that CEO John Mackey called Wild Oats' "monopoly" markets. PX00712 at 001. In one of his anonymous posts, Mr. Mackey said, "Whole Foods says they will open 25 stores in OATS territories in the next 2 years. . . . The writing is on the wall. The end game is now underway for OATS. . . . Whole Foods is systematically destroying their viability as a business – market by market, city by city." PX00801 at 001; *see also* PX00550 (In 1998, referring to a previous attempt to acquire Wild Oats, Jim Sud of Whole Foods noted the importance of the "elimination of a competitor in the marketplace, competition for sites, competition for acquisitions, and operational economies of scale. We become the Microsoft of the natural foods industry.").
583. According to John Mackey, "Whole Foods has taken significant market share from OATS wherever they have opened competing stores – Boulder, Santa Fe, Denver, Boca Raton, Ft. Lauderdale and St. Louis. Whole Foods has plans to open new stores in Oats cash-cow markets of Portland, Las Vegas, Santa Monica, Phoenix, Chicago, and Kansas City all within the next 12 months. It is also likely that Whole Foods will continue to aggressively pursue OATS other cash cow markets such as Albuquerque, Eugene, Cleveland, Columbus, Salt Lake, etc." PX00815.
584. Mr. Mackey said, "Whole Foods is killing [Oats] in direct competition, with new stores in Portland, Santa Monica, [and] Albuquerque opening soon. It appears to me that WFMI's management is going to keep aggressively attacking their uncontested (currently) markets. It would have been foolish and tactless for the CEO of Whole Foods to criticize OATS on a conference call." PX00791.
585. Mr. Mackey additionally said, "I believe that Whole Foods will continue to aggressively enter their markets and will pressure and harass them at every opportunity." PX00816 at 001-002.
586. In May 2005, Mr. Mackey said, "[C]ongratulations on finally getting your store in Nashville. I didn't hear the company mention how long it will take to develop, but they did say something about the average being around 20 months. You still have a bit of waiting ahead of you. At least Wild Oats will likely improve their store there in anticipation of Whole Foods eventually opening and you'll benefit from that." PX00786.
587. Prices were higher when the two were not in competition. One Whole Foods executive observed that "prices were higher at [the newly opened Wild Oats in Tampa, Florida]. Being the only game in town gives them that freedom Their pricing was high since they are the only large natural food store in the area." PX00080 at 001-002.
588. In November 2006, the Director of Marketing at C&S Wholesale Grocers sent John Mackey a notice that Wild Oats was going to close eight stores. PX00766. Mr. Mackey

responded that “[m]ost of those stores competed directly against us.” *Id.* The C&S Marketing Director replied that it “just goes to show them they should be cautious opening future stores to [sic] close to WFM stores.” *Id.*

589. Whole Foods and Wild Oats provide unique levels of service and quality. PX01003 (John Mackey 3Q06 Investment Script: “we walk our talk when it comes to our quality standards and our commitment to the environment”).
590. Even when a lower price competitor acquires a higher priced competitor, the merger can be anticompetitive if the parties are substantial competitors in a relevant market. Scheffman Dep. (JX 18) at 124:8-17.

d. Loss of Choice

591. Whole Foods plans to close some of the acquired Wild Oats stores. The criteria used to decide which stores to close include how close the store is to a Whole Foods store and the number of Wild Oats customers that would begin shopping at Whole Foods once the Wild Oats store was closed. Chamberlain Dep. (JX 40) at 137:8-22.
592. Whole Foods anticipated increased comps from closing nearby Wild Oats stores. PX00823; *accord* Chamberlain Dep. (JX 40) at 157:10-159:16.
593. Anticompetitive effects will also be felt in the markets where Whole Foods plans to leave open a competing Wild Oats store but “reflag” it as a Whole Foods store. Current Wild Oats shoppers in these markets will lose their current preferred choice among PNOS. Murphy Report (PX02878) ¶ 146.
594. The closure of the Wild Oats stores would be harmful to consumers even if nominal prices were not changed by the acquisition. Consumers that currently shop at Wild Oats have revealed that they prefer the combination of price, selection, quality, location etc. to that offered by the competing Whole Foods store – that is why they shop at Wild oats rather than Whole Foods or another supermarket. All of these consumers are unambiguously worse off due to a loss of their top choice in addition to any loss from higher prices and reduced service. For each of these customers, the appropriate loss from the closure is equivalent to the price increase required to make them shift from Wild Oats to Whole Foods or another store. Murphy Report (PX02878) ¶¶ 10, 86.

e. Summary of Economic Analysis

595. The medium to long-term price effects from the acquisition may range from a low of 1% to as high as 5%. Murphy Report (PX02878) ¶ 83-84; Murphy Supp. Rebut. Report (PX02883) ¶¶ 4-5.

596. Defendants' expert economist (Dr. Scheffman) concurs that it is appropriate to analyze the competitive effects of supermarket mergers in terms of one or two percent price increases. Scheffman Dep. (JX 18) at 39:1-5; Murphy Rebuttal Report (PX02878) ¶ 17.
597. Anticompetitive effects, without any countervailing pro-competitive effects, will be realized on price and non-price dimensions (breadth of choice, quality and service) in each of the markets where Whole Foods plans simply to close a competing Wild Oats store. Murphy Report (PX02878) ¶ 145.
598. Anticompetitive effects will also be felt in the markets where Whole Foods plans to leave open a competing Wild Oats store but "reflag" it as a Whole Foods store. Current Wild Oats shoppers in these markets will lose their current preferred choice, and all consumers will lose the benefit of head-to-head price and non-price competition. Murphy Report (PX02878) ¶ 146.
599. This proposed acquisition poses the risk of substantial, non-transitory price increases and non-price anti-competitive effects that will persist for at least two years. Murphy Report (PX02878) ¶ 147.
600. Competition may also be affected in other markets where Whole Foods plans to close ■ additional ■ Wild Oats stores and ■ that was scheduled to open. Murphy Report (PX02878) ¶ 22; PX04355; Foster IH (JX 41) at 94:20-95:11 (Whole Foods initially planned to operate only 35 of the 110 Wild Oats Stores.).
601. Competition may also be reduced in local markets where Whole Foods currently does not compete head-to-head with Wild Oats and Wild Oats might have entered in the future, but for the acquisition. Murphy Report (PX02878) ¶ 22.

VI. OTHER RETAILERS WILL NOT ENTER THE PREMIUM NATURAL AND ORGANIC SUPERMARKET PRODUCT MARKET

602. Referring to problems facing one recent aspirant to the premium natural and organic market, Whole Food's Co-President and Chief Operating Officer Walter Robb summed it up best: "Not as easy as it looks folks." PX00180 at 001.
603. The evidence on this question is that competition from other sources through entry and or repositioning is unlikely to prevent consumer harm arising from the acquisition from persisting for a number of years. Murphy Report (PX02878) ¶ 148.

A. *De Novo* Entry Would Not Be Timely, Likely or Sufficient

604. As with any industry, there is always the possibility of *de novo* entry. The key question is whether such entry would occur in a timely fashion and would be of sufficient magnitude

to make a small but significant price increase unprofitable. Murphy Report (PX02878) ¶ 137. While it is possible that a new retailer, a conventional supermarket, or even a PNOS, could enter one of the relevant geographic markets with a new store, it is unlikely that retailers would do so in each relevant geographic market to the extent necessary to make price increases unprofitable. *Id.* ¶¶ 119, 121, 126, 129, 138.

1. *De Novo* Entry Would Not Be Timely

605. Entry and growth in the PNOS market takes significantly longer than two years. *See* Merger Guidelines (PX01310) § 3.2. Whole Foods' ordinary course of business documents establish the length of time, high cost, and difficulty of *de novo* entry into the market for premium natural and organic retailers. As Professor Murphy stated, entry "would not occur in a timely manner." *See* Murphy Report (PX02878) ¶ 138.
606. Even for a PNOS, *de novo* entry into a new geographic market would take well over two years. For example, Whole Foods devotes a tremendous amount of time and resources to carefully selecting a site, conducting an in depth analysis, reviewing the findings, designing the store, and finally building on the site. Kenneth Meyer, President of Whole Foods' Mid-Atlantic Region, stated "a lot of people think, you know, we want a store, and then within 12 months there will be a store there. They don't realize that it's about a three-year process at a minimum of taking a store from the point of idea to opening, at a minimum." Meyer Dep. (JX 10) at 107:8-14. *See generally* Kadish Dep. (JX 7) at 40:25-60:21 (His team conducts an in-depth analysis of each site location, including evaluating the area's psychographic profile, demographic profile, and traffic patterns. They also create detailed thematic maps depicting population density, household income, racial composition, residential psychographic compatibility, and college graduate density.).
607. Apart from other impediments to entry, finding and developing suitable real estate on which to locate a supermarket is often a multi-year task in many metropolitan areas. It can easily take three or more years from conception to site selection. *See, e.g.*, Meyer Dep. (JX 10) at 20:15-21, 107:3-25; PX00538 at 002 (Mr. Mackey touting his new White Plains store to investors after a "ten year search for the perfect location").
608. According to John Mackey, "It took [Whole Foods] almost 10 years to open a second store in San Francisco." PX00803.
609. In addition to the three or more years that it can take from conception to site selection, the process from site selection to the actual opening of a store can take several more years. Even a successful and sophisticated PNOS like Whole Foods takes anywhere from two to seven years to accomplish this process. *See, e.g.*, PX00179; DX 101 (site selection for ██████████, store was completed on April 21, 2003. The store is scheduled to open almost five years later on March 31, 2008); DX 129 (site selection for ██████████, store was completed on March 7, 2003. The store is scheduled to open over seven years

later on July 3, 2010); DX 123 (site selection for [REDACTED], store was completed on April 29, 2002. The store is scheduled to open approximately 5½ years later on September 15, 2007); DX 110 (site selection for [REDACTED] was completed on February 18, 2002. The store is scheduled to open over five years later on June 27, 2007); DX 159 (site selection for [REDACTED], store relocation was completed on July 20, 2004. The store is scheduled to open over 4½ years later on January 15, 2009); DX 165 (site selection for [REDACTED], store was completed on November 12, 2002); Meyer Dep. (JX 10) at 15:2-7 (the [REDACTED], store is not scheduled to open until early 2009, almost seven years later); DX 162 (site selection for the store in [REDACTED], was completed on April 18, 2005; Meyer Dep. (JX 10) at 15:2-7 (the [REDACTED], store is not scheduled to open until Spring 2009, almost four years later.

610. Furthermore, for any retailer that does not already have a PNOS brand, entry would take even longer as the new PNOS entrant would have to effectively build a brand presence and an appropriate supply and distribution system. Current interim Wild Oats CEO Greg Mays was quoted in a November 4, 2006, article as saying “It takes five or six years to develop a label that has natural and organic integrity to it. Their choices are to waste five years or get immediate recognition on the shelf.” PX01243 at 002. CEO Mays was talking about the time required to develop a natural and organic private label brand, a much more detailed and involved activity than selling Wild Oats’ private label brand products on retailers’ shelves.
611. A new PNOS entrant would have to establish a large scale supply chain and distribution system for natural and Organic Rule-compliant products. Establishing such a system from scratch would be expensive, timely, and difficult to accomplish. Odak IH (JX 37) at 68:1-79:25; *see also* Mackey IH (JX 28) at 96:15-21 (“It is a lot easier to take an acquisition as a platform to grow from than it is to greenfield it from scratch. Because you are gaining – in our case, going over to the U.K., we gained – they had a supply chain that we were able to tap into.”); PX01305; PX01306 (In May 2006, Wal-Mart announced that it would double the number of organic items in ten percent of its stores; one year later, Wal-Mart appears to be pulling back due to continuity of supply problems, among other issues.).
612. While *de novo* entry would likely be most beneficial to consumers because it involves creating a new brand that resonates with PNOS customers and would open a fleet of new stores in the overlap markets, it would not occur in a timely manner. Murphy Report (PX02878) ¶ 138.

2. *De Novo* Entry Is Unlikely

613. A February 2007 study by The Hartman Group, a research firm well-regarded by both Defendants, *see* Coblentz IH (JX 33) at 23:16-24, corroborates that entry or repositioning

619. Whole Foods was concerned about the threat of Wild Oats being used as a springboard; it was not concerned about *de novo* entry. CEO Mackey sent an e-mail to his Board of Directors six days before announcing the deal with the following rationale for the acquisition: “Furthermore we eliminate forever the possibility of Kroger, Super Value (sic), or Safeway using [Wild Oats’] brand equity to launch a competing national natural/organic food chain to rival us [Wild Oats] is the only existing company that has the brand and number of stores to be a meaningful springboard for another player to get into this space. Eliminating them means eliminating this threat forever, or almost forever.” PX00773.
620. Whole Foods management worried that unless they preemptively acquired Wild Oats, a conventional operator like Kroger or Safeway could enter the PNOS market by buying Oats. *See* PX00565 at 002:
- We keep Kroger or Safeway from acquiring [Wild Oats] and using their brand name to roll out a strong competing concept. How realistic a risk is this, however? Safeway seems happy with their Lifestyle Store remodels and likely wouldn’t want to waste time and money on OATS. Kroger, however, operates a diversity of brands and formats. They might potentially be interested. How dangerous would this be to us? Potentially – very dangerous.
- Accord*, PX00555 (“[In my opinion], it is the Kroger situation that requires the most discussion . . . Sure, it would be expensive to Kroger to acquire Oats, but they might look at the risk/reward ratio and conclude that it is worth doing.”).
621. Whole Foods’ CEO Mackey said: Whole Foods brand “creates strong loyalty from their customer base – something [conventionals like] Safeway doesn’t have and likely never will have.” PX00809A at 001.
622. SuperValu’s recently launched limited assortment food stores, Sunflower, have not been effective at competing with Whole Foods. In assessing the launch, Whole Foods executives CEO John Mackey and Senior Vice-President of Growth & Business Development Jim Sud said that “[s]tarting up a brand from scratch is very risky and expensive as Super Value [sic] is now discovering with Sunflower.” PX00565 at 002. Co-President A.C. Gallo wrote with respect to Sunflower, “Maybe they [SuperValu Sunflower] will bag the whole thing or at least not try to come head to head with us for awhile.” PX00180 at 001.
623. Similarly, in the late 1990s, Star Markets attempted to provide a more gourmet-type store with Wild Harvest. It was not successful with that format. Stanton Dep (JX 19) at 165:16-25.

B. Repositioning Is Unlikely

624. Existing retailers could reposition to provide increased competition for existing premium natural and organic supermarkets. In principle, such repositioning could increase competition from outside the relevant market enough to compensate for the loss of pricing restraint within the market. Murphy Report (PX02878) ¶ 130.
625. In principle, many retailers could reposition in response to an increase in prices in the relevant market. One common problem all these potential entrants would face is that repositioning is not costless. Moving one's attribute mix in one direction will typically result in a less suitable fit with one's current customer base. To the extent that a company's current position came about through costly investments in reputation and other assets, such repositioning will likely cause the firm to forgo economic rents on those investments. Although these firms may have some advantages that make their entry easier than the *de novo* entry of other firms, they also have these additional costs. Murphy Report (PX02878) ¶ 131.
626. Other retailers are unlikely to reposition because, in order to compete effectively in the PNOS space, they would have to dramatically change the nature of their operations. They would have to expand the amount of space dedicated to natural and organic products and also offer slower-moving products and extra services and maintain a large inventory of a broad range of premium natural and organic items. The failure of prior repositioning efforts amply supports Whole Foods' decision to deter entry by purchasing the only viable "springboard" for entry into the premium natural and organic space. *See* Murphy Report (PX02878) ¶ 132.
627. Expanding their natural and organic offerings would jeopardize the successful formats of conventional supermarkets like Safeway, Kroger, and Wal-Mart. As CEO Mackey said, "Safeway and other conventional retailers will keep doing their thing--trying to be all things to all people They can't really effectively focus on Whole Foods Core Customers without abandoning 90% of their own customers." PX00785; *accord*, PX00180 at 001.
628. Before the Complaint in this matter was issued, Whole Foods management publicly dismissed the notion that old line supermarket chains like Safeway, Giant Eagle, Publix, or Wal-Mart could reposition successfully into the PNOS space. Whole Foods Co-President Walter Robb told USA Today in June 2006 that the addition of natural and organic items to grocers shelves is merely an attempt to "chas[e] our shadow. We won't be tomorrow what we are today." PX02086 at 002; *accord* PX02201 ("By the time these other companies add organics to their mix or possibly change their store layouts, we will have evolved to the next generation of retailing.").

629. Wild Oats' previous CEO agrees that conventional supermarkets will be unable to successfully reposition:

[T]his is a format that is very difficult for them to get into because it's largely perishable and their business is not largely perishable. This business has a high service level component and their business is based on low labor, which means low service level. They don't understand at all the whole vitamins, minerals and supplement area, you know, and some of those suppliers won't -- many of those suppliers won't do business with them.

So it is very difficult and they've tried for years to get into this business and they have not succeeded.

Odak IH (JX 37) at 153:2-14.

630. Efforts by conventional stores to offer natural and organic foods have led to limited offerings that actually grow the business at premium natural and organic supermarkets. "With regard to the conventionals getting into natural and organic foods, [Wild Oats] really see[s] this as serving as a gateway to our stores than a competitive threat. The focus [of the conventionals] so far has been on the nonperishable categories and what they are doing is introducing new customers to the brands we carry, and when customers want more information, service and selection, they come to our stores." PX02704 at 010.
631. Whole Foods summarized its limited concern for conventional supermarkets offering natural and organic products in two investor conference calls:

a. "Throughout our history, we have been asked about the potential effect on our business should conventional supermarkets start to offer or increase their offering of natural and organic products. We believe that by offering natural and organic products, supermarkets are raising customers' awareness and interest levels in these products and serving as a "gateway experience" to shopping with us. Once customers try natural and organic products and want to experiment further, they come to Whole Foods Market. With approximately 64% of our sales in perishables, we have the broadest selection as well as the 'authentic advantage.' We have offered natural & organic products for over 22 years because we believe that food in its purest state – unadulterated by artificial additives, sweeteners, colorings and preservatives – is the best tasting and most nutritious food available. We believe that the fact that our comparable store sales have been running above our historical average over the same timeframe that conventional supermarkets have stepped up their offering of natural and

organic products is evidence that, rather than hurting us, they are in fact helping us.” PX00532 at 001.

b. “Due to our success, we have seen many competitors over the years add a limited selection of 500 to 2,000 natural and organic SKUs. To understand why this has not hurt us, but has instead created a gateway experience as evidenced by our strong historical comps, you have to understand that Whole Foods Market is about much more than just selling ‘commodity’ natural and organic products.

We are a lifestyle retailer and have created a unique shopping environment built around satisfying and delighting our customers. Our stores feature over 30,000 natural and organic SKUs and our emphasis on the highest quality perishables, which are just under 70 percent of our sales and gradually increasing, broadens our appeal beyond the core natural and organic food customer. We adhere to the highest quality standards, and our non-union empowerment culture comprised of 90 percent full-time team members fosters continual improvement and innovation. We are a leader, not a follower, and we walk our talk when it comes to our quality standards and our commitment to the environment.” PX02026 at 003.

632. In an investor conference call, Wild Oats stated that the natural and organic product offerings at conventional supermarkets were not a significant concern: “[W]hen a new competitor opens in our markets, we experience a short-term hit to comp sales in the affected store or stores [O]ver time, they are helping to build awareness of natural and organic foods among their customers, thereby serving as a gateway to our stores.” PX04361 at 002; *see also* PX02704 at 010.
633. Defendants’ economic expert, Dr. Scheffman, testified that Whole Foods has not faced substantial or sustained pressure on its pricing as a result of conventional repositioning. Scheffman Dep. (JX 18) at 155:12-24; *see also* July 31, 2007 PM Tr. Mot. Hr’g at 52:24-53:4 (Scheffman test.) (Dr. Scheffman testified that “[t]here is a document, one or more document says, well this [repositioning by conventional supermarkets] makes people more interested in organic and [Whole Foods] can benefit from that.”).
634. To the extent conventional supermarket chains would try to reposition as premium natural and organic supermarkets they would likely experience supply difficulties. Former Wild Oats CEO explained those difficulties regarding produce purchases: “Whole Foods and Wild Oats are the two big dogs or the two big buyers of produce that’s organic and all natural. They’re going to get preference over everybody else If you’re coming into the marketplace as a conventional, you’re not the big buyer, you don’t get that preference, and you have supply problems.” Odak IH (JX 37) at 70:1-14; *see also id.* at 76:11-77:2 (detailing the difficulties SuperValu, one of the nation’s largest wholesalers and retailers, experienced while trying to purchase organic produce for its organic market Sunflower).

635. [REDACTED]
[REDACTED]
[REDACTED] 18-164:1. Accord, Odak IH (JX 37) at 71:14-23 (“[I]n ‘06 there was a shortage of organic milk, but you know – and the two big buyers never got shorted. It’s everybody else that got shorted in the industry.”).
636. The supply of organic meat is very limited. “If the conventionals wanted all of that, they couldn’t get it all . . . there’s just not enough of it to go around . . . the big buyers, which would be Wild Oats, Whole Foods, are going to get preference in that particular business.” Odak IH (JX 37) at 70:16-71:5.
637. The substantial costs associated with repositioning into Whole Foods’ and Wild Oats’ product space would prevent a conventional supermarket from attempting this even if it was so inclined. Whereas “[REDACTED],” (PX02704 at 008), PNOS shoppers demand extensive perishables. Odak IH (JX 37) at 78:18-23; Mackey IH (JX 28) at 249:24-251:25.
638. To attract Whole Foods and Wild Oats customers, conventional supermarkets would have to substantially increase their focus on perishables, devote substantially more selling space to perishables, markedly improve quality, and forgo certain slotting allowances. See Odak IH (JX 37) at 60:11-23; PX02704 at 008.
639. A retailer considering becoming a PNOS would need to establish a large-scale Organic Rule-compliant supply chain and distribution system. This is not only expensive, but it is also difficult and would raise prices for conventional store shoppers, most of whom are price-oriented. See Odak IH (JX 37) at 77:11-78:23.
640. Former Wild Oats CEO Odak explained why conventional supermarkets would not be able to reposition into the PNOS market:

[U]ntil you have a predictable demand or takeaway at the store, you don’t know how much to buy. If you buy too much and you don’t sell it because you’re trying to get in the market, you shrink it out [*i.e.*, it spoils] and you lose money. If you buy too little, the consumer comes in your store and says you’re not in the business . . . of organic and I’ll go buy it someplace else.

So . . . the conventionals have a very difficult time getting into this business. One . . . it’s primarily a or predominantly a perishable

business. And two, they have never been able to establish a predictable takeaway from the product.

And we've seen this for the five or six years I ran the company. This has been a consistent pattern. They [the conventionals] have a big push on. It doesn't sell through. Their margins aren't where they ought to be, and it shrinks back and shrinks back and shrinks back. There's less and less organic in those stores.

Odak IH (JX 37) at 77:14-78:23; *see also* Odak Dep. (JX 16) at 28:7-24 (Conventionals are not successful in the PNOS space.).

641. A retailer seeking to reposition would need to spend money to better “segregate” its organic foods so they do not touch the non-organic food. *See* PX02072 at 115 (Hartman Organic 2006); PX01302 at 005 (“[R]etailers . . . must implement measures to protect their organic integrity by preventing the commingling of organic and conventional products”); Organic Food Production Act of 1990, 7 U.S.C. §§ 6501-22 (USDA’s Organic Rule requirement). Whole Foods’ Co-President, Walter Robb, describes the rigorous requirements:

Essentially it's [the Organic Rule] mostly around commingling and handling standard, so, for example, in the cooler you can't have conventional broccoli above organic broccoli so that it melts and drips down and so forth. Basically you run proper segregation of the product and handling. On the butcher block you can't have conventional meat and organic meat on the block at the same time. You've got to have separate tools, wash the tools, that sort of thing.

Robb Dep. (JX 2) at 18:14-24.

642. The attempts by conventional supermarkets to reposition have failed, in part from substantial opportunity costs. Whereas “[REDACTED],” PX02704 at 008, premium natural and organic supermarket shoppers demand extensive perishables. Odak IH (JX 37) at 60:2-10; Mackey IH (JX 28) at 249:24-251:25.

643. Allotting additional space to perishables (and many other natural and organic items) would require conventional supermarkets to forgo some of the slotting fee revenues on which they depend. Mr. Odak explained that conventional stores “get so much money for slotting fees and promotional trade allowances from the big CPG companies, that’s where they make . . . the bulk of their money in the store. . . . [I]f you took out the amount of money they make in slotting fees, they would not be profitable.” Odak IH (JX 37) at 60:13-21; Gallo Dep. (JX 1) at 162:6-9 (Whole Foods receives no slotting allowances).

1. Safeway

644. [REDACTED]

645. [REDACTED]

646. [REDACTED]

647. [REDACTED]

648. [REDACTED]

649. [REDACTED]

650. [REDACTED]

651. [REDACTED]; accord Odak IH. (JX 37) at 13 (Whole Foods and Wild Oats carry around 300-400 SKUs of fresh organic produce.).

652. [REDACTED]

653. [REDACTED]

654. [REDACTED]

either Whole Foods or Wild Oats. Defendants' industry consultant, Dr. Stanton, describes Kroger's repositioning efforts as being focused on developing its private label and Kroger brands. Stanton Dep. (JX 19) at 128:21-129:4.

662. [REDACTED]

663. In April 2005, John Mackey dismissed the possibility that Kroger would reposition in any manner capable of affecting Whole Foods. He stated, "I've never seen Safeway or any other conventional supermarket operator ever hurt Whole Foods at any time or in any place in the past . . . Kroger with their 'Fresh Fare' concept and 'Signature Stores'." PX 00799A.

3. Tesco

664. Defendants describe Tesco as "a major British natural and organic firm" about to enter the United States. They state that Tesco's U.S. stores will carry a large supply of natural and organic items. *See* Gallo Dec. ¶ 10; Scheffman Report (PX02066) ¶ 336.

665. [REDACTED]

666. A.C. Gallo, Whole Foods Co-President, states that Wild Oats stores of 15,000 to 20,000 square feet "are simply too small to operate as full service supermarkets." Gallo Dec. (PX04622) ¶ 10. It stands to reason, therefore, that Tesco's planned markets at 10,000 square feet will also be too small to operate as full-service supermarkets.

667. Defendants' industry consultant, Dr. Stanton, expressed his belief that Tesco will not compete against supermarkets. Stanton Dep. (JX 19) at 154:5-6.

4. Wal-Mart

668. In 2005, Wal-Mart began testing organic produce at a store near Albuquerque, New Mexico. PX1306A at 002. In early 2006, a top Wal-Mart marketing executive told investors that the company planned to double the number of organic food items available in its stores to 400 items and offer them "at the Wal-Mart price." PX01045A at 001.

669. Wal-Mart's attempted push into the organic space was unsuccessful. First, it was difficult for Wal-Mart to obtain consistent quality product. "Whenever growers are

straining to meet your volume it means they're forced almost into selling you something that would not be their best crop because they're desperate to get you something to meet your demand." PX1306A at 003. Second, Wal-Mart's customers tend to be very price conscious and were unwilling to pay a premium for organic product, whereas "consumers who go to Whole Foods Markets or Wild Oats Markets are less price sensitive and may not be lured to Wal-Mart with low prices." PX01045A at 002.

670. In April 2007, a Wal-Mart spokesperson stated that the majority of Wal-Mart stores cut their organic offering in half. Wal-Mart now offers only 100 to 200 organic food items and no longer plans to offer 400 organic items in most Wal-Mart stores. PX01045A.
671. In March 2006, Wal-Mart's opened a new supercenter in Plano, Texas, two miles from a Whole Foods, complete with a full Wal-Mart line of organic products. Analyzing Wal-Mart's competitive impact on Whole Foods, a Whole Foods executive reported, "[t]here doesn't seem to be any significant impact on total sales from the Wal-Mart opening." PX00770 at 001. John Mackey agreed: "We are going head to head with them in Plano, and they . . . haven't really hurt us too much at all." Mackey IH (JX 28) at 265:17-19.
672. As recently as February 23, 2007, in his report to the Board of Directors, CEO Mackey dismissed the notion that [REDACTED] expansion into the PNOS market was having any competitive impact on Whole Foods, or that it would in the future. He stated: [REDACTED] [REDACTED],] despite the hoopla in the media, hasn't had much impact in the organic market. I doubt they will because their core customers don't want to pay the higher prices and their non-core customers don't want to shop there for various reasons." PX01304 at 002.
673. Wild Oats former CEO analyzed Wal-Mart's failed attempt to reposition as follows: "So if you look at the history of a more successful retailer, *i.e.*, Wal-Mart, they've done a great job except in the produce perishable area. That's a long, tough road for them, you know, to go head to head, you know, and rechange their format of their stores to take this on. I mean, it's a huge investment for them to do this Well, if you're saying do they have the financial wherewithal, yes. You know, would they have the desire? I don't think so whatsoever. I mean, you know, they have a format that works incredibly, so why would I totally restart and build, you know, this format. I don't know why they would do that." Odak IH (JX 37) at 154:20-155:13.

5. Trader Joe's

674. [REDACTED]
[REDACTED]
[REDACTED]
675. Trader Joe's sells natural and organic product [REDACTED]
[REDACTED] Trader Joe's has no

plans to reposition itself as a natural and organic retailer. Its CEO refused to describe his company as a “natural and organic retailer.” *Id.* at 161:15-25.

- 676. Whole Foods acknowledges that Trader Joe’s offers only a limited range of natural products, not nearly the range that a Whole Foods customer expects to find. LaMacchia IH (JX 32) at 84-85.
- 677. Trader Joe’s makes it a point not to be involved in animal welfare organizations. Bane IH (JX 39) at 165:3-9.
- 678. [REDACTED]
- 679. [REDACTED]
- 680. [REDACTED]
- 681. [REDACTED]
- 682. Trader Joe’s does not offer customers in-store service departments like bakeries, prepared food, or service meat counters. Bane IH (JX 39) at 62:1-18; Meyer Dep. (JX 10) at 79:2-10; *accord* Bane Dep. (JX 24) at 109:5-110:4. Trader Joe’s has no plans to add these services. CEO Bane said he would “bite their head off” any employee who recommended changing the format to include these types of departments. Bane IH (JX 39) at 105:2-10.
- 683. [REDACTED]
- 684. Eighty percent of the items sold in Trader Joe’s stores are private label unavailable in any other stores. This is a very high number in the grocery industry. Bane IH (JX 39) at 86:15-23, 89:20-25.
- 685. [REDACTED]

[REDACTED]

686. [REDACTED]

687. Wild Oats former CEO doesn't consider Trader Joe's to be a significant competitor. Odak Dep. (JX 16) at 320:25-321:4. The Hartman Group agrees. In February 2007, it told Whole Foods, "While Trader Joe's has a marked appeal to some WFM consumers, the overall Trader Joe's experience fails to resonate at the same high level of quality of the WFM retail experience." PX02508 at 010.

688. Trader Joe's has a strong business model. The company currently has about 270 stores. The current format for Trader Joe's uses a smaller format and a narrower range of SKUs than either Whole Foods or Wild Oats. A typical new Trader Joe's store is roughly 11,000 square feet while recently built Whole Foods stores are typically larger than 40,000 square feet. In addition, although Whole Foods and Wild Oats focus on perishables (accounting for roughly 70 percent of their sales), Trader Joe's places much less emphasis on perishables (roughly [REDACTED] percent of sales). Murphy Report (PX02878) ¶ 133; see Bane IH (JX 39) at 44:20-25; [REDACTED]).

689. "Trader Joe's differs significantly from Whole Foods and Wild Oats in terms of a number of attributes. In particular, Trader Joe's focuses much more on discount private label products and does not cultivate an upscale image." Murphy Report (PX02878) ¶ 135.

690. "Given that Trader Joe's differs significantly from both Whole Foods and Wild Oats in terms of product variety, product mix, store size, and image, Trader Joe's would need to reposition itself significantly in order to provide broad based price competition for Whole Foods and other premium natural and organic supermarkets. Even if such repositioning is possible, it would require that Trader Joe's sacrifice its current successful format. There is no evidence that it would choose to do so in response to a small but significant increase in the prices charged by Whole Foods." Murphy Report (PX02878) ¶ 136.

6. Delhaize

691. [REDACTED]

692. Hannaford operates only one store in the Portland, Maine, overlap area. Vail Dep. (JX 21) at 102:24-103:1, 141-142. [REDACTED]. PX04645.
693. Hannaford and Bloom [REDACTED]. Vail Dep. (JX 21) at 21:1-22:11.
694. [REDACTED]. Vail Dep. (JX 21) at 21:5-21. *Accord* Stanton Dep. (JX 19) at 138:12 (Food Lion is a low-priced operator).
695. [REDACTED]. Vail Dep. (JX 21) at 21:3-18; *accord* Stanton Dep. (JX 19) at 138:17-138:21.
696. [REDACTED].” Vail Dep. (JX 21) at 21:5-21; *accord* Stanton Dep. (JX 19) at 15:23-16:11 (Bottom Dollar is targeted at the low end of the market).
697. [REDACTED]. Vail Dep. (JX 21) at 141:12-142:2. [REDACTED].” *Id.* at 142:1-2.
698. Natural and organic SKUs represent only [REDACTED]. Vail Dep. (JX 21) at 108:1-2. [REDACTED]. *Id.* at 110:17-21.
699. [REDACTED]. Vail Dep. (JX 21) at 150:23-151:2.
700. [REDACTED]. *Id.* at 105:5.
701. [REDACTED]



7. Other Retailers

- 702. Premium supermarkets represent another potential platform for entry into the relevant market. One potential entrant from this space is Wegman's. Wegman's format, however, makes rapid expansion difficult. In particular, Wegman's built its business model on providing high quality products and exceptional services to its customers. In order for entry to leverage this reputation effectively, it would be essential to carry that expertise over to any new venture. Providing such a high level of service means that adding capacity requires significant effort in training new management and employees. Murphy Report (PX02878) ¶ 128.
- 703. Although super-competitive pricing might cause Wegman's to change its business model somewhat or accelerate its timing, there is no evidence that it would be willing or able to provide a meaningful restraint on the ability of the combined firm to raise prices in overlap markets. Murphy Report (PX02878) ¶ 129.
- 704. Wegman's has demonstrated a pattern of slow and controlled growth in its core states. Meyer Dep. (JX 10) at 59 (Wegman's is a privately held company that opens only three stores per year). In 2006, Wegman's did open only three stores. See PX04644.

8. Defendants' Industry Expert on Repositioning Knows Very Little About The Extent of Conventionals' Repositioning into Natural and Organic Items

- 705. Dr. Stanton has no knowledge whether Whole Foods has even 100 identical SKUs with other supermarkets. Stanton Dep. (JX 19) at 118:23-119:5.
- 706. Dr. Stanton has no knowledge whether Harris Teeter has more than 3 percent of its grocery sales in organics or more than 4 percent of its produce sales in organics. Stanton Dep. (JX 19) at 192:12-193:2.
- 707. Dr. Stanton has no knowledge whether Supervalu's Premium Fresh & Healthy has more than 2 or 3 percent of its meat sales in organics, more than 4 to 7 percent of its produce sales in organics, more than 1 percent of its bakery sales in organics, more than 100 SKUs of organic produce, or more than 20 SKUs of natural or organic meat. Stanton Dep. (JX 19) at 193:5-194:13

708. Dr. Stanton has no knowledge whether Publix has more than 2,000 natural and organic items. Stanton Dep. (JX 19) at 193:5-194:13.
709. Dr. Stanton has no knowledge whether Supervalu's Sunflower carries more than 5,000 SKUs of natural and organic products. Stanton Dep. (JX 19) at 123:2-126:20.
710. Dr. Stanton has no knowledge whether any of the following chains developed any organic private label brands: Price Chopper, Pathmark, Hienen's, or Ukrops. Stanton Dep. (JX 19) at 186:12-188:15.
711. Instead of developing their own organic private label, Price Chopper and Pathmark signed supply agreements to sell Wild Oats private label products in their stores. PX 00613 at 009.
712. Defendants' expert testified that, in his business, "Spectra is the industry standard," not Prizm. Stanton Dep. (JX 19) at 129:12-16.
713. Gene Kadish, Vice President of Corporate Development and Research for Whole Foods, testified in his deposition that Spectra is "almost always wrong, and "totally unreliable" even for the size and volume of supermarkets in a given area. Kadish Dep. (JX 7) at 57:7-58:2.
714. Mr. Kadish testified that he has found the information provided by Spectra to be unreliable since the late 1970s or early 1980s. Kadish Dep. (JX 7) at 57:7-58:2.
715. Defendants' expert has no idea which psychographic and demographic research products Whole Foods or Wild Oats use. Stanton Dep. (JX 19) at 129:5-7.
716. Wild Oats has used [REDACTED] site selection model since its development. PX2901 at 013-015.
717. Mr. Kadish stated that the [REDACTED] clusters provided by [REDACTED] of what we do in research. It's the basis of everything." Kadish Dep. (JX 7) at 99:12-102:9.

VII. WILD OATS IS NOT A FAILING FIRM

718. If the likely alternative to a merger is the failure (and exit) of one of the firms, an acquisition that preserves the assets in the business is preferred. *Int'l Shoe Co. v. FTC*, 280 U.S. 291, 302-03 (acquired company's resources depleted, business failure was a "grave probability," and a less anticompetitive acquisition was not possible).

719. The factual showing necessary to make out a “failing firm” defense is stringent. The evidence must show that (1) failure is imminent, (2) the firm has no realistic prospect of reorganization, and (3) no viable, less anticompetitive purchaser is available. *Citizen Publ’g Co. v. United States*, 394 U.S. 131, 138-39 (1969). To claim the benefit of the defense, the firm must show that it has made a diligent, good faith effort to find an alternative, less anticompetitive purchaser. *See, e.g., FTC v. Harbour Group Invs.*, 1990-2 Trade Cas. (CCH) ¶ 69,247 (D.D.C. 1990); *Pillsbury Co.*, 93 F.T.C. 966, 1032 (1979); *Merger Guidelines* (PX01310) § 5.

720. [REDACTED].

721. When a natural resource company’s reserves are depleted or committed under long-term, fixed price contracts with large customers, the company’s market share (based on the quantity of its already committed reserves) may overstate its competitive significance. In *United States v. General Dynamics Corp.*, 415 U.S. 486, 493 (1974), when the company had no uncommitted coal to sell, the Court concluded that its power to affect the price of coal was “severely limited and steadily diminishing.” *See also FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004). In *Olin Corp. v. FTC*, 986 F.2d 1295 (9th Cir. 1993), the court affirmed the FTC’s decision that the defendants failed to prove the acquired firm lacked future competitive significance.

722. Defendants have not shown that Wild Oats lacks the ability to compete or that, even if so, that no less anticompetitive acquirer was not available.

A. Wild Oats Is Not a “Weakened” Competitor

723. Section VII of Defendants’ Preliminary Injunction Brief, in which Defendants argue Wild Oats is a weakened competitor and its elimination by Whole Foods will lead to a more efficient competitor, contains 54 factual cites. Thirty-eight of these cites, over 70%, are to declarations of Defendants’ own employees.

724. Defendants refused to allow their employees’ declarations, or any of the declarations, to be tested by deposition. Defendants’ declarations were prepared for litigation, outside the ordinary course of business, and after the Complaint in this matter was filed.

725. Post complaint evidence that is in the control of Defendants must be evaluated very carefully, because of the potential for manipulation. *See B.F. Goodrich*, 110 F.T.C. 207, 341 (1988), *citing United States v. General Dynamics Corp.*, 415 U.S. 486, 504 (1974); *United States v. E.I. duPont de Nemours & Co.*, 353 U.S. 586, 597, 602 (1957); *United States v. Continental Can Co.*, 378 U.S. 441, 463 (1964); *accord Weyerhaeuser Co.*, 106 F.T.C. at 284 n.59; *see also Hospital Corp. of Am. v. FTC*, 807 F.2d 1381, 1384 (7th Cir.

1986, *cert. denied*, 481 U.S. 1038 (1987); *British Oxygen Co.*, 86 F.T.C.1241, 1365 n.26 (1975), *rev'd on other grounds sub nom. BOC Int'l Ltd v. FTC*, 557 F.2d 24 (2d Cir. 1977) (conclusory testimony of industry executives that their industry is "competitive" not particularly useful and cannot be given much weight).

B. Wild Oats Is a Viable Competitor

- 726. Wild Oats is a viable competitor. At the end of 2006, the company reported that it had sufficient cash and cash flows to meet budget requirements, to fund necessary capital expenditures, to provide adequate working capital, and to expand as planned for the next year. PX00613 at 049-050. There is no evidence in the record that it was unable to meet current obligations, such as pay roll, tax, or lease payments, or that any of its suppliers were refusing to ship.
- 727. Wild Oats' sales have risen steadily from \$919 million in 2002 to \$1.2 billion in 2006, a compound annual growth rate of 6.5 percent. PX00613 at 025. Wild Oats' adjusted EBITDA in 2006 was \$46.9 million, up from \$41.6 million in 2005 and \$22.3 million in 2004. PX00613 at 037, 059. Wild Oats' cash generated from operations has risen steadily from \$17 million in 2004 to \$31 million in 2005 to \$32 million in 2006. PX00613 at 071.
- 728. Wild Oats has steadily grown its cash and near-cash balance (cash and cash equivalents plus short-term investments) from \$41.8 million in 2004 to \$54.1 million in 2006, a growth rate of 29.4%. PX00612 at 56; PX00613 at 068. These figures do not include the \$24.6 million Wild Oats has available through the unused portion of its \$40.0 million credit facility from Bank of America, N.A. PX00613 at 089-090.
- 729. Although Wild Oats experienced a net loss in 2006, this would have been a net profit but for restructuring and asset impairment charges. PX00613 at 025. The restructuring and asset impairment charges taken by Wild Oats in 2006 were mostly non-cash expenses (change in lease-related liability estimate, accretion expense on lease-related liabilities, and asset impairment charges). PX00613 at 035. Wild Oats has earned a net profit in three of the last five years. PX00613 at 025.
- 730. Wild Oats' gross profit margin in 2005 was 29.1%, and its gross profit margin in 2006 was 30.0%. PX00613 at 032.
- 731. [REDACTED]

[REDACTED]
[REDACTED]. PX00066 at 001.

732. Wild Oats in its 2006 SEC Form 10-K told the investing public that:

cash generated from operations, and available under our credit facility . . . will be sufficient to satisfy our budgeted cash requirements through fiscal 2007. . . . We believe that current cash and cash equivalents, short-term investments and cash flows from operations will be sufficient to fund necessary capital expenditures, to provide adequate working capital, and to expand as planned for the foreseeable future (the next 12 months).

PX00613 at 049-050.

733. In its 2006 10-K, Whole Foods disclosed a cash balance of \$2,252,000 versus \$509,770,000 in current liabilities, which is a cash ratio of 0.0044. PX01302 at 038. In its 2006 10-K, Wild Oats disclosed a cash balance of \$40,420,000 versus \$152,078,000 in current liabilities, which is a cash ratio of 0.2658. PX00613 at 068.

734. Wild Oats' capital expenditures were \$48 million in 2006, \$28 million in 2005, and \$49 million in 2004. PX00613 at 071.

735. [REDACTED]
[REDACTED]
[REDACTED]). PPF 725-29.

736. Wild Oats reported positive financial results from ongoing operations (backing out non-cash restructuring and impairment charges from operating income) in all but one year from 2003-2005. PX00612 at 53-54; PX00613 at 066.

737. Wild Oats reported negative results from ongoing operations in 2004. Former CEO Odak attributed the loss to difficulties in starting up a new perishables warehouse in California and in dealing with the repercussions of a strike. Odak IH (JX 37) at 159:16-160:11. The strike affected the Henry's banner stores that Wild Oats owns. Odak Dep. (JX 16) at 44:4-24. Wild Oats' pre-tax loss of \$6.5 million from ongoing operations (excluding the non-cash valuation allowance change and other restructuring and impairment charges) is less than one percent of its 2004 \$1.0 billion sales. PX00613 at 025.

738. Income tax expense comprised \$25.8 million of the \$40 million net loss reported in 2004. PX00612 at 54. Given that Wild Oats reported a loss before income taxes, an income tax credit, rather than an income tax expense, would have been expected. However, the reason so substantial an income tax expense was reported in 2004 was that Wild Oats

recorded a non-operating, non-cash, non-recurring valuation allowance against its deferred tax assets. PX00612 at 35.

- 739. The 2004 results did not deter creditors as three months after the end of the fiscal year on March 31, 2005, Wild Oats entered into its current five-year, \$40 million revolving line of credit with the Bank of America. Subject to certain conditions, this line can be increased to \$100 million. PX00612 at 78.
- 740. In 2005, Wild Oats reported a 10.3% increase in its gross profits (to \$327.6 million). It also reported net income of \$3.2 million, or \$0.11 per share, compared with a net loss of \$40.0 million or \$1.37 per share in 2004. PX00612 at 54.
- 741. In November 2006, newly appointed Wild Oats CEO Greg Mays said in an earnings conference that sales and earnings growth were “positive” for year-to-date sales, “including positive year-over-year results for the last six consecutive quarters.” PX01273 at 003.

C. Wild Oats Is An Aggressive Competitor

- 742. In November 2006, Wild Oats’ current CEO, Greg Mays, stated “Our focus is really to accelerate the programs Perry [Odak] put in place for sales growth, new store openings, with probably a greater emphasis on remodeling. As we’ve focused on store growth, we haven’t always reinvested in existing stores. Our offering is much better now, much greater – we’re going to spend in the first and second quarters to increase our offering. We’re going to invest in our store training and staffing. We’ll launch an aggressive remodel program and spend more capital dollars on marketing and merchandising programs that will bring new energy to our stores.” PX00340 at 001.
- 743. In the third quarter 2006 earnings conference call on November 7, 2007, Wild Oats’ CEO Greg Mays announced that Wild Oats will have opened seven new stores by the end of the year and represented that Wild Oats had 21 leases or letters of intent signed for stores that would open in 2006, 2007, or 2008. PX01273 at 004.
- 744. According to a Wild Oats’ ordinary course of business document, entitled “[REDACTED]”, [REDACTED], [REDACTED], [REDACTED], [REDACTED]. PX00455 at 001.
- 745. Wild Oats opened new stores every year for the last five years. Wild Oats opened one store in 2002, eight stores in 2003, 12 stores in 2004, eight stores in 2005, seven stores in 2006, and one store in early 2007. PX00613 at 028.

746. In the November 7, 2006, earnings conference call, Wild Oats' CEO Greg Mays also said: "Simply put – our plan is to become more aggressive with our marketing and merchandising and with enhancing our 'customers' experience.' Supported by our 'Marquee Name' – a name that represents quality, integrity and trust for organic and natural foods. By using these assets more aggressively, we believe we can improve the top line 'sales' performance for fiscal 2007." PX01273 at 002.

747. In the November 7, 2006, earnings conference call, Wild Oats' CEO Greg Mays said that "[t]he company has delivered positive sales and very positive earnings growth year-over-year for the full year 2005 and year-to-date 2006, including positive year-over-year results for the last six consecutive quarters. However, Wild Oats has the potential to do better, and I believe much better. . . . [W]e continue to formalize the strategic operational and marketing initiatives to step up our: product offerings, merchandising, and operational execution to maximize the sales growth being realized in this growing natural and organic space." PX01273 at 003.

D. Wild Oats Has Opportunities for Further Financing

748. [REDACTED]

E. Wild Oats Is Not a High-Priced Competitor

749. Whole Foods's CEO John Mackey credited Wild Oats' price competition when he told his Board of Directors in February 2007 that one justification for the proposed acquisition was to eliminate "nasty price wars" with Wild Oats:

[Wild Oats] remains a relevant competitor. By buying them we will greatly enhance our comps over the next few years and will avoid nasty price wars in Portland (both Oregon and Maine), Boulder, Nashville, and several other cities which will harm our gross margins and profitability.

PX00773 at 001.

750. Wild Oats' Executive Vice President Roger Davidson told other Wild Oats executives in January 2007, "[REDACTED] Whole Foods at retail. [REDACTED]. It will therefore be necessary for your departments to offset these retail reductions with cost reductions by department indicated at the bottom of the spreadsheet." PX01202 at 001 (redacted).

751. In May 2006, Whole Foods Regional Vice President Will Paradise reported [REDACTED]
[REDACTED]
[REDACTED].” PX00054 (redacted).
752. In 2001, when Perry Odak became CEO of Wild Oats, it was [REDACTED] days from running out of cash. Odak IH Tr. at 166:18-167:4, PX01325 at 166-167. By 2006, Wild Oats had \$54.1 million in cash and near cash (cash and cash equivalents plus short-term investments). Wild Oats Markets, Inc. 2005 SEC Form 10-K (filed February 28, 2006) at 56, PX00612. During Mr. Odak’s tenure as CEO of Wild Oats, Wild Oats never missed a cash forecast. Odak IH (JX 37) at 144:22-145:8.
753. Whole Foods’ CEO John Mackey recognized that over the last few years, Wild Oats’ performance improved. Mr. Mackey testified that Wild Oats is “a stronger and better company than they were 6 and a half years ago.” Mackey IH (JX28) at 225:18-22.
754. According to February 2007 “Project Goldmine” valuation of Wild Oats prepared for Whole Foods’ board, Whole Foods estimated Wild Oats would enjoy [REDACTED] EBITDA growth in FY2007 and [REDACTED] EBITDA growth in FY2008. DX 401 at 26; PX02899.
755. In October 2006, Whole Foods Regional Vice President Will Paradise told the Whole Foods store in Boulder, Colorado, “to match these deals” offered by Wild Oats BOGO [Buy one, get one] sale, but he limited the price matching to “Boulder only since these deals are only in the four [Wild Oats] stores in the Boulder area.” PX00187 at 001.
756. Wild Oats’ “Financial and Business Overview: 2007 Plan” contains a document entitled “Reduce Retail Pricing”:
- Wild Oats Grocery and Natural Living ([REDACTED] on WFMI)
- [REDACTED] Investment Needed [REDACTED] with WFMI
- PX00458 at 005 (redacted).
757. Wild Oats’ May 2006 Competitive Intrusion Plan contains a document entitled “Pricing”:
- Competitive Issues
- Competitor may execute a new store pricing plan whereby ~ [REDACTED] are priced below competition
- Objective/Tactics
- Maintain a good price perception relative [REDACTED]
 - Run competitive price checks [REDACTED] starting [REDACTED] after opening

■ [REDACTED]
[REDACTED]
[REDACTED].

PX00661 at 012 (redacted).

758. Wild Oats Director of Pricing Chad Smith testified that the “competitor opening that caused this price zone to be created” in [REDACTED] “was Whole Foods at [REDACTED]. Mr. Smith said that Wild Oats Executive Vice President Roger Davidson instructed him to create the price zone in [REDACTED] to respond to the planned opening of a Whole Foods store in [REDACTED].” Smith IH (JX 38) at 96:3-5, 99:5-6.

759. Wild Oats Director of Pricing Chad Smith testified that he was instructed by Wild Oats Executive Vice President Roger Davidson to make price changes in [REDACTED], in the [REDACTED] to respond to competition from the opening of a Whole Foods store directly across the street from Wild Oats and the opening of a [REDACTED] farther away. Smith IH (JX 38) at 100:1-101:20.

760. In contrast to this testimony and documentary evidence, Defendants’ counsel asserted:
“[REDACTED]
[REDACTED]
[REDACTED].”

761. A Wild Oats planning document entitled “Whole Foods Competitive Marketing Plan: Pricing” states the “Objective: [REDACTED] between WFMI [Whole Foods] and Wild Oats [REDACTED].” PX00677 at 078.
The document identifies the following steps to achieve the objective:

- WFMI executes a new store pricing plan whereby [REDACTED] key items are priced below competition
- Wild Oats needs to counter this tactic by creating a [REDACTED]
[REDACTED]
[REDACTED]

— [REDACTED]
[REDACTED]
[REDACTED]”

testified before the FTC after approximately four months running a premium natural and organic supermarket; he has significantly less experience than does Mr. Odak to testify to the business of Wild Oats. *See* PFF 28, 30.

768. Walter Robb, the Co-President of Whole Foods, testified that Greg Mays “has really been in there [Wild Oats] such a short time, I mean, they took Perry [Odak] out and there isn’t really evidence for him to be able to do that. And I think he [Mays] was only there as an interim caretaker until they [Wild Oats] could find a new CEO. I mean, I know they were looking for a new CEO because the headhunters called me.” Robb IH (JX 29) at 179:14-23.
769. When Perry Odak took up his CEO position at Wild Oats the company was within 90 days of running out of cash and had violated its loan covenants. Odak IH (JX 37) at 30:2-13. During Perry Odak’s tenure (2001-October 2006), Wild Oats sales rose steadily from \$919 million in 2002 to \$1.2 billion in 2006, a compound annual growth rate of 6.5 percent. PX00613 at 025. Its adjusted EBITDA in 2006 was \$46.9 million, up from \$41.6 million in 2005 and \$22.3 million in 2004. PX00613 at 037, 059. Wild Oats’ cash generated from operations rose from \$17 million in 2004 to \$31 million in 2005 and \$32 million in 2006. PX00613 at 071. This has allowed Wild Oats to steadily grow its cash and near-cash balance (cash and cash equivalents plus short-term investments) from \$41.8 million in 2004 to \$54.1 million in 2006. PX00612 at 56; PX00613 at 068. These figures do not include the \$24.6 million available through the unused portion of its \$40.0 million credit facility from Bank of America, N.A. PX00613 at 089-090.
770. On every material issue, Mr. Odak’s testimony is corroborated by evidence from, among others, the Whole Foods CEO John Mackey. To illustrate: (i) Mr. Odak and Mr. Mackey agree that Wild Oats has considerable brand equity and authenticity in the premium natural and organic market, *see* PX00773; PX00751; Odak Dep. (JX 16) at 236:4-9; (ii) Mr. Odak and Mr. Mackey agree that conventional supermarkets such as Safeway have been unsuccessful in their efforts to compete with Whole Foods and Wild Oats, *see* PX000785 and Odak Dep. (JX 16) at 343:19-25; and (iii) Mr. Odak and Mr. Mackey agree that both Whole Foods and Wild Oats have a well defined customer demographic that is affluent and well educated. *See* PX000718; Odak IH (JX 37) at 95:5-96:6.
771. Mr. Odak had no financial incentive to testify to anything other than the truth in this matter. In contrast, the declarants for Defendants, most of whom are employees of Defendants, do have financial incentives to give statements favorable to Defendants. Similarly, Wild Oats’ principal witnesses in this case, Mr. Mays and Mr. Martin, will realize considerable sums of money should the proposed merger be consummated. *See, e.g.*, PX00613 at 160.

VIII. THE TRANSACTION PRODUCES NO VERIFIABLE, MERGER-SPECIFIC EFFICIENCIES

772. In order to be weighed against an anticompetitive merger, efficiencies must be cognizable, verifiable and merger-specific. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720 (D.C. Cir. 2001); *FTC v. Cardinal Health*, 12 F.Supp. 2d 34, 62 (D.D.C. 1998); *Merger Guidelines* (PX01310) § 4.
773. Because “information relating to the efficiencies is uniquely in the possession of the firms,” the merging firms carry the burden of proof on efficiencies and:
- must substantiate efficiency claims so that the Agency can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved . . . how each would enhance the merging firm’s ability and incentive to compete, and why each would be merger-specific. Efficiency claims will not be considered if they are vague or speculative or otherwise cannot be verified by reasonable means.
- Merger Guidelines* (PX01310) § 4.
774. “Cognizable efficiencies are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service.” *Merger Guidelines* (PX01310) § 4.
775. The costs associated with achieving any efficiencies must be subtracted when quantifying such efficiencies. *Merger Guidelines* (PX01310) § 4 (“Cognizable efficiencies are assessed net of costs produced by the merger or incurred in achieving those efficiencies.”).
776. Certain types of efficiencies are more likely to be cognizable and substantial than others. For example, efficiencies resulting from shifting production among facilities formerly owned separately, which enable the merging firms to reduce the marginal cost of production, are more likely to be susceptible to verification, merger-specific, and substantial, and are less likely to result from anticompetitive reductions in output. Other efficiencies, such as those relating to research and development, are potentially substantial but are generally less susceptible to verification and may be the result of anticompetitive output reductions. Yet others, such as those relating to procurement, management, or capital cost are less likely to be merger-specific or substantial, or may not be cognizable for other reasons. *Merger Guidelines* (PX01310) § 4; *Heinz*, 246 F.3d at 722 n.20.
777. Defendants must show that any asserted efficiencies from reducing general and administrative expenses could not be achieved by either party acting alone. *Merger Guidelines* (PX01310) § 4.

778. A showing of “extraordinary efficiencies” will be required “where the HHI is well above 1800 and the HHI increase is well above 100.” *Heinz*, 246 F.3d at 720, quoting IVA Areeda, Antitrust Law ¶ 971f at 44. Efficiencies must be subjected to “rigorous analysis” by the Court. *Heinz*, 246 F.3d at 720.
779. To establish a valid efficiencies defense, Defendants’ claimed efficiencies, when balanced against the potential anticompetitive harm, must create a net economic benefit for the . . . consumer.” *Rockford Mem’l Corp.*, 717 F. Supp. at 1251.
780. An efficiencies defense will be rejected when monopoly rents would far outweigh the presented savings. *Rockford Mem’l Corp.*, 717 F. Supp. at 1251; *Cardinal Health*, 12 F. Supp. 2d at 63.

A. Efficiencies Not Verified or Quantified

781. The Request for Additional Information (“Request”) issued to Whole Foods in the investigation of the proposed acquisition that Whole Foods provide a “detailed description of all efficiencies that [Whole Foods] claims will or may arise from the proposed acquisition.” The Request also asked Whole Foods to describe the means by which each efficiency was to be accomplished, the investments required, the expected savings, and the time required for Whole Foods to achieve each efficiency. Whole Foods in its response to the Request did not include a single efficiency nor did it specify the time in which it expected to achieve any efficiency. PX01349 at 001-004.
782. David Scheffman testified in his deposition that he was “not putting forward a [Merger G]uidelines analysis of merger efficiencies” and that his analysis of the purported benefits of the acquisition were based on “[REDACTED]” Scheffman Dep. (JX 18) at 227:12, 233:24-25 (redacted).
783. Whole Foods identified possible efficiencies from “rationalizing product flow from the parties’ respective distribution centers” and “reductions in distribution costs . . . resulting from renegotiation of a new contract with United Natural Foods Inc. (UNFI) made possible by the merged entity’s larger combined purchase volume.” PX01340-004.
784. Dr. Scheffman [REDACTED]. Scheffman Dep. (JX 18) at 224:15-22, 165:7-15.
785. The claimed efficiencies must be merger-specific, that is, Defendants must show that the efficiency could not be accomplished without the proposed transaction. The D.C. Circuit in *FTC v. Heinz*, 246 F.3d 708 (D.C. Cir. 2001), rejected an asserted efficiencies defense that was based on an expert study lacking any statistical validity and that failed to show that the claimed efficiency was merger-specific. The Court said that

each store that it closes for lease breakage fees. *Id.*

C. The Alleged Efficiencies Result from a Reduction in Output

791. Closing a store has the same effect on consumers as an immediate price increase. Murphy Report (PX02878) ¶ 9.

792. Whole Foods CEO John Mackey testified:

One of the motivations [for the acquisition of Wild Oats] is to eliminate a competitor. I will not deny that. That is one of the reasons why we are doing this deal. That is one of the reasons we are willing to pay \$18.50 for a company that has lost \$60 million in the last six years. If we can't eliminate those stores, then Wild Oats, frankly, isn't worth buying.

Mackey IH (JX 28) at 75:13-21.

793. Whole Foods' valuation models for the acquisition include assumptions that Whole Foods will [REDACTED]; PX00553.

794. Whole Foods intends to close some number of Wild Oats stores due to their proximity to Whole Foods locations. James Sud said that Whole Foods does not have enough information on Wild Oats' stores to determine which stores it will close. Sud Dec. ¶ 47.

Respectfully submitted,

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