PUBLIC RECORD VERSION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EKATERINI KOTTARAS, individually On Behalf Of Herself And On Behalf Of All Others Similarly Situated	
v.	Case: 1:08-cv-01832-PLF
WHOLE FOODS MARKET, INC.	

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WHOLE FOODS MARKET, INC.'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

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I. BACKGROUND FACTS

Plaintiff says **REDACTED** [1] but this is no "ordinary" antitrust class action, if there is such a thing. It is not a price-fixing case, where the conduct is *per se* illegal and devoid of consumer benefit. In this class action, plaintiff challenges a merger of supermarket chains that has been consummated since August 2007. Section 7 of the Clayton Act requires Ms. Kottaras to prove that the merger *substantially lessened competition* in a well-defined relevant market. Her own expert agrees that the merger may have led to *lower* prices for shoppers—highlighting the burden that plaintiff faces in proving her case. This is also not "like" the typical price-fixing case where class members paid overcharges on a handful of closely related products. Here, the putative class seeks recovery for alleged overcharges on up to *tens of thousands* of supermarket products. Plaintiff's inability to account for those distinctions at the class certification stage dooms her motion.

The motion fails a critical test under Fed. R. Civ. P. 23(b)(3): proving that individual impact or injury can be shown on the basis of classwide evidence. Plaintiff's expert, Dr. Oral Capps, openly concedes that he has not settled on (let alone applied) a method to show individual impact. Gleaning what one can from his report and deposition about what he *might* do, the inadequacy of Dr. Capps' approach is apparent:

- He aims only to determine aggregate, not individual, impact. If, *e.g.*, he finds an overcharge on Fuji apples at a store, he will assume impact for *every* shopper at that store regardless of whether *every* shopper *bought* the apples.
- His impact analysis will not account for price benefits. If he finds that the merger caused a product's price to decline, *Dr. Capps will simply ignore it*. If his regressions yield a conclusion that the merger caused prices to increase for a handful products and fall for thousands of others, he will find impact. This approach defies common sense and the principle that a "substantial lessening of competition" turns on the merger's overall effect on consumer welfare.

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[1] Plaintiff's Motion for Class Certification (hereinafter "Brief") at 1.

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- He will ignore approximately 20% of the class. Dr. Capps will not study price effects at five of the twenty-two post-merger Whole Foods stores, including at the former Wild Oats stores where Whole Foods lowered prices and improved store quality substantially.

- He has **REDACTED** that he says he needs for his analysis—and does not even know this, because plaintiff's counsel never gave the data to him. **REDACTED**

- He assumes an implausible relevant geographic market (Los Angeles County, California) that differs from the complaint (which alleges a more-implausible United States market), then undermines his market theory by contending that price competition occurs among rivals located in the same "neighborhood."

Plaintiff tries to shield Capps' inadequacy through outdated platitudes about the inherent susceptibility of antitrust cases to class treatment or the "conditional certification" standard that was discarded in the 2003 amendments to Rule 23. Her claim that antitrust cases "such as this one" are "consistently" certified ignores the fact she has not cited a single case "like" this one. She cites no case concerning a contested consummated merger with potential pro-competitive effects and *tens of thousands* of products at issue. Those realities exist here and, compounded by plaintiff's inadequate showing, make this case wholly unsuitable for class treatment.

The motion fails for other reasons as well. She cannot prevail under Rule 23(b)(2), because she seeks predominantly money, not injunctive relief. Also, her class definition does not allow potential class members to determine membership. Plaintiff, her counsel, and her expert conflict and stumble over whether she seeks a class of purchasers of "premium, natural and organic *foods*" or "premium, natural and organic *products*" (Whole Foods sells thousands of non-food products). Lay persons will be perplexed by the ambiguity in plaintiff's definition of "premium, natural, and organic."

Ms. Kottaras also is an inadequate representative. She saved no store receipts until almost a year after filing this action (two years after the merger) which subjects her to a spoliation charge. Her expert, moreover, has not selected a method to calculate impact and

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damages. The tentative methods he does propose would likely yield different results—some benefiting certain class members at the expense of others, creating intra-class conflict. One method for determining impact and damages rewards infrequent shoppers at the expense of frequent shoppers. Plaintiff cannot adequately represent a class with such diverse interests.[2]

A. The Complaint and Plaintiff's Motion

On August 28, 2007, Whole Foods acquired Wild Oats Markets, Inc. (the "merger"). Fifteen months later, plaintiff filed this class action, charging that the merger violates Section 7 of the Clayton Act, 15 U.S.C. § 18, and other antitrust statutes, because it enabled Whole Foods to charge supra-competitive prices in an alleged relevant product market of "premium, natural, and organic supermarkets" and a "nationwide" relevant geographic market. (Compl. ¶ 39)

The complaint variously alleges representation of a class of customers who purchased "*produce*" or "premium, natural and organic *produce*" (¶¶1, 5) or "premium, natural and organic *goods*" (¶ 55) from Whole Foods in "the United States." In her motion, plaintiff narrowed the geographic scope of the class and altered the product scope. She moves **REDACTED**

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[2] This is not surprising, since Ms. Kottaras' shopping habits reveal her to be virtually the opposite of a supposed "core" Whole Foods shopper described in the complaint. She extensively substitutes among many sellers of "premium, natural, and organic" food besides Whole Foods, rarely if ever partakes in the supposedly "unique" features that define a so-called "premium, natural, and organic supermarket," and had not even been inside a Wild Oats store in years (which did not stop her from alleging in the complaint that Wild Oats was Whole Foods' "foremost competitor"). Plaintiff's *own expert* suggests that Ms. Kottaras is, in economic terms, a "marginal" rather than "core" consumer, *i.e.*, someone whose proclivity to switch vendors rather than pay a supra-competitive price is at odds with the claim that "premium natural and organic supermarkets" is a relevant product market and that Whole Foods monopolizes it. *Infra.*

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B. The FTC Action

In the administrative challenge to the merger that followed its preliminary injunction action in this Court, the FTC alleged that the relevant product market was "premium natural and organic supermarkets" and the relevant geographic markets were twenty-two separate local areas where both chains had a store, and seven other areas where one chain had a store and the other chain was a potential entrant.[3] Two FTC-alleged markets were smaller than Los Angeles ("LA") County: "Pasadena" and "LA-Santa Monica-Brentwood."[4]

In March 2009, after months of discovery, the FTC and Whole Foods entered a consent agreement that required Whole Foods to permit a Trustee to sell thirty-two locations—not one of which was in LA.[5] Before finalizing the consent, the FTC posted it (and the divestiture list) for public comment. Ms. Kottaras did not submit a comment objecting to the FTC's decision not to require a divestiture in LA.[6] On May 28, 2009, the FTC finalized the consent agreement.[7]

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3 Amended Complaint ¶¶ 30, 32, *available at* http://www.ftc.gov/os/adjpro/d9324/080908wfamendedcmpt.pdf.

4 *Id.* ¶ 30.

5 Decision and Order, Appendices A and B, *available at* http://www.ftc.gov/os/adjpro/d9324/090306wfdo.pdf. Of the thirty-two locations subject to the divestiture terms, thirteen were operating stores and the rest were properties without operating stores.

6 Public Comments, Docket 9324, *available at* http://www.ftc.gov/os/comments/wholefoods/index.shtm.

7 Decision and Order, *available at* http://www.ftc.gov/os/adjpro/d9324/090529wfdo.pdf. As of April 12, 2010, the Trustee found buyers for only three locations. The proposed buyer for a Portland, Maine, site is Trader Joe's – a national grocery store chain that the Trustee said would "accomplish the purposes of the Consent Agreement and remedy any lessening of competition." Petition of Divestiture Trustee for Approval of Proposed Divestiture to Trader Joe's East, Inc., *available at* http://www.ftc.gov/os/adjpro/d9324/100309wholefoodstraderjoes.pdf. Plaintiff Kottaras admits that she is a frequent purchaser of "premium, natural, and organic" products at two Trader Joe's stores close to her Glendale home. *Infra.*

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II. PLAINTIFF AND PLAINTIFF'S EXPERT

A. Plaintiff Kottaras

Plaintiff has resided in Glendale, California, since 2000. (Pl. Tr. 11)[8] Mr. Braun is her counsel in this case and a friend with whom she and her family share monthly dinners. (*Id.* at 250, 260) The two first discussed the merger at a family dinner at Mr. Braun's in August 2008. (*Id.* at 34, 249-50) Plaintiff said that Mr. Braun told her (inaccurately) that the Court of Appeals in *FTC v. Whole Foods* ruled "that Whole Foods had a monopoly on the market." (*Id.* at 35)

Two months later, she filed this case. Even though she never shopped at Wild Oats from February 2006 to the August 2007 merger and cannot remember the last time prior to February 2006 that she shopped there (*id.* at 160-62), this did not deter plaintiff from alleging that Wild Oats was Whole Foods' "foremost competitor" and that the two chains comprised a market based on many marketing attributes they shared. (*See* Compl. ¶¶ 1, 28-38).[9] She alleges (*id.* ¶ 33) that "premium, natural, and organic supermarkets" (*i.e.,* Wild Oats and Whole Foods) strive to be "a destination to which shoppers come not merely to shop, but to gather together, interact, and learn, often while enjoying shared eating and other experiences," but could not recall *ever* having gone to Whole Foods to gather with friends, take a class, or observe an in-store demonstration. (Pl. Tr. 246, 249) The complaint (¶ 32) also claims that "premium, natural, and organic supermarkets" offer "special features such as in-store community centers," but the most plaintiff could offer at her deposition about a community center is that it is "nice if it's there." (Pl. Tr. 245-246)[10]

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8 Cited pages from plaintiff's deposition are collected at Ex. B.

9 The Wild Oats store nearest to Ms. Kottaras' Glendale home was about twelve miles away in Pasadena. (This distance in miles from Ms. Kottaras' home to the former Pasadena Wild Oats was calculated using Yahoo! Maps.)

10 Ms. Kottaras also singles out Whole Foods as unique because it is the only store that "had pretty much everything that I needed in one place, so I started shopping there." (Pl. Tr. at

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Ms. Kottaras admits that she "purchased numerous products from multiple [food] stores every month" since February 2006—except at Wild Oats.[11] She provided a chart listing sixteen rival stores where she shopped for food over that period (Ex. F) and a "farmers markets" category that is based on at least seven farmers' markets. (Pl. Tr. 113, 143, 125, 216, 219, 235, 281) The chart omits a seventeenth rival, Henry's, which is a supermarket offering premium, natural, and organic products that opened in Burbank in September 2009. (*Id.* at 181-84)

Ms. Kottaras spends more at *other* food stores than she does at Whole Foods. (Ex. F) Prior to February 2006, she rarely shopped at Whole Foods. (Pl. Tr. 165-66.) From February 2006 to August 2007, she spent *zero* dollars at Whole Foods in at least *nine* different months. (Ex. F) (three months are not reported). Prior to the merger, Ms. Kottaras shopped at Whole Foods less often than she did at Vons/Pavilions,[12] Trader Joe's, and Ralph's. (Pl. Tr. 169)

Plaintiff buys premium, natural, and organic products at Pavilions (*Id.* at 143-45, 265-67) and Trader Joe's (*Id.* at 147, 194-95). From February 2006 to October 2009, she spent twice as much at Pavilions ($15,442.70)[13] than Whole Foods ($7,505.19), and substantially more at

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87) Contrary to her testimony, in no month, pre- or post-merger, did plaintiff ever do all of her food shopping at Whole Foods. (Ex. F)

11 Plaintiff's Supplemental Objections and Responses to Defendant Whole Foods Market, Inc.'s Interrogatories Relating to Class Certification Issues, First Supplemental Response no. 4. (Ex. E)

12 Plaintiff testified that the amount listed for Vons in Ex. F likely was spent at Pavilions, but both entities are recorded as "Vons" on the credit card statements from which she compiled the data. (Pl. Tr. 138-40) Both Vons and Pavilions are owned by the same parent, Safeway.

13 This total is reported in Ex. F for "Vons," but, as explained in note 12, Plaintiff testified that these probably were purchases at Pavilions. In Ex. F, Plaintiff has a separate column for Pavilions and states that she spent $1,891.92 at that store (in addition to $15,442.70 at Vons).

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Trader Joe's ($9,358.50) than Whole Foods. (Ex. F)[14] In March 2009, for example, plaintiff spent $530.32 at Trader Joe's, $455.76 at Pavilions, $200.17 at Vons (plus spending at other stores), and *nothing* at Whole Foods; in May 2009, she spent $648.50 at Trader Joe's and just $31.79 at Whole Foods. (*Id.*)

Plaintiff makes purchasing decisions based on price comparisons between stores. (Pl. Tr. 273-77) In 2008, she "cut back" at Whole Foods on products including milk, chicken, beef, fruits, vegetables, yogurt and coffee (Pl. Tr. 177-78, 180, 183) and now buys fruits, vegetables, and beef primarily at farmers' markets. (*Id.* at 181-82) Plaintiff substituted from Whole Foods to Trader Joe's for organic chicken, milk, yogurt, oatmeal, and some fruits and vegetables (*id.* at 82-85,178-82), and buys fruits and vegetables, yogurt, coffee, and milk at Pavilions, plus beef and other products at Henry's. (*Id.* at 181-82)[15]

Since June 2008, Ms. Kottaras has spent about $110 per week at farmers' markets. (Ex. F; Pl. Tr. 102-08) These markets sell premium, natural, and organic items (Pl. Tr. 103) and produce that equals Whole Foods' quality. (*Id.* at 113) She is such an enthusiast that she wrote online in December 2008 that she "started shopping the farmers' markets *exclusively*." (Ex. G) (emphasis added). She exaggerated about "exclusively" but says the article is "95 percent" true. (Pl. Tr. 223) In another online posting, she said she would be "[b]uying produce *only* from farmer's markets." (Ex. H) (emphasis added). That too was an exaggeration (Pl. Tr. 239), but at

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[14] Plaintiff subsequently produced some receipts from August-November 2009; it is unclear whether these reflect purchases in addition, or redundant, to Ex. F. The receipts show that Ms. Kottaras continued to spend more for groceries at stores other than Whole Foods. The receipts show the most purchases at Henry's ($1,413).

[15] When confronted with Ex. F (chart showing where Ms. Kottaras shopped) and asked whether the chart depicted a "marginal" consumer (one who is likely to switch vendors in response to a price increase) or a "core" consumer (one who is relatively insensitive to price and likely to pay a supra-competitive price rather than switch), Dr. Capps replied that "one can make the case that she's more likely a marginal shopper." (Capps Tr. 188)

$110 per week Ms. Kottaras spent more at farmers' markets than she did at Whole Foods in eleven of the seventeen months from June 2008 to October 2009. (Ex. F)

At plaintiff's favorite farmers' market in Burbank, "plainly the quality and the selection of the products" is what "keeps [her] coming back." (Pl. Tr. 220) Here she buys produce, beef, seafood, and cheese, and thus does not have to buy these products at Whole Foods. (*Id.* at 234-35) The same is true for the Montrose farmers' market, where she buys beef, seafood, and cheese. (*Id.* at 234-35) The Glendale farmers' market offers "mounds of beautiful produce," variety, fresh bread and cakes, and goat cheese that is as "fantastic" as the goat cheese at Whole Foods. (*Id.* at 216-18) At the South Pasadena farmers' market, the produce, grass-fed beef, and fish has an "excellence" equal to Whole Foods. (*Id.* at 115-16) At the Kenneth Village farmers' market, plaintiff is "able to get my week's shopping done for produce." (*Id.* at 235)

Ms. Kottaras observed that "food prices have gone up across the board," including at farmers' markets, and noted that "[w]e're in a recession" so "they raise the food prices." (*Id.* at 121-22) "[I]n all grocery stores and restaurants, and I have seen it, and I've read articles about it, as well, that food costs have gone up. So I know that from personal experience and from reading the news." (*Id.* at 210) Ms. Kottaras also knows from articles and personal farming efforts that growing organic products is costlier than growing non-organic products (*id.* at 205-06), and that higher costs can lead to higher prices at farmers markets and Whole Foods. (*Id.* at 121-23)

Ms. Kottaras saved no grocery receipts until August 2009. (Pl. Tr. 77-78) For the prior time period, she produced only credit card statements that do not itemize her purchases. She did not view her status as plaintiff as obliging her to preserve receipts, but began to do so once instructed by her counsel some nine months after filing the complaint. (*Id.*)

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B. The Capps Report

The primary issue for class certification in an antitrust case is whether antitrust injury, or impact, can be proved on the basis of classwide evidence. On this issue, plaintiff offers the report of Dr. Capps, who never before submitted an opinion on class certification. (Capps Tr. 338)[16]

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Regression is a statistical tool that can be used to measure the relationship between two or more variables that economic theory suggests should be correlated. Multiple regressions typically seek to calculate the magnitude of the effect of several potential explanatory variables (described below) on a single dependent variable (in this case, price).

Whole Foods produced to plaintiff's counsel the detailed transaction data that the company provided under subpoena in the FTC administrative case, but plaintiff's counsel never gave the data to Dr. Capps. (Capps Tr. 75)

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(*Id.*; Capps Rpt. ¶¶ 59-61) Dr. Capps also did not specify his method for proving impact; he provided only possible theoretical approaches,

[16] Cited pages from the Capps deposition are collected at Ex. C.

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admitting "I didn't describe how I was going to proceed." (Capps. Tr. 77) At his deposition, he could not explain core components of his work, such as:

- Regarding whether his analysis will be "simple:" "Obviously, I'm not sure, because we haven't done it yet, and it could be simple, it may not be simple. I don't know." (*Id.* at 206)
- Whether he can think of variables for his regressions that he has not already mentioned: "No, but that doesn't mean with – you know, another day thinking about it, that there wouldn't be others." (*Id.* at 392)
- Whether he will run regressions of **REDACTED** "It's possible. It's certainly within the plan. . . . I wouldn't rule it out, let me put it that way." (*Id.* at 71-72) [17]
- Same issue: "That's one path we could go, yes." (*Id.* at 159)

Other examples of Dr. Capps' indecisiveness and unpreparedness are collected at Ex. D.

Any insight that Capps provided into how he will show impact and calculate damages was little more than a generalization that could come from any statistics textbook. He proposed to show whether the merger led to supra-competitive pricing for *some* products at *some* stores by conducting a series of regressions by SKU and by store[18] in LA County. (Capps Tr. 78)

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17 "SKU" means "stock-keeping unit." For example, a gallon of branded milk, gallon of private-label milk, quart of branded milk, and box of cereal are four SKUs.

18 Whole Foods operates twenty-two stores in Los Angeles County. Dr. Capps intends to analyze only the seventeen Whole Foods stores that operated both before and after the acquisition of Wild Oats. (Capps Tr. 261) The former Wild Oats stores in Los Angeles County will be excluded from his analysis, as will the Whole Foods stores opened after the merger.

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Capps said that "[w]ith another day of thinking about it" he might come up with additional variables. (Capps Tr. 392) Dr. Capps suggests that additional variables may be considered as merits discovery proceeds. (*Id.* at 391-92) He provided few specifics as to how his analysis will unfold.

He was opaque and uncertain about how to model the "competition" variable in his regressions. He provided a handful of potential approaches that he might pursue, "but as to which approach works better or best, that remains to be seen." (*Id.* at 351) None of his options would capture changes in a rival's competitiveness through repositioning, such as by expanding product offerings or changing a store's format. (*Id.* at 303) To capture repositioning, Dr. Capps proposed additional variables for each competitor. (*Id.* 304-05) Regardless of which approach he ultimately takes, Dr. Capps provides no definitive criteria for how he will identify each competitor or from what geographic area he will look to find them.

Under the "before-and-after" approach that he appears to favor, Dr. Capps suggests two potential procedures.

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If the regression analysis for an SKU results in a positive and statistically significant coefficient on the dummy variable, then Dr. Capps would conclude that the merger empowered Whole Foods to charge a supra-competitive price for the SKU. (Capps Tr. 322; 404)

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If Dr. Capps determines that the merger caused a supra-competitive price on an SKU at a particular store, he will multiply the anticompetitive portion of the price by the number of units of that SKU purchased in a week, divide the result by that week's number of shoppers at the store, and deem the quotient to constitute "damages." This method for determining impact and damages creates class conflict by rewarding infrequent shoppers at the expense of frequent shoppers. He will conclude that the merger injured *all* shoppers at that store that week *regardless* of how many shoppers never actually bought the SKU in question. (Capps Tr. 145-47)

Capps will *ignore* regression results that show a merger-induced price *reduction* on a SKU. He admits that a negative coefficient on the dummy variable will indicate "some positives associated with the merger," adding *"[b]ut we wouldn't consider those, because, essentially, that's zero damage*." (*Id.* at 332) (emphasis added) When asked if a regression for a chicken breast could prove that the merger had a pro-competitive effect, Dr. Capps replied "Yes. I think that would be a reasonable interpretation as to what a negative coefficient would mean." (*Id.* at 326) He explains his basis for ignoring pro-competitive effects this way: "My assignment was, was there damages or not, associated with UPCs[19] pre- and post-merger. That's it. *I'm not addressing whether or not particular customers were better off or worse off*." (*Id.* at 327) (emphasis added).

Capps does not know which SKUs he will analyze through regressions. (Capps Tr. 331-32; Ex. D) To the extent that he generalizes about which products to analyze, he reveals an approach that conflicts with the class definition (purchasers of "premium, natural, and organic

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[19] "UPC" means "universal product code," which, like an "SKU," refers to an individual product. For example, one quart of a particular brand of milk and one pint of Ben & Jerry's "Cherry Garcia" ice cream each has its own unique UPC. In the deposition of Dr. Capps, "SKU" and "UPC" were generally used interchangeably in referring to a specific item such as the aforementioned pint of Cherry Garcia.

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products").

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At his deposition, Dr. Capps announced that *all* products sold by Whole Foods are at issue. (Capps Tr. 69; 148; 150-51)

Even if "all" products are "at issue," however, Dr. Capps will not analyze "*all* products."

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Whichever subset he chooses, Capps does not justify his ignoring so many products.

Dr. Capps' minimal efforts alone confirm that plaintiff did not carry her burden for certification of the class. The few thin rays of light that he did shed reveal fatal inadequacies that prevent him from proving individual impact using class-wide evidence. Among other flaws, Capps *assumes* that all consumers actually bought the SKUs that he deems to have supra-competitive prices, *ignores* the merger's welfare effects on consumers who purchased SKUs that fell in price, and will analyze *only a subset* of Whole Foods' tens of thousands of SKUs (leaving it to anyone's guess whether shoppers who bought the omitted products benefitted from still more price reductions). His method cannot prove that the merger harmed all "purchasers of

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premium, natural, and organic products" in LA County without extensive individualized inquiry into what individuals purchased.

When weighed against the analysis by Whole Foods' expert, Dr. Janusz Ordover, the Capps Report is overwhelmed.[21] Using the transaction data provided by Whole Foods to the FTC and to plaintiff, Dr. Ordover analyzed what happened to prices following the merger—

REDACTED It is easy to see why Dr. Capps hides behind vague assertions and mathematical formulas rather than actual analysis.

III. DR. ORDOVER'S ANALYSIS

Dr. Ordover is Professor of Economics at New York University, where he has taught since 1973, and Senior Consultant at Compass Lexecon, Inc., an economic consulting firm. Dr. Ordover served as Deputy Assistant Attorney General for Economics in the Antitrust Division of the United States Department of Justice, during which time he co-drafted the 1992 DOJ-FTC *Horizontal Merger Guidelines*. Dr. Ordover regularly consults and testifies in a wide range of antitrust litigation matters, including supermarket mergers. He has also provided the expert support to defeat class certification on a number of occasions. (Ordover ¶ 2)

Dr. Ordover concludes that Dr. Capps' approach cannot demonstrate impact using classwide evidence and that his damages theory will yield capricious results. Dr. Capps' impact analysis is unsound because it ignores the economic implications of the fact that shoppers buy highly differentiated baskets of products at food stores (Ordover Rpt. ¶ 31) and because the merger may have had beneficial effects for consumers. (*Id.* ¶ 18, 35)

Dr. Ordover explains that "[w]hen assessing the impact on consumers of a merger, it is common to account for both the potential harms to consumers as well as the benefits, where

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[21] Dr. Ordover's Expert Report is provided at Ex. A.

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those benefits would not be obtainable absent the merger." (*Id.* ¶ 35 n.51) He adds that "because of consumers' heterogeneous tastes and shopping habits, each consumer purchases a variegated basket of goods, containing individual items whose prices and quality may have changed to varying degrees—and indeed in different directions—post-merger." (*Id.* ¶ 10) Determining whether individual consumers are better or worse off from a supermarket merger requires an assessment of price changes in different baskets, not in individual products. (*Id.* ¶ 36)[22]

Dr. Ordover analyzed price changes of all individual products (with sales of at least $100 in the relevant 2007 and 2008 periods) at the seventeen legacy Whole Foods stores, and for

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22 Dr. Capps does not dispute that shoppers fill baskets. "[A] customer makes a bundle of purchases, and that bundle of purchases is going to vary with respect to each visit to the store. . . .The point is, they purchase a bundle of products, not just a single product." (Capps Tr. 88)

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To determine whether a member of the putative class was harmed by the merger, "it will be necessary first to determine which prices have increased solely as a result of the transaction and then examine whether any particular customer suffered harm on his or her overall purchases. This latter inquiry is distinctly individual." (*Id.* ¶ 10) (footnote omitted)

By ignoring the reality that consumers buy heterogeneous baskets of goods and focusing instead only on those products that may show a positive overcharge in his model, Dr. Capps explicitly ignores the very products that his own analysis may show to have fallen in price because of the merger. (Capps Tr. 326, 332) Such a method, according to Dr. Ordover, "is not consistent with economic principles regarding measuring the impact on consumer welfare of a merger where consumers purchase many goods that may be differentially impacted by a merger and where the benefits are intrinsically linked to the transaction itself." (Ordover Rpt. ¶ 11)

Price declines that are merger-related would not have been obtainable but for the merger, so consumers would not have benefited from those price declines without also facing the higher prices on some products. By ignoring those products that his model shows were lower-priced due to the merger, Dr. Capps turns economic principle on its head and "will essentially discard any possible efficiencies from the merger and will bias upwards his estimate of aggregate and individual damages." (*Id.* ¶ 46)

Dr. Capps ignores impact on shoppers at three former Wild Oats stores that are now branded Whole Foods, and on shoppers at two Whole Foods stores that opened post-merger.

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(Capps Tr. 262-64, 386) These stores account for approximately **REDACTED** of total Whole Foods stores in LA County. (Ordover Rpt. ¶ 21) Dr. Capps cannot account for impact at these stores because doing so would require non-existent pre-merger data that he says he needs. (Capps Tr. 262-63; 392) He will disregard these shoppers in analyzing impact, although he did offer a "quite vague" suggestion of how he *might* try to overcome his data limitations. (Ordover Rpt. at n. 27)

Assessing impact for former Wild Oats shoppers would be especially difficult, given their unique circumstances. Heterogeneous preferences among these shoppers would require an individualized inquiry into whether quality enhancements at the Wild Oats stores were sufficiently valued by these consumers to compensate for prices that may have increased following the merger. (*Id.* ¶ 22) Likewise, former shoppers of legacy Whole Foods stores who now shop at a legacy Wild Oats store because the location is more convenient may feel compensated despite having to pay some higher prices. These examples demonstrate that showing adverse impact for this significant portion of the putative class is not possible using classwide evidence.

Dr. Ordover also points out the sheer practical difficulties facing Dr. Capps in conducting a vast number of regressions. Dr. Capps does not indicate that he can adequately "address issues of proper measurement of explanatory variables, analysis of the robustness (*i.e.*, reliability) of the regression models, and proper assessment of statistical precision . . . for any specific product, let alone for thousands of distinct products across 17 stores." (*Id.* ¶ 39) His list of proposed explanatory variables omits important factors such

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ARGUMENT

Plaintiff claims that courts have

REDACTED (Brief at 15) The fact is that plaintiff cites no case "such as this one"—involving a potentially pro-competitive, consummated merger involving tens of thousands of highly differentiated products—in which certification was granted. Demonstrating impact on the basis of classwide evidence will be impossible given the heterogeneity in what individual class members purchased at Whole Foods and the need to account for the merger's pro-competitive downward effect on prices.

To avoid these problems, plaintiff would turn back the clock and ignore key amendments to Rule 23 and the numerous antitrust cases in the last three years where courts applied the amendments and denied certification. She erroneously states that courts

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(*Id.*) This is not the law, particularly after the 2003 amendments. Plaintiff also suggests that

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This standard, too, is obsolete—but plaintiff falls short of it nonetheless.

IV. PLAINTIFF FAILS THE RULE 23 STANDARDS FOR CLASS CERTIFICATION

For class certification, it is plaintiff's burden to satisfy the provisions of Fed. R. Civ. P. 23. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). This requires satisfaction of all parts of Rule 23(a) and one of the three subsections of Rule 23(b). *Id.* To certify a class, a court

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must conduct "rigorous analysis" and be satisfied that the Rule's requirements have been met. *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982). This may require a probe beyond the pleadings, because actual, not presumed conformance is "indispensible." *Id.* at 160 Rule 23(b)(3) requires "findings" on whether questions of law or fact common to the class predominate over individual issues.

Rule 23's 2003 amendments underscore the need for a thorough analysis of the Rule 23 factors within the context of the facts of the case. To ensure that the parties have time to gather and present to the court the information necessary to the class certification decision, the amendments changed the process to a decision from "as soon as practicable" after the complaint to "an early practicable time." The Advisory Committee notes explain this change:

> Time may be needed to gather information necessary to make the certification decision. Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. In this sense it is appropriate to conduct controlled discovery into the 'merits,' limited to those aspects relevant to making the certification decision on an informed basis. [*Fed. R. Civ. P. 23 advisory comm. notes, 2003 amends.*]

The amendments further underscore the need for a conclusive determination on the propriety of class treatment by deleting a provision that permitted "conditional" certification. As the Advisory Committee noted, "A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met." *Id.*

Plaintiff's reliance on a **REDACTED** standard (Brief at 6) is inconsistent with the rejection of "conditional" certification and the nationwide trend in appellate courts to scrutinize a plaintiff's evidence with increasing rigor. *See, e.g., In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 320 (3d Cir. 2008) ("amendments do not alter the substantive

standards for class certification" but "they guide the trial court in its proper task—to consider carefully all relevant evidence and make a definitive determination that the requirements of Rule 23 have been met before certifying a class"); *In re Initial Public Offerings Secs. Litig.*, 471 F.3d 24, 39 (2d Cir. 2006) (Rule 23 now requires "more extensive inquiry into whether Rule 23 requirements are met than was previously appropriate"); *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 267 (5th Cir. 2007) ("These subtle changes . . . recognize that a district court's certification order often bestows upon plaintiffs extraordinary leverage, and its bite should dictate the process that precedes it"); *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6 (1st Cir. 2008) (remanding for trial court to evaluate Rule 23 requirements on more developed record, with more complete expert analysis).[24] The Court of

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[24] Many Courts of Appeals have reached a similar conclusion. *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004) ("[W]hile an evaluation of the merits to determine the strength of plaintiffs' case is not part of a Rule 23 analysis, the factors spelled out in Rule 23 must be addressed through findings, even if they overlap with issues on the merits"); *Rodney v. NW Airlines*, 146 F. App'x 783, 788 (6th Cir. 2005) (holding that a court may consider preliminary merits issues as part of its class certification analysis without violating the procedural requirements of Rule 23); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001) ("Before deciding whether to allow a case to proceed as a class action, therefore, a judge should make whatever factual and legal inquiries are necessary under Rule 23"), *cert. denied*, 534 U.S. 951 (2001); *Blades v. Monsanto Co.*, 400 F.3d 562, 567 (8th Cir. 2005) (class certification inquiry "may require the court to resolve disputes going to the factual setting of the case, and such disputes may overlap the merits of the case"); *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1177 n.2 (9th Cir. 2007) (recognizing that "courts are not only at liberty to but *must* consider evidence which goes to the requirements of Rule 23 . . . even if the evidence may also relate to the underlying merits of the case") (internal quotation marks and citation omitted), *reh'g granted*, 556 F.3d 919 (9th Cir. 2009); *Shook v. Bd. of County Comm'rs of El Paso*, 543 F.3d 597, 612 (10th Cir. 2008) ("[W]hile a district court may not evaluate the *strength* of a cause of action at the class certification stage, it must consider . . . whether remedying the harm alleged can be done on a class-wide basis in conformity with Rule 23(b)(2)"); *Heffner v. Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330, 1337 (11th Cir. 2006) ("[W]hile a court should not determine the merits of a claim at the class certification stage, it is appropriate to consider the merits of the case to the degree necessary to determine whether the requirements of Rule 23 will be satisfied") (internal quotation marks and citation omitted).

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Appeals in this Circuit has not yet ruled on the impact of the Rule 23 amendments, but it has indicated that factual issues enmeshed in the class determination must be resolved. *Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 530 n.5 (D.C. Cir. 2006).

Plaintiff seeks to avoid these principles by contending that

REDACTED (Brief at 6) In fact, in the *last three years alone*, district courts have *declined* to certify a class in *at least ten antitrust cases*,[25] and appellate courts have remanded for further consideration of the propriety of class certification in at least three cases.[26] She also cites to a string of cases in this District in which she asserts that classes were certified. (Brief at 6 n.2) Of the thirteen cases she cites, only five were contested class certification decisions.[27] Among those five, only two, *Meijer, Inc. v. Warner Chilcott Holdings Co.*, 246 F.R.D. 293 (D.D.C. 2007), and *In re Nifedipine Antitrust*

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25 *See, e.g., Reed v. Advocate Health Care*, No. 06 C 3337, 2009 WL 3146999 (N.D. Ill. Sept. 28, 2009); *Somers v. Apple, Inc.*, 258 F.R.D. 354 (N.D. Cal. 2009); *Funeral Consumers Alliance, Inc. v. Serv. Corp. Int'l*, No. H-05-3394, 2008 WL 7356272 (S.D. Tex. Nov. 24, 2008); *In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478 (N.D. Cal. 2008); *Allied Orthopedic Appliances, Inc. v. Tyco Healthcare Group*, 247 F.R.D. 156 (C.D. Cal. 2007); *Stand Energy Corp. v. Columbia Gas Transmission Corp.*, No. 2:04-0867, 2008 WL 3891219 (S.D.W. Va. Aug. 19, 2008); *California v. Infineon Techs.*, No. C 06-4333, 2008 WL 4155665 (N.D. Cal. Sept. 5, 2008); *Best Pallets Inc. v. Brambles Indus., Inc.*, No. 08-2012 (W.D. Ark. Aug. 17, 2009); *Spa Universaire v. Quest Comms. Int'l, Inc.*, No. 02-cv-01977, 2007 WL 2694918 (D. Colo. Sept. 10, 2007); *Wheeler v. Pilgrim's Pride Corp.*, 246 F.R.D. 532 (E.D. Tex. 2007).

26 *Hydrogen Peroxide*, 552 F.3d 305; *Danvers Motor Co. v. Ford Motor Co.*, 543 F.3d 141 (3d Cir. 2008); *New Motor Vehicles*, 522 F.3d 6.

27 Of the other eight, one does not explain the class certification decision and grants defendant's motion for summary judgment, and the others approve settlement classes. The scrutiny under Rule 23 for a settlement class is much less than for a litigation class. *In re Vitamins Antitrust Litig.*, 305 F. Supp. 2d 100, 104 (D.D.C. 2004) (finding that, to evaluate a settlement class, the court "must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case"), *quoting United States v. District of Columbia*, 933 F. Supp. 42, 47 (D.D.C. 1996).

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Litigation, 246 F.R.D. 365 (D.D.C. 2007), were decided after the 2003 amendments to Rule 23.[28] Both cases are so factually far afield from this one that they are readily distinguishable.

Meijer involved a challenge to an agreement between drug companies that allegedly delayed generic entry and maintained higher brand prices. A single drug product was at issue, and by the time of class certification, the generic had entered. The generic price was uniformly lower than the brand price, and the brand price dropped upon generic entry. *Id.* at 309. Thus it was clear that individual class members—whether they bought the brand or the generic—suffered impact if the conduct was wrongful. *Nifedipine* was similar, except that it involved an agreement among generic companies that delayed a second generic's entry, and price fell after the generic finally entered. 246 F.R.D. at 370-71. *Meijer* and *Nifedipine* bear no similarity to the instant case. Here, shoppers bought *tens of thousands* of products,

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Meijer and *Nifedipine* both recognized that evidence of a price effect in generic-delay antitrust cases was consistent with government and academic literature on the subject, company documents, and the courts' extensive experience in pharmaceutical antitrust cases. The court in

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[28] The other three cases are easily distinguished. *In re Vitamins Antitrust Litigation* involved allegations of price-fixing in the vitamins industry. 209 F.R.D. 251 (D.D.C. 2002). After criminal investigations, several companies pled guilty, and class actions followed. *Id.* at 254-55. The court relied on evidence of the guilty pleas as well as other fruits of discovery to find that class certification was appropriate. *Id.* at 265. *In re Lorazepam & Clorazepate Antitrust Litigation* involved allegations of monopolization and price-fixing for only two generic drugs. 202 F.R.D. 12 (D.D.C. 2001). Plaintiffs there were identifiable through invoices and contracts which contained information about which drug was purchased and when. *Id.* at 22-23. In *Brown v. Pro Football, Inc.*, plaintiffs challenged salary restraints. 146 F.R.D. 1 (D.D.C. 1992). By the time of the class certification decision, summary judgment had already been granted for plaintiffs on the issue of liability, so there was no question of whether plaintiffs could use classwide evidence to prove the antitrust violation or impact. *Id.* at 3.

Meijer found that cases cited by defendants, which involved more "complicated" allegations or industries, could be "easily distinguished" from the brand-generic case before her. 246 F.R.D. at 312. With respect to experts, the *Nifedipine* court held that plaintiff's expert's calculations, in conjunction with the "well-established" evidence common to the industry, provided a "colorable method by which [plaintiffs] intend to prove classwide impact." 246 F.R.D. at 370. The *Meijer* court determined that plaintiffs' expert's opinion provided enough information, including "precisely the types of information" found in other brand-generic cases, to satisfy the court that it was not "so insubstantial as to amount to no method at all." 246 F.R.D. at 309, 312. In both cases, unlike in this case, the expert had actually pinpointed the analysis to be done.

The Court of Appeals has held that a court ruling on class certification "must examine the plaintiff's offering" and determine whether there is a fit between the statistics and the facts of the case. *Wagner v. Taylor*, 836 F.2d 578, 594 (D.C. Cir. 1987). Particularly since the amendments to Rule 23, courts have held that the rigorous standard applied to class certification prerequisites "extends to the resolution of expert disputes concerning the import of evidence concerning the factual setting." *Blades v. Monsanto Co.*, 400 F.3d 562, 575 (8th Cir. 2005). Rule 23 does not provide for the uncritical acceptance of an expert's opinion, and it follows that "[w]eighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands." *Hydrogen Peroxide*, 552 F.3d at 323; *see also West v. Prudential Secs., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002) (holding that accepting experts' opinions without resolving competing perspectives "amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert").

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V. PLAINTIFF FAILS RULE 23(b)'s REQUIREMENTS FOR CLASS CERTIFICATION

Plaintiff seeks certification under Rule 23(b)(2) and 23(b)(3). Rule 23(b)(2) permits certification where the "party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Certification is generally appropriate only in cases in which injunctive relief is the exclusive relief sought, which is not the situation here.

Certification under Rule 23(b)(3) requires the court to find that "the questions of law or fact common to class members predominate over any questions affecting only individual members" and that class treatment is "superior" to other available methods of resolving the dispute. Plaintiff offers no method (not even a "colorable" one) to demonstrate antitrust impact—a key element of each of her claims—on the basis of classwide evidence. Proof of this issue will require individualized evidence that would overwhelm any common issues. Certification under Rule 23(b)(3) is therefore inappropriate.

A. Class Certification is Not Justified Under Rule 23(b)(3) Because Impact Can Be Shown Only With Individualized Evidence

Under Rule 23(b)(3), a court must predict how specific issues would be resolved in a trial on the merits to determine whether common or individual issues predominate in a given case. Fed. R. Civ. P. 23, advisory comm. notes, 2003 amends. "If, to make a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question." *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005).

Plaintiff alleges that the merger violated section 7 of the Clayton Act, as well as sections 1 and 2 of the Sherman Act and sections 3 of the Clayton Act. (Compl. ¶¶ 63-104) Each statutory claim is for the same conduct: the merger. Plaintiff seeks damages and injunctive

relief, presumably under sections 4 and 16, respectively, of the Clayton Act, 15 U.S.C. §§ 15, 26. Both require a showing of impact. *Cargill Inc. v. Montfort of Colo., Inc.*, 479 U.S. 104, 109-13 (1986). The impact element requires plaintiff to demonstrate a causal connection between the specific antitrust violation alleged and an injury to the business or property of each putative class member. *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990).

With regard to Section 7 of the Clayton Act, "[t]he Supreme Court has adopted a totality-of-the-circumstances approach to the statute, weighing a variety of factors to determine the effects of particular transactions on competition." *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 984 (D.C. Cir. 1990). "Indeed, the Court in *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974) emphasized the comprehensive nature of a Section 7 inquiry." *Id.* This includes analysis into whether efficiencies offset any anticompetitive effects from the merger. *Fed. Trade Comm. v. H.J. Heinz Co.*, 246 F.3d 708, 720 (D.C. Cir. 2001) ("a merger's primary benefit to the economy is its potential to general efficiencies").

Plaintiff must show *now* that she has a method for proving individual injury on the basis of classwide evidence. *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 28 (1st Cir. 2008) ("[Plaintiff] must include some means of determining that each member of the class was in fact injured, even if the amount of each individual injury could be determined in a separate proceeding"). Impact is critically important at the class certification stage because it often requires individual, as opposed to common, proof. *Hydrogen Peroxide*, 552 F.3d at 311.

To demonstrate antitrust impact, Ms. Kottaras must prove on the basis of classwide evidence whether the merger caused individual class members to be worse off as a result of his or her purchases at Whole Foods. This requires information on the baskets of products that shoppers bought and on the merger's effect on the prices of products in the baskets. (Ordover

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Rpt. ¶ 36) To make her showing of impact, plaintiff must establish (i) what each class member purchased; (ii) that the merger empowered Whole Foods to charge a supra-competitive price on at least some portion of the products each class member purchased; and (iii) that the total supra-competitive amount paid by a given class member exceeded any savings that the class member enjoyed on products that fell in price because of economies from the merger.

Determining whether a class member suffered impact (*i.e.*, whether the class member paid more for his or her basket of purchases as a result of the merger) requires individualized proof that would dominate a trial on the merits. Common issues do not predominate, therefore, and the case is unsuitable for class treatment.

1. Dr. Capps Provided No Rigorous Analysis

Contrary to the accepted standards for class certification expert opinions,[29] Dr. Capps conducted virtually no analysis and offered no classwide methodology by which to identify individual impact. It is not sufficient for an expert merely to promise that a model probably can be devised or to indicate a mere intention to prove impact. *Hydrogen Peroxide*, 552 F.3d at 323 ("Expert opinion with respect to class certification, like any matter relevant to a Rule 23 requirement, calls for rigorous analysis"); *see also Piggly Wiggly Clarksville, Inc. v. Interstate*

[29] Even under a minimal standard, plaintiff's showing here is insufficient. Capps' failure to provide any formula or calculations, or even to identify the factors that he would use in his analysis, is not a "colorable method" by which to prove classwide impact. Capps' musings on how he might devise a workable method in the future instead amount to no method at all. Moreover, many courts have found, following the amendments to Rule 23, that a *Daubert* analysis governs the consideration of expert testimony at the class certification stage. *See Reed v. Advocate Health Care*, No. 06 C 3337, 2009 WL 3146999 at *21 & n. 20 (N.D. Ill. Sept. 28, 2009) (applying *Daubert* analysis at class certification stage and rejecting expert opinion that did not apply econometric principles and methods reliably to the facts of the case); *Bell v. Ascendant Solutions, Inc.*, No. 301CV0166N2004, WL 1490009 at *2 (N.D. Tex. July 1, 2004) (applying *Daubert* at class certification stage). Capps' opinion most assuredly does not meet this more exacting standard.

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Brands Corp., 100 F. App'x 296, 299 (5th Cir. 2004) (affirming denial of class certification because plaintiffs' expert "did not offer a formula based on regression analysis, but merely opined that one could be found").

Rather, an expert must actually do the work required to present an analysis that is capable of demonstrating individual impact without the need for individual inquiry. *New Motor Vehicles*, 522 F.3d at 28 (concluding that the court needs enough information to evaluate whether the proposed model will be able to establish impact without the need for individual determinations); *In re Initial Public Offerings Secs. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006) (rejecting the contention that expert testimony could be sufficient to establish a Rule 23 requirement as long as it is not "fatally flawed"); *Weisfeld v. Sun Chem. Corp.*, 84 F. App'x 257, 264 (3d Cir. 2004) (affirming the rejection of expert opinion where there was no "actual analysis" and "no discussion of the evidence on which his analysis was based").

Plaintiff retained Dr. Capps one month before he filed his report. (Capps Tr. 45) He did *no* quantitative analysis. He identified in general terms the multiple regression analysis he thinks he thinks he will use, but testified repeatedly that he did not know how he would deploy it, the number of products he will study, what variables he will use, and, for those variables that he has identified (*e.g.*, the competition variable), he has not figured out how he will apply it. (*See supra* at 9-14; Ex. D) Dr. Ordover observes that "in describing his proposed methodology to demonstrate individual impact and assess damages, Dr. Capps left many questions unanswered and indicated that he is unsure about many aspects of the data and analysis, so it is difficult even to know exactly what he is proposing." (Ordover Rpt ¶ 11)

Dr. Capps did not look at detailed Whole Foods transaction data that were produced to his counsel, **REDACTED**

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Dr. Capps learned about the transaction data from the FTC litigation record, but apparently he did not even ask counsel for a copy of the data. (*Id.* ¶ 55 & n.65) Indefensibly, plaintiff's counsel not only did not provide the data to Capps for use in his report, they also did not bother even to tell him (as of March 9, 2010) that they had possession of it. (Capps Tr. 75)

2. Dr. Capps' Rejection of Consumer Savings from the Merger Is Contrary to Law and Economics Principles

Expert opinions must be based on sound scientific principles. Fed. R. Evid. 702. At class certification, "[t]he critical issue is not whether [the expert's] techniques are generally accepted; it is whether they are appropriate to the facts and data *in this case*." *Reed v. Advocate Health Care*, No. 06 C 3337, 2009 WL 3146999 at *20 (N.D. Ill. Sept. 28, 2009). Other courts faced with irrelevant or incomplete expert opinions that did not address the relevant facts in the case have denied class certification. *Allied Orthopedic Appliances, Inc. v. Tyco Healthcare Group*, 247 F.R.D. 156, 172 (C.D. Cal. 2007) (expert "failed to address in sufficient manner or degree such salient factors not attributable to the defendant's alleged wrongdoing that may have caused the harm alleged, and this failure renders his conclusions largely valueless") (internal quotation marks and citation omitted); *Freeland v. AT&T Corp.*, 238 F.R.D. 130, 149 (S.D.N.Y. 2006) (determining that missing variables in regression analysis made the analysis so incomplete as to be inadmissible).

Dr. Capps will *ignore* important facts. He realizes (Capps Tr. 64) that "when customers come in to buy, they . . . buy a plethora of products." He concedes (*Id.* at 326-27, 332) that, with respect to any consumer's bundle of purchases, his regression analyses may yield "positive coefficients" (evidence of harm) for some products and "negative coefficients" (evidence of

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benefit) for others. (*See supra* at 12) Further, plaintiff knows that the merger may have pro-competitive effects that must be weighed against any anticompetitive effects. (Compl. ¶ 87)

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This is precisely *opposite* from the "totality of the circumstances" approach required in Section 7 cases under *General Dynamics*, *Baker-Hughes*, and *Heinz*, *supra*.

Capps' approach is also contrary to fundamental economic principles.

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To illustrate the invalidity of Dr. Capps' approach to impact, assume that a post-merger Whole Foods shopper purchased a basket of ten products, and that Capps finds that the merger led to two of those products being overcharged by 20 cents, three of the products falling in price by 15 cents, and the other five products showing zero effect. The total basket price is 5 cents less than it would have been absent the merger (overcharges = 40 cents; savings = 45 cents; net effect = 5 cents savings). The merger demonstrably improved the consumer's welfare for that trip to the store, yet, under Dr. Capps' approach, the consumer would have suffered an injury.[30] Plaintiff's position that "fact of injury" does not require a careful weighing of all effects from the

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[30] As Dr. Ordover states (Rpt. ¶ 35) that "if the merger caused an increase in the price of Fuji apples but a decrease in the price of organic chicken, then consumers who buy both Fuji apples and organic chicken may have benefited or been harmed by the merger; one cannot tell without examining the individual price changes and the amount of each item purchased by each consumer."

merger—those that are efficiency-enhancing and those that are not—is inconsistent with settled antitrust jurisprudence as well as current case law on class certification.

In *Exhaust Unlimited, Inc. v. Cintas Corp.*, plaintiff sought certification of a class of persons who purchased textile linen supplies and/or services and incurred an Environmental Charge. 223 F.R.D. 506 (S.D. Ill. 2004). Plaintiff alleged that defendants colluded on the Environmental Charges, which were unrelated to actual environmental costs. Putative class members purchased a wide variety of products and services and defendants imposed several hundred types of Environmental Charges, which varied in cost justification and were sometimes negotiated by putative class members. The class expert agreed that legitimate costs were included among the alleged improper charges, and that if legitimate costs equaled or exceeded the improper charges, then there would be no impact. *Id.* at 511. The court found that individual issues predominated, for several reasons. First, mere payment of the offending overcharge was not proof of injury because

> [a] class member could not have actually been injured unless the alleged conspiracy inflated its net payments for textile rental services above the competitive (or "but for") price. In the matter before the Court, it is the total invoice amount that matters for this purpose. If the total invoice price is equal to the but-for price, the customer would not be injured.

Id. at 513. The court also noted that potential class members ordered different mixes of products and services, and therefore "the impact of total invoice price would not be measurable without considering the particular mix of products and services covered by each invoice." *Id.* at 514.

A similar result was reached in *Allied Orthopedic Appliances, Inc. v. Tyco Healthcare Group LP*, a case involving pulse oximetry systems which consist of durable monitors and a wide array of consumable (i.e., disposable) sensors. 247 F.R.D. 156 (C.D. Cal. 2007). Plaintiffs eventually settled, after several tries, on a theory that the defendant maintained supra-competitive

prices on the disposable sensors through a series of wrongful actions designed to frustrate lower priced generic entry, including (1) market share discounts to purchasers of the durable monitors, (2) sole source contracts and (3) introduction of a new monitor not compatible with generic sensors. *Id.* at 161-62. The court refused to certify the class. The court was troubled by plaintiff's failure to account for four market realities: (1) there was no showing that generics would produce all the different products that defendant produced, (2) there was no showing that defendant would lower its prices on all products to compete with the generics, (3) plaintiffs purchased a variety of goods and (4) in the but-for world, many plaintiffs would lose the benefits of discounting on the durable monitors. The court held that the full economic impact must be considered:

> Without accounting or controlling for the benefits that many class members receive from the exclusionary conduct on a class-wide basis, the court cannot conclude that Plaintiffs have shown that common evidence is available to show class-wide impact. . . . Thus the question remains: how much would a particular mix of pulse oximetry consumables purchased by a hospital, taking into account the market-share and sole-source discounts, compare to the purchase of that mix of consumables in a world with enhanced generic competition?

Id. at 169-70. These cases illustrate the unsuitability of class treatment of claims in which class members purchase a wide variety of goods and in which the allegedly wrongful conduct may have off-setting benefits.[31]

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[31] *See also In re Graphics Processing Units (GPU) Antitrust Litig.*, 253 F.R.D. 478 (N.D. Cal. 2008) (denying class certification because individualized determinations would be required to demonstrate impact to diverse customers of hundreds to thousands of diverse GPU products); *Dry Cleaning & Laundry Inst. of Detroit, Inc. v. Flom's Corp.*, No. 91-cv-76072, 1993 WL 527928 (E.D. Mich. Oct. 19, 1993) (class certification denied where common evidence could not prove impact for hundreds of different dry cleaning products which varied in costs, brand, and type over many years).

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3. Capps Fails to Account for Purchases By a Large Portion of the Class

Plaintiff's burden under Rule 23(b)(3) is to come forward with a method by which she can demonstrate whether individual class members suffered an impact on the basis of classwide evidence. Whole Foods operates twenty-two stores in LA County, but Capps has no plans or method for determining whether shoppers at five of the stores were harmed by the merger. (Capps Tr. 262-63, 392) This is because he would lack pre-merger pricing data. (*Id.*) Three of the five stores are former Wild Oats stores, and the other two are Whole Foods stores that opened after the merger. **REDACTED**

(Ordover Rpt. ¶ 21)

Determining impact at the former Wild Oats stores would be particularly problematic. (*Id.* ¶ 22) Dr. Capps would have to address improvements in terms of service, quality or enhanced product offerings that Whole Foods made at former Wild Oats stores after the merger. (Capps Tr. 384) Whole Foods improved quality at the Wild Oats stores by refurbishing the stores and by improving the quality of the merchandise. (Ordover Rpt. ¶ 22) "Because quality changed after the merger, some consumers may be no worse off or may even be better off even if prices did increase some at those Wild Oats stores. To determine impact, one would need to know each individual consumer's preferences as reflected in willingness to pay for quality." (*Id.*) By ignoring the merger's impact on shoppers at five Whole Foods stores, and the improvements in quality at the Wild Oats stores that he ignoring, Dr. Capps fails to assess impact for a substantial portion of the class. Thus, he does not even plan on showing classwide injury.

4. Capps Fails To Address Individual Impact

Dr. Capps does not pretend to calculate whether individual class members suffered injury. Instead, he testified repeatedly that he was *not* going to make *any* individual determinations. (*See* Capps Tr. 97: "my analysis doesn't speak to individual consumers;" 145: "my analysis

wouldn't be based on an individual consumer basis, it would be the aggregate of consumers;" 265: "we're not doing this by individual consumer;" and 273-74 "the hypothetical doesn't apply here, because we're not doing an individual consumer analysis, we're aggregating all consumers").

Capps will conduct individual regressions for thousands of items sold after the merger in each of seventeen Whole Foods stores in LA County, so as to identify every product (if any) from that group that supposedly has a higher post-merger price than it would have had absent the merger. The "price" that Dr. Capps intends to analyze is a weekly average price. For each product that Dr. Capps finds was priced at a supra-competitive level, he will calculate the product's overcharge (actual price less "but-for" price). He will then multiply the overcharge by the product's total store unit sales, to assess an aggregate overcharge for that store, and attribute that amount as damages to all shoppers in the store (quantified by Whole Foods' records of weekly store customer counts).

This approach completely avoids—and therefore cannot adequately address—a critical issue for purposes of class certification: whether *individual class members actually purchased* the product subject to an overcharge. Obviously some class members purchased the product, because the transaction data record sales, but Dr. Capps assumes without foundation that *every* shopper bought *every* overcharged product. He sidesteps the issue, therefore, whether an individual shopper was harmed.

Other courts have found that aggregating damages and attributing them to the entire class is not a valid method by which to show injury to class members. In *Newton v. Merrill Lynch, Pierce, Fenner & Smith*, a securities case requiring actual injury to be shown to each class member, the plaintiffs' expert suggested he could show injury to the class by calculating

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aggregate damages and then allocating the damages. 259 F.3d 154, 187-88 (3d Cir. 2001). Because of the similar injury requirement, the court relied on antitrust principles, noting "an antitrust plaintiff must prove that his damages were caused by the *unlawful* acts of the defendant . . . [before] the *amount* of damages may be determined." *Id.* at 188 (quoting *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1494 (8th Cir. 1992) (alteration in original)). The court held that the ability to calculate aggregate damages "does not absolve plaintiffs from the duty to prove each [class member] was harmed by the defendants' practice." *Id.* at 188. Determining which class members, if any, were actually injured would require individual analyses, as actual injury cannot be presumed. *Id.* at 189, 191.

5. Plaintiff Cannot Prove Relevant Geographic Market Using Evidence Predominantly Common to the Class

A properly defined relevant geographic market is a "necessary predicate" to a Clayton Act section 7 claim. *United States v. Marine Bancorp, Inc.*, 418 U.S. 602, 618 (1974); *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957). This essential element flows from section 7's express requirement that a substantial lessening of competition must be shown in a particular "section of the country." *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962). The relevant geographic market must "correspond to commercial realities of the industry and be economically significant." *Id.* at 336-37 (internal quotation marks and citation omitted).[32]

With respect to the relevant geographic market, plaintiff literally is all over the map. The complaint (¶ 39), which plaintiff has not amended, alleges that the relevant market is "nationwide." Plaintiff's brief reduces the class location to LA County but says nothing about a change to the relevant geographic market. **REDACTED**

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[32] Plaintiff admits, as she must, that section 1 of the Sherman Act "requires a definition of the relevant antitrust market" and that "definition of the relevant market" is "one of the cornerstone elements to be proven" under section 2 of the Sherman Act. (Brief at 13-14)

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He states only a framework to consider "if one were testing whether L.A. County was the relevant geographic market." (Capps Tr. 233-34) Indeed, Dr. Capps is in no position to state an opinion, since he admits "I have a lack of geographic knowledge about the L.A. area." (*Id.* at 300)

In his deposition, Dr. Capps said he "took as a given" that "[t]he geographic market is focused on LA County" and was unaware that the complaint pleads a nationwide market. (*Id.* at 220, 226) He admitted that plaintiff's "nationwide market" claim is not credible—conceding that a nationwide market has a "pretty close to zero" chance of being sustainable under the FTC-DOJ Horizontal Merger Guidelines' framework for geographic market definition (which he endorses).[33] (*Id.* at 240) This is common sense, since the fundamental question for market definition in a supermarket case is how far shoppers will travel to buy food—and shoppers in LA do not fly to Nebraska or Boston to buy groceries. (*See* Capps. Tr. 226, 238-39)

Since a nationwide market cannot be proven by *any* means, plaintiff cannot prove it using evidence common to the class. Moreover, had she followed Fed. R. Civ. P. 15 and amended the complaint to allege "LA County" as the relevant geographic market, she still would be unable to prevail under Rule 23(b)(3). "LA County" also is not a credible market definition. As a threshold matter, there is no reason to believe that LA County residents living near the County line do not cross outside it for groceries (like residents of far Northwest Washington, D.C. do when they cross Western Avenue to shop at Giant Foods in Chevy Chase, MD, and residents of

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[33] Dr. Capps cites often to the Merger Guidelines in his report and testified that the Guidelines set forth "a mainstream approach that's been accepted by economists," including by him. (Capps Tr. 195)

Chevy Chase, MD do when they cross into Washington to shop at Safeway on upper Connecticut Avenue). (*See* Capps Tr. 223-24)

Dr. Capps' actions do not square with an assumption that LA County is the relevant market. He implies that the markets are much smaller. Capps notes (*Id.* at 121) that "typically, when customers shop, they usually shop in a quote/unquote 'neighborhood.'" He will account for this his planned regressions. Capps will control for "competition" as an explanatory variable for price at each Whole Foods store, using only rival stores *near* the store in question, *i.e.*, those within roughly a sixteen-minute drive of the Whole Foods store. (*Id.* at 121-22, 129-32). When analyzing prices at the Whole Foods store in Glendale, for example, Capps proposes to use "a set of dummy variables regarding the presence or absence of other stores *close to Glendale* over that time period." (*Id.* at 117-18) (emphasis added). Dr. Ordover (Rpt. ¶ 11) points out:

> He assumes that the geographic market is Los Angeles County, but his proposal to estimate the relevant regressions at the store level is conceptually more consistent with a localized view of geographic markets. If Dr. Capps believes that a store-level methodology is correct for assessing overcharges, then this implies that the geographic market cannot be proven with classwide evidence. Dr. Capps does not explain how he will reconcile his econometrics with his assumption that the geographic market is the whole of Los Angeles County.

If Dr. Capps believes that rival stores in LA County situated twenty to thirty miles from Glendale are potential competitive constraints to Whole Foods' Glendale store, then he would have planned to control for those distant stores in his competition variable. His choice to control only for stores located "in the ballpark" of a sixteen minute drive to the Whole Foods store under review (Capps Tr. 132) reveals his understanding that competition is much more local. Plaintiff provides no evidence that LA County is a relevant geographic market, let alone that such a market can be defined using evidence predominantly common to the class. As Dr. Capps

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himself shows, because the relevant geographic market(s) are local, they cannot be proven using evidence that is common to the class.

6. Dr. Capps' Analysis Has Many Other Significant Problems

Dr. Capps' potential plan to conduct a vast number of regressions REDACTED faces large methodological problems. (Ordover Rpt. ¶¶ 39-44) For example, REDACTED Different stores across LA County have different operating costs (rents, occupancy costs, local taxes, etc.), and if these costs rose over time and led to increased prices, then Dr. Capps' model is susceptible to overestimating the merger effect. (*Id.* ¶ 40) REDACTED

Had he actually looked at Whole Foods' wholesale cost data, moreover, Dr. Capps would REDACTED

Wholesale cost is an important explanatory variable in his regression analyses. Not having examined the data, REDACTED

Also, by proposing, in determining impact, to divide what he concludes to be weekly aggregate damages at a store by the number of weekly shoppers, Dr. Capps would find impact where none existed (because not all shoppers buy the same products) and individual damage awards that bear no resemblance to actual harm suffered, if any. (Id. ¶ 47) This would create class conflict, as shown in Dr. Ordover's illustrations of some of the untenable outcomes stemming from Dr. Capps' method. (Id. ¶¶ 47-48)

B. Certification Under Rule 23(b)(2) is Inappropriate

Certification under Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." Fed. R. Civ. P. 23 advisory

comm. notes, 1966 amends. "If recovery of damages is at the heart of the complaint," certification under Rule 23(b)(2) is inappropriate. *Richards v. Delta Airlines, Inc.*, 453 F.3d 525, 530 (D.C. Cir. 2006). This is because "[t]he underlying premise of (b)(2) certification—that the class members suffer from a common injury that can be addressed by classwide relief—begins to break down when the class seeks to recover back pay or other forms of monetary damages to be allocated based on individual injuries." *Eubanks v. Billington*, 110 F.3d 87, 95 (D.C. Cir. 1997). Indeed, one of the principal reasons "courts must determine whether a proposed (b)(2) class implicates individual issues" is that "unnamed members with valid individual claims are bound by the action without the opportunity to withdraw and may be prejudiced by the negative judgment in the class action." *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998), *cert. denied*, 526 U.S. 1114 (1999); *see also Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894, 899 (7th Cir. 1999) (explaining that *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), "says in no uncertain terms that class members' right to notice and an opportunity to opt out should be preserved whenever possible").

The D.C. Circuit has not established a framework for determining whether monetary damages "predominate." Other courts have held that monetary relief predominates unless it is "incidental" to requested injunctive or declaratory relief. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998) (denying class certification under Rule 23(b)(2) where class sought back pay and compensatory and punitive damages in addition to reinstatement, retroactive seniority and other injunctive relief related to job conditions);[34] *accord Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d at 898. An example of "incidental" damages are "those to which class

[34] Though the "bright-line rule" of *Allison* precluding Rule 23(b)(2) certification in Title VII claims for injunctive relief and damages was not adopted by the District of D.C., the *Allison* holding setting forth the test for predominance has not been directly addressed. *See Taylor v. D.C. Water & Sewer Auth.*, 205 F.R.D. 43, 47-48 (D.D.C. 2002).

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members automatically would be entitled once liability to the class . . . as a whole is established," such as statutorily mandated damages that do not depend on differences in class members' circumstances. *Allison,* 151 F.3d at 415.

Plaintiff only half-heartedly asserts that the class should be certified under Rule 23(b)(2) and never specified the type of injunctive or declaratory relief she seeks. (*See* Compl. ¶ f; Brief at 36) It is difficult to take her injunctive relief claim seriously, since she has been threatening since the outset of the case—for over eighteen months—to seek preliminary injunctive relief but has never done so. (Joint Report Pursuant to Local Rule 16.3 at 2) She also did not take the opportunity to object to the FTC's decision not to order a divestiture in LA. *See supra* at 4.

Plaintiff relies on a single Title VII case to support her motion for Rule 23(b)(2) certification. As comments to Rule 23 indicate, civil rights actions are often illustrative of appropriate 23(b)(2) classes. Fed. R. Civ. P. 23 advisory comm. notes, 1966 amends. In this antitrust action however, plaintiff would still need to show injury to each class member which, as discussed above, can only be achieved through individual analysis. As a result, plaintiff cannot establish a basis for injunctive relief for the class as a whole.

It is plain from plaintiff's complaint and motion that monetary damages are at the heart of her action. The monetary relief she seeks is not incidental, flowing directly from liability to the class as a whole. Instead, the monetary relief requested is individual, based on each putative class member's purchases. Accordingly, monetary damages predominate and the class should not be certified under Rule 23(b)(2).

VI. THE CLASS DEFINITION IS NOT PRECISE, OBJECTIVE, OR PRESENTLY ASCERTAINABLE

Plaintiff must also demonstrate that a class exists and is readily ascertainable. *Pigford v. Glickman,* 182 F.R.D. 341, 346 (D.D.C. 1998) ("this is a common-sense requirement and courts

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routinely require it"). The class definition must be sufficiently precise that the Court, counsel, and putative class members are able to read the class definition and ascertain membership at the outset of the litigation. *Id.* Ambiguous class definitions that require individual determination or rely on an individual's state of mind fail to meet the ascertainability requirement. *In re Copper Antitrust Litig.*, 196 F.R.D. 348, 359-60 (W.D. Wis. 2000) (declining to certify a class of purchasers of "physical copper" in part on grounds that class was not ascertainable); *In re K-Dur Antitrust Litig.*, No. 01-1652, 2008 WL 2699390 (D.N.J. Apr. 14, 2008) (rejecting class definition with the amorphous concept of "increased discount" because it would require individualized inquiry to determine class membership). Plaintiff does not satisfy even this most basic requirement.

Plaintiff moves for certification of a class of purchasers of

REDACTED (Brief at 1) This definition does not "limit the scope of the class to such a degree that it is administratively feasible for this Court to determine whether a particular individual is a member of the class." *Bynum v. District of Columbia*, 214 F.R.D. 27, 32 (D.D.C. 2003).

First, there is the question of whether the class is meant to include purchasers of *all* "premium, natural, or organic" products, or whether the class is limited to purchasers of "premium, natural, or organic" *food* products. At plaintiff's deposition, she claimed that the case involved only food products. (Pl. Tr. 284) Dr. Capps provided a different interpretation—he believes the class encompasses purchasers of *any* product from Whole Foods, not just "premium, natural, or organic" products. (Capps Tr. 67-68; 101-02; 150-51)

Plaintiff supplies a definition for "natural," but limited to "food." Her definition ignores that Whole Foods sells an extensive line of non-food items, including body care, nutritional

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supplements, vitamins, and educational products such as books, floral, pet products, and household products.[35] (Brief at 1) At her deposition, plaintiff defined "natural" differently from how she defines it in her Brief, stating "[n]atural meaning no preservatives, no additives, no high fructose corn syrup." (Pl. Tr. 73) Plaintiff provides no basis for ascertaining whether any, and if so which, non-food items are "premium, natural, or organic," such that purchases of these items provide entry to the class. Her brief adds to the confusion by repeatedly referring to the class definition in terms of " **REDACTED**

(*See* Brief at 1, 3, 8, 9, 10)

Plaintiff also provides no written definition for "premium." Asked for a definition, she said ambiguously that "premium *could include* hand-made items, locally grown or locally made" (emphasis added) and that it "means selective, quality, specialty." (Kottaras Tr. 73) She also described products she has purchased that meet her definition of "premium." (*Id.* at 140-45) Dr. Capps has no expertise on the word's meaning, stating, "I know, generally, what a premium and a natural and an organic product is—generally." (Capps Tr. 153-54)

To offer just one illustration of the problem with "premium" as a defining term for the class, Whole Foods offers two different lines of "body care" products: one line called "Premium Body Care" (Ex. I)[36] and another called "365 Everyday Value" (Ex. J).[37] It is anyone's guess whether body care products in the 365 line meet plaintiff's definition of "premium" even though

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35 Form 10-K for Fiscal Year ended 9/27/09, Whole Foods Market, Inc., at 7, *available at* http://www.sec.gov/Archives/edgar/data/865436/000110465909067266/a09-34257_110k.htm.

36 "Premium Body Care™ Quality Standards," *available at* http://www.wholefoodsmarket.com/products/premium-body-care.php (4/12/2010).

37 "365 Everyday Value® products," *available at* http://www.wholefoodsmarket.com/products/365-everyday-value.php (downloaded 4/12/2010), at page 4 of 5 ("Body care…Lotion, shampoo, conditioner, soap").

they are not labeled as "premium" by Whole Foods. A class definition cannot rely on individual interpretation or an individual's feelings about whether a given product is "premium." *See In re Paxil Litig.*, 212 F.R.D. 539, 545 (C.D. Cal. 2003) (rejecting class definition that relied upon an individual's interpretation of "severe" symptoms).

The Court, counsel, and potential class members would not be able to determine who is in the class based on the definitions provided. It is insufficient to provide a class definition that relies upon each putative class members' subjective "I know it when I see it" definition of each term. Courts also reject class definitions which are overly broad and include people who were not injured. *See Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006) (denying class certification and finding that "[s]uch a class could include millions who . . . have no grievance under the [statute]"), *cert. denied*, 551 U.S. 1115 (2007); *Cunningham Charter Corp. v. Learjet, Inc.*, 258 F.R.D. 320, 326 (S.D. Ill. 2009) (rejecting class definition as overly broad because it included those who may have suffered no injury). Plaintiff's proposed class encompasses many consumers who were not injured, such as those who purchased only products for which prices went down due to merger efficiencies. Her proposed class definition is therefore overly broad and does not conform with the requirements of Rule 23.

VII. PLAINTIFF AND HER COUNSEL ARE INADEQUATE REPRESENTATIVES

Plaintiff must show that "the representative parties will fairly and adequately protect the interests of the class" as a prerequisite to class certification. Fed. R. Civ. P. 23(a)(4). The class representative "must be part of the class and possess the same interest and suffer the same injury as the class members." *Gen. Tel. Co. of SW v. Falcon*, 457 U.S. 147, 156 (1982). Class counsel is duty bound to "fairly and adequately represent the interests of the class" as a whole. Fed. R. Civ. P. 23(g)(4). Because of the fiduciary nature of the relationship between class counsel and

the class, counsel's competency and diligence are subject to a heightened standard in class actions. *Palumbo v. Tele-Comms., Inc.*, 157 F.R.D. 129, 133 (D.D.C. 1994).

Plaintiff and her counsel are inadequate to represent the class because they spoliated key relevant evidence, plaintiff's Whole Foods receipts. "It is the law of this Circuit that a party has an obligation to preserve evidence it knew or reasonably should have known was relevant to the litigation and the destruction of which would prejudice the other party to that litigation." *Miller v. Holzmann*, No. 95-cv-1231, 2007 WL 172327, at *3 (D.D.C. Jan. 17, 2007). The duty to preserve evidence arises "when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation." *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003).

Spoliation is recognized without question as a cause for sanctions and other remedies. *See, e.g., Jones v. Hawley*, 255 F.R.D. 51 (D.D.C. 2009) (granting motion for preclusion of evidence due to putative class representatives' failure to preserve documents); *Syanon Church v. United States*, 820 F.2d 421 (D.C. Cir. 1987) (dismissing complaint because plaintiff willfully destroyed evidence). Spoliation can be cause to find a proposed class representative unsuitable. In *Falcon v. Philips Electronics North America*, the court affirmed the denial of certification based on the representative's inadequacy due to spoliation. 304 F. App'x 896 (2d Cir. 2008). The class representative alleged a design defect in a television. *Id.* at 897. The court found that she was inadequate because she disposed of the television and was subject to unique defenses regarding defending against a spoliation charge and proving her design defect charge.

Plaintiff admits that she disposed of grocery receipts until ten months *after* she started this case because her lawyers did not ask her to save them until August or September 2009. (Pl. Tr. 77-78) The reason for the destruction, whether purposeful or because counsel did not instruct

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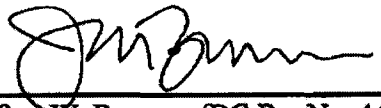
her of her duties as a litigant, matters little to the fact of spoliation. Receipts are clearly relevant to show the products plaintiff bought, what and when she paid for each item, and other key facts. Plaintiff and her counsel had a duty to preserve receipts when she considered filing a complaint, and certainly no later than October 2008 when she filed it. Their failure to preserve relevant evidence makes both plaintiff and her counsel inadequate to represent the class.

Plaintiff's counsel is also inadequate to represent the class because they did not provide relevant evidence to their expert. Capps testified that he needed transaction data to perform his analysis but was not provided any. (Capps Tr. 75) This is odd, considering that plaintiff's counsel had a hard drive containing Whole Foods transaction data since September 2009. Counsel's failure either to recognize relevant information in their possession or to provide relevant information when needed demonstrates their lack of competence or diligence in handling this matter and their inability to adequately represent the interests of the class.

CONCLUSION

For the foregoing reasons, plaintiff's motion for class certification should be denied.

Respectfully submitted,



Jeffrey W. Brennan (DC Bar No. 447438)
Christine C. Levin (Pro Hac Vice)
Sean P. Pugh (DC Bar No. 482583)
Carolyn E. Budzinski (Pro Hac Vice)
Dechert LLP
1775 I Street, N.W.
Washington, D.C. 20006-2401
Tel: (202) 261-3326
Fax: (202) 261-3333
jeffrey.brennan@dechert.com
Attorneys for Whole Foods Market, Inc.

April 12, 2010

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Memorandum of Law in Opposition to Plaintiff's Motion for Class Certification was served this 12th day of April, 2010, by:

Hand Delivery to:

Roy A. Katriel
THE KATRIEL LAW FIRM
1101 30th Street, NW
Suite 500
Washington, DC 20007
E-mail: rak@katriellaw.com

and by Overnight Mail to:

Michael D. Braun
THE BRAUN LAW GROUP, P.C.
10680 West Pico Blvd., Suite 280
Los Angeles, CA 90064
E-mail: mdb@braunlawgroup.com

Jeffrey W. Brennan

April 12, 2010

PUBLIC RECORD VERSION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EKATERINI KOTTARAS, individually On Behalf Of Herself And On Behalf Of All Others Similarly Situated	)	
v.	)	
WHOLE FOODS MARKET, INC.	)	Case: 1:08-cv-01832-PLF

ORDER

AND NOW, this _____ day of _____, 2010, upon consideration of plaintiff's Memorandum of Law in support of her Motion for Class Certification and Whole Foods Market Inc.'s Memorandum of Law in Opposition to plaintiff's motion, it is hereby ORDERED that plaintiff's Motion for Class Certification is DENIED.

_____
Paul L. Friedman
United States District Judge