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No. 07-5276

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellant,

v.

WHOLE FOODS MARKET, INC., and
WILD OATS MARKETS, INC.,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Columbia, Civ. No. 07-cv-01021-PLF

PROOF BRIEF FOR APPELLANT FEDERAL TRADE COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(1)(1), Appellant Federal Trade Commission certifies as follows:

(A) PARTIES

FEDERAL TRADE COMMISSION *(Plaintiff)*

WHOLE FOODS MARKET, INC. *(Defendant)*

WILD OATS MARKETS, INC. *(Defendant)*

APOLLO MANAGEMENT HOLDING LP *(Intervenor)*

DELHAIZE AMERICA. INC. *(Interested Party)*

H.E. BUTT GROCERY COMPANY *(Intervenor)*

KROGER CO. *(Intervenor)*

PUBLIX SUPER MARKETS, INC. *(Intervenor)*

SAFEWAY INC. *(Intervenor)*

SUPERVALU INC *(Intervenor)*

TRADER JOE'S COMPANY *(Intervenor)*

TARGET CORPORATION *(Movant)*

WAL-MART STORES, INC. *(Intervenor)*

WINN-DIXIE STORES INC *(Intervenor)*

WEGMANS FOOD MARKETS, INC. *(Movant)*

AMICI CURIAE

AMERICAN ANTITRUST INSTITUTE

CONSUMER FEDERATION OF AMERICA

ORGANIZATION FOR COMPETITIVE MARKETS

(B) RULING UNDER REVIEW

Federal Trade Commission v. Whole Foods Market, Inc., 502 F. Supp. 2d 1 (D.D.C. 2007).

(C) RELATED CASES

The case on review has not previously been before this Court or any other court. Appellant is not aware of any related cases in this Court or any other court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

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* Authorities upon which we chiefly rely are marked with asterisks.

FEDERAL STATUTES

MISCELLANEOUS

GLOSSARY

1. Op. – District court opinion of August 16, 2007, denying preliminary injunction.

2. Record Citations:

   Tr. – Hearing transcript.

   PX – Plaintiff's exhibit.

   DPFF – Defendants' proposed finding of fact.

   JA – Joint Appendix.

JURISDICTIONAL STATEMENT

The Federal Trade Commission ("Commission") appeals the denial of its motion for a statutory preliminary injunction under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). The Commission's motion sought to preserve its ability to render effective relief in a pending administrative proceeding to determine the legality of Whole Foods' acquisition of Wild Oats, under Section 7 of the Clayton Act, 15 U.S.C. § 18; *see* 15 U.S.C. § 21. The district court had jurisdiction under Section 13(b). Pertinent portions of Sections 7 and 13(b) are set out in the addendum attached to this brief.

This Court has jurisdiction over this appeal under 28 U.S.C. §§ 1291 and 1292(a)(1). The order under review denied all relief sought by the Commission in the district court and resolved all issues before that court. The order is also reviewable as an order refusing to grant an injunction. The order appealed from was entered on August 16, 2007, and the Commission filed its notice of appeal on August 17, 2007.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in failing to apply the standard set forth by this Court for determining whether a preliminary injunction of a corporate acquisition should be issued pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), specifically, whether the Commission has raised "serious, substantial" questions about the acquisition's lawfulness as to make them a "fair ground" for administrative litigation.

2. Whether, given that standard, the district court erred in declining to grant a preliminary injunction.

3. Whether defendant Whole Foods' consummation of the challenged acquisition renders moot the Commission's request for preliminary injunctive relief to preserve the possibility of meaningful relief at the conclusion of administrative litigation.

STATEMENT OF THE CASE

The Commission filed a motion for a statutory preliminary injunction on June 6, 2007, to prevent Whole Foods from completing its acquisition of its most significant competitor, Wild Oats, during the pendency of administrative proceedings before the Commission.[1] [JA __.] The motion was filed in the United States District Court for the District of Columbia pursuant to the Commission's authority under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). The relief sought by the Commission would preserve the Commission's ability to render effective relief at the conclusion of an administrative action to determine the legality of the acquisition under Section 7 of the Clayton Act.

In order to achieve the statutory purpose of Section 13(b), the authority of the district court is focused on maintaining the status quo:

> [t]he district court is not authorized to determine whether the antitrust laws have been or are about to be violated. That adjudicatory function is vested in FTC in the first instance.

FTC v. H.J. Heinz Co., 246 F.3d 708, 714 (D.C. Cir. 2001) (quoting *FTC v. Food Town Stores*, 539 F.2d 1339, 1342 (4th Cir. 1976)). The Commission need not satisfy the traditional equity standard for preliminary injunctive relief when seeking an injunction pursuant to Section 13(b). Rather, the Commission is

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[1] "Whole Foods" refers to Whole Foods Market, Inc. "Wild Oats" refers to Wild Oats Markets, Inc.

entitled to a preliminary injunction in aid of its administrative proceeding if it

> has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals.

Id. at 714-15 (quoting *FTC v. Beatrice Foods Co.*, 587 F.2d 1225, 1229 (D.C. Cir. 1978) (Appendix to Statement of MacKinnon & Robb, JJ.)).

The matter was decided below on an expedited basis. The district court heard a day of testimony from the parties' economic experts on July 31, 2007, and argument on August 1, 2007. The experts offered conflicting opinions about the relevant product market and the likely competitive effects of the proposed merger. Two weeks later, on August 16, 2007, the district court denied the Commission's motion. [JA –.] The court's ruling focused almost entirely on the issue of product market definition, and concluded "that the FTC has not met its burden to prove that 'premium natural and organic supermarkets' is the relevant product market in this case for antitrust purposes." Op. at 64, JA ___.[2]

This appeal follows.[3]

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[2] Citations in this brief are to the district court's memorandum opinion, which contains material under seal that was redacted from the published version.

[3] The Commission sought an injunction pending appeal, both in the court below and in this Court, but those requests were denied. [JA __, ___, ___]. On August 28, 2007, the merger was consummated. Whole Foods subsequently moved to dismiss the appeal, arguing that it is moot because the transaction has

STATEMENT OF FACTS

A. The Parties

Whole Foods has introduced substantial innovations to the grocery retailing industry since the opening of its first store in Austin, Texas, in 1980. Its focus on premium natural and organic products, and commitment to quality and service, transformed the way many consumers think about a trip to the grocery store.[4] The success of its business model is reflected in both its profits and its growth over the last twenty years. Whole Foods now operates approximately 200 stores in the United States and plans to open dozens more in the coming years. [PX1302-004; JA ___.]

Wild Oats was founded in 1987. Its similarities with Whole Foods in product offerings, format, and philosophy contributed to a longstanding rivalry

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closed. The Commission opposed that motion, and, on December 11, 2007, this Court ordered that the motion to dismiss be carried with the case and briefed together with the merits. [JA __.]

[4] Whole Foods and Wild Oats set themselves apart from conventional supermarket chains by building attractive stores that offered a wide variety of high-quality perishables, and emphasizing healthy living and environmental sustainability. The food retailing industry has recognized these important competitive differences by referring to this new type of food retailer as "super naturals," separating it in competitively important ways from the old-style, smaller "mom and pop" health food stores and conventional supermarkets alike. [PX2866-035; JA ___.] We refer to them herein as "premium natural and organic supermarkets."

between the two companies. Before its acquisition by Whole Foods, Wild Oats was implementing plans to inject new vigor into its already vibrant competition with Whole Foods around the country. [PX458-005; JA __.]

In November 2006, Whole Foods announced that it intended to acquire Wild Oats. The parties executed a merger agreement on February 21, 2007. Whole Foods offered a 23 percent premium over Wild Oats' market value ($18.50 per share, at a time when the shares' market value was $15.72), although it planned to shutter 30 or more competing Wild Oats stores. PX2878-009, ¶ 22.4; JA __.] The Commission issued an administrative complaint alleging that Wild Oats was Whole Foods' closest competitor in 17 local markets (and that they were two of the three closest competitors in another local market), and that the acquisition would violate Section 7 of the Clayton Act. The Commission also filed a preliminary injunction action under Section 13(b) to preserve its ability to render meaningful relief in that administrative proceeding.

B. Direct Evidence of Market Definition and Likely Competitive Effects.

The Commission presented direct evidence on the relevant product market for antitrust analysis and on the merger's likely anticompetitive effects.[5] That

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[5] The merging parties and the Commission agreed that food retailers compete by seeking to differentiate themselves one from another, using individual combinations of price, quality, product mix and service; and that all food retailers

evidence primarily took the form of Whole Foods' and Wild Oats' own statements and documents.

1. Each of the merging parties treated the other as its closest competitor.

The merging parties viewed themselves as one-of-a-kind retailers in local markets where only one or the other was located. For example, until the acquisition was announced, Whole Foods often referred to Wild Oats' markets (where Whole Foods was not present) as "non-competitive," "cash cow" markets, and even "monopoly" markets. [PX713, PX712-001; JA __.] As Whole Foods founder and CEO, John Mackey, wrote in October 2004, "[i]t seems highly probable to me that OATS is dependent upon its stores in non-competitive markets for any profits that it is currently generating * * *." [PX719-001; JA __.] In a May

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compete with each other to some degree. The parties also all agreed that food retailers compete in local areas that are within convenient driving distance for consumers. The Commission alleged that the merger will eliminate Whole Foods' only premium natural and organic supermarket competitor in defined areas in the following 17 locations: Albuquerque; Boston; Boulder; Hinsdale, Illinois; Evanston, Illinois; Cleveland; Denver; West Hartford; Henderson, Nevada; Kansas City-Overland Park; Las Vegas; Los Angeles; Louisville; Omaha; Pasadena; Portland, Maine; and St. Louis. [PX2883-005,¶ 8, PX 2883-012-23, 025-26; JA __.] The merger will reduce the number of competitors from three to two in a defined area in Portland, Oregon. [*Id.* at 024; JA __.]

The district court adopted the Commission's position on the definition of the relevant local geographic markets for purposes of analyzing the merger. Op. at 66; [JA __].

2006 email, forwarded by Mr. Mackey to his executive team, a Whole Foods executive observed that "prices were higher at [the newly opened Wild Oats store in Tampa, Florida, because] *[b]eing the only game in town* gives them that freedom ." [PX80-001; JA __] (emphasis added); *see also* [PX1372; JA __] (Wild Oats Fall 2006 list of stores showing that if there is no [ ] present, there is "no Major Competitor" in the market).

As for Whole Foods' market position, one high level Whole Foods executive observed, " I'd say that WFM currently has a dominant position in the marketplace." [PX774-001; JA __.] Similarly, Wild Oats called Whole Foods "the leading full-service competitor." [PX469-009; JA __.]

Whole Foods and Wild Oats each saw the other as its closest competitor, and each operated as a unique competitive constraint on the other in a number of cities. As the former CEO of Wild Oats testified, "[T]here's really only two players * * * of any substance in the organic and all natural, and that's Whole Foods and Wild Oats." [PX1325-058; JA __.]

As one Whole Foods Board Report put it, "[w]e have put in place a competitive pricing strategy to beat [ ] to the punch." [PX16-005-06; JA __]. Whole Foods saw itself in a "war" with Wild Oats. [PX1337; JA __.] In local markets around the country, Whole Foods reduced prices to match Wild Oats'

prices and promotions.[6] Looking for victory over its closest rival, Whole Foods regularly invaded what it described as Wild Oats' "monopoly" markets. [PX712-001; JA __.] In March 2006, for example, Mr. Mackey wrote pseudonymously:

> Whole Foods says they will open 25 stores in OATS territories in the next 2 years. * * * The writing is on the wall. The end game is now underway for OATS. * * * Whole Foods is systematically destroying their viability as a business – market by market, city by city.

[PX801-001; JA __]; *see also* [PX1337; JA __] (suggesting a switch to a "Red Sox/Yankees" rivalry rather than "war" metaphor).

Wild Oats, for its part, studied how best to handle "competitive intrusions" by Whole Foods,[7] and lowered its prices in local areas when Whole Foods opened stores nearby.[8] Consumers benefitted from this competition, through both lower prices and high-quality, innovative services.

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[6] *See, e.g.,* [PX187; JA __] (Whole Foods had to reduce prices in Boulder, Colorado, to match advertised "Buy One Get One Free" promotions at Wild Oats); [PX39; JA __] (Whole Foods matching Wild Oats prices in Evanston, Illinois).

[7] *See, e.g.,* [PX661, PX 458, PX 913, PX2101, PX3835; JA __] (numerous Wild Oats "Competitive Intrusion" plans).

[8] *See* [PX2878-024-25, ¶¶ 58-59, PX2882-006; JA __.]

2. The merging parties did not consider conventional supermarkets to be effective competitors now or in the future.

Although conventional supermarkets now frequently carry some natural and organic products, Whole Foods and Wild Oats recognized that their primary competitors were other premium natural and organic supermarkets. According to Mr. Mackey, conventional supermarkets cannot effectively reposition themselves to compete in this market:

> Safeway and other conventional retailers will keep doing their thing – trying to be all things to all people. * * * They can't really effectively focus on Whole Foods Core Customers without abandoning 90% of their own customers.

[PX785; JA __.]

A February 2007 study by a research firm used by both Whole Foods and Wild Oats concluded that repositioning by conventional supermarkets was unlikely to replace the unique competition between the merging parties in any reasonable time period. [PX2508-023; JA ___.] The study concluded:

> **It is our belief that WFM will not encounter significant, if any, competition from leading mainstream retailers (Safeway, Wal-Mart, Costco, etc.) entry into organics.**
> Most other major retailers lack the ability to consistently generate authentic, high-quality food experiences.

[PX2508-026 (emphasis in original); JA __.]

In the candid words of one senior Whole Foods officer, before this litigation,

repositioning by conventional supermarkets is "[n]ot as easy as it looks folks." [PX180-001; JA __.] Another added: "[

]" [PX565-002; JA __.]

3. The purpose and effect of the merger was to terminate the price and non-price competition that existed between the merging parties.

Whole Foods changed its strategy in November 2006, when it decided to acquire Wild Oats rather than compete with it. [PX167; JA __.] Wild Oats had just made concrete plans to reduce its prices to meet Whole Foods head-on. Wild Oats' 2007 Business and Financial Plan called for the company to "Reduce Retail Pricing. Wild Oats Grocery and Natural Living ([ ] on WFMI), [ ] * * * investment needed [ ] with WFMI." [PX458-005; JA __.] Mr. Mackey, justifying the large price to be paid for Wild Oats, told his Board of Directors that "[b]y buying [Wild Oats] we will * * * avoid nasty price wars in Portland (both Oregon and Maine), Boulder, Nashville, and several other cities which will harm our gross margins and profitability." [PX773-001; JA __.]

Mr. Mackey viewed the merger not only as eliminating "nasty price wars" but also as eliminating the "threat" that a conventional supermarket chain could acquire Wild Oats and use it as a "springboard" to enter the market by "launch[ing] a competing national natural/organic food chain to rival us." *Id.* According to Mr.

Mackey, the purchase price included "a premium for taking it off the table for Kroger or Safeway * * *." [PX1324-246; JA __.]

Whole Foods did indeed pay a premium for Wild Oats, paying an additional [ ] over market value for each of the many Wild Oats stores it intends to close. [*See* PX1349-006; PX553-001; PX1338-095; JA __.] Whole Foods paid this premium even though it had no use for these stores as going concerns. [PX553-001; PX1338-095; PX1349-006; JA __.] Mr. Mackey testified that closing these stores would eliminate competition:

> One of the motivations is to eliminate a competitor. * * * That is one of the reasons we are willing to pay $18.50 [a share] for a company that has lost $60 million in the last six years. If we can't eliminate those stores, then Wild Oats, frankly, isn't worth buying.

[PX1324-075; JA __.]

Whole Foods' exhaustive evaluation of the merger, "Project Goldmine," projected that after it closed a Wild Oats store an average of [ ] percent of the closed store's revenue would transfer to Whole Foods, not to the many other supermarkets nearby.[9] [PX553, PX2884-014-17, ¶ ¶ 31-32, PX2884-020, § 39; JA __]. In some local markets, this capture, or diversion, rate was as much as [ ]% (Las Vegas, Nevada); [ ]% (Portland-Downtown, Oregon); and [ ]% (Evanston,

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[9] Whole Foods used these estimates to determine how much Whole Foods would pay for Wild Oats. [PX1340-070-073; JA __]; [PX1338-094-095; JA __.]

Illinois). *Id.* Wild Oats' "Competitor Intrusion" studies similarly predicted that Whole Foods would capture [ ] of Wild Oats' sales when it entered a Wild Oats "monopoly" market. [PX919-006; JA __.]

C. The District Court's Treatment of the Direct Evidence from the Merging Parties.

In its ruling denying a preliminary injunction, the district court simply ignored nearly all of the foregoing direct evidence on the unique competition between Whole Foods and Wild Oats and the likely and intended effects of the merger. It failed to mention, for example, the pre-litigation statements of Mr. Mackey and other senior executives at Whole Foods and Wild Oats that the merging parties viewed each other as each others' closest substitutes; that conventional supermarkets were not effective competitors and could not quickly reposition themselves to provide such competition; and that in local markets where both were located, Whole Foods and Wild Oats engaged in fierce competition both in the pricing of their products and in the size and features of their stores. Nor did it mention Mr. Mackey's pre-litigation statements on the purpose and probable effect of the transaction: to eliminate "nasty price wars" with Wild Oats, ([PX773-001; JA __]). The court did mention the "Project Goldmine" report, but only to recite

the diversion numbers in the report most favorable to its conclusion,[10] ignoring its high predicted capture rates.

The court relied upon made-for-litigation declarations from Whole Foods and Wild Oats executives that conflicted with the contemporaneous evidence. For instance, the district court cited declarations from Whole Foods employees as evidence that Safeway has repositioned to exert competitive pressure on Whole Foods. Op. at 83-84; [JA __]. The district court did not mention pre-litigation documents authored by the same declarants, saying that the revenue effect of Safeway's "very best" Lifestyle store in Boulder was less than one-fifth the effect Whole Foods expected from a Wild Oats store being built in Boulder. [PX1327-021-22, PX54, PX1304-002, PX1004-022-23, PX2863-055-56; JA __.] Nor did the district court acknowledge testimony from Safeway itself that it had tried to do some minimal repositioning, failed, and did not view itself as a significant competitor of Whole Foods.[11]

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[10] The district court selectively mentioned only the lowest "Project Goldmine" numbers, and ignored the rest. *Compare* Op. at 60; [JA __] *with* [PX553; JA __.]

[11] *See* PX2870-032, 033, 042-44; JA __.]

D. The Relevant Expert Testimony.

The district court also heard testimony from economists for both parties. The Commission presented the testimony of Professor Kevin M. Murphy, who conducted a series of seven econometric analyses using Whole Foods' and Wild Oats' business records generated over approximately three years of competition. Professor Murphy concluded that, without the competitive constraint exerted by Wild Oats as an independent company, the merged firm would be able to exercise market power to raise prices or lower quality.

Professor Murphy first studied the effect of changing the number of premium natural and organic competitors in local markets – and found that Whole Foods and Wild Oats had far greater effects on each other's sales volume, profit margins,[12] and prices than did conventional supermarkets. [PX2882-004; JA __.][13] Professor Murphy analyzed the effect of entry by Whole Foods on Wild Oats'

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[12] Because the price data provided by Whole Foods and Wild Oats were inadequate, he used profit margin data for some of his studies. *See* Tr. 101-02, 7/31/07 a.m.; [JA __] (price data available at due date for expert reports had "very large discrepancies, both over time and cross-sectionally.") Professor Murphy explained that profit margin data provided a meaningful proxy for price. *See* Tr. 100, 7/31/07 a.m. (because "price is a major ingredient in a margin calculation," inferences about price can be drawn from margin data.)

[13] To do this, Professor Murphy studied "banner entry" events – "the entry of the first store of a given brand into a given geographic market." [PX2878-019, ¶ 48; JA __.] He used a 5-mile radius for each of these local markets. *Id.*

prices and sales volume, showing striking episodes of price competition, despite the limited data available. Of the five events that were available for study, only two – in West Hartford, Connecticut, and Fort Collins, Colorado, took place early enough to yield adequate post-entry data. [PX2878-024, ¶ 58; JA __.] Prices both at Wild Oats' West Hartford store and at its Fort Collins store were [

] following entry by Whole Foods. [PX2878-024-25, ¶¶ 58-59, PX2882-006; JA __.] Thus, Professor Murphy found that when Whole Foods entered a market, the incumbent Wild Oats' profit margins, prices, and sales volume dropped significantly.[14] [PX2878-003, ¶ 6, PX2882-004; JA __. Entry by Whole Foods had a much larger impact on Wild Oats than entry by any conventional supermarket brand. [PX2878-020, ¶ 49, PX2878-021, ¶ 51, PX2882-004; JA __.] Notably, these effects occurred despite the fact that Wild Oats was already surrounded by conventional supermarkets.

Professor Murphy then examined the effect of entry on Whole Foods. There were no instances of entry by Wild Oats within 5 miles of a Whole Foods store, so it was not possible to look directly at Wild Oats' impact on Whole Foods.

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[14] Margins fell by [ ] percent, prices by [ ] percent, and sales volume by roughly [ ] percent. *Id.* (All of these percentages are rounded off; the exact calculated amounts appear in the cited record documents.) As the merging parties' economic expert admitted, profit margins in the food retail business are ordinarily razor-thin: only 1 to 2 percent. [PX2066, ¶ 114, PX322; JA –.] In this context, a 1 percent drop in profit margins is highly significant.

However, entry by a regional chain of premium natural and organic supermarkets, Earth Fare, allowed Professor Murphy to study closely analogous events. [PX2878-022, ¶ 52; JA __.] When Earth Fare entered a local market, Whole Foods' sales and margins dropped significantly. [*Id.*, PX2882-005; JA __.][15] Entry by conventional supermarkets had even less effect on Whole Foods than it did on Wild Oats. [PX2878-022, ¶ 52; JA __.]

Professor Murphy also found that Whole Foods cut its prices in exactly the localities where it faced competition from Earth Fare – and at the precise time Earth Fare opened stores in those localities. [PX2883-003-04, ¶ ¶ 3-4, PX2883-010; JA __.] This showed "the types of [premium natural and organic supermarket] price wars that Whole Foods hopes to avoid by acquiring Wild Oats." [PX2883-004, ¶ 6; JA __.]

Finally, on the eve of the hearing, Professor Murphy was able to demonstrate that Whole Foods only marginally lowered its prices in response to market entry by Safeway Lifestyle in Boulder, Colorado, but clearly and dramatically lowered its prices in anticipation of Wild Oats' entry into that market. Tr. 26-27, 7/31/07 a.m.; [JA __]. The court excluded Dr. Murphy's testimony on

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[15] Whole Foods' sales fell by roughly [ ] percent and its margins by about [ ] percent. *Id.*

this point as untimely. *See* [Tr. 122-23, 7/31/07 a.m., Tr. 4, 7/31/07 p.m.; JA __.][16]

The merging parties' economist was Dr. David Scheffman. Dr. Scheffman did not conduct any econometric analyses of the likely impact of the merger. Instead, Dr. Scheffman's opinions were largely based on a critical loss analysis. Such an analysis takes as its starting point the principle that a key determinant of the appropriateness of a proposed antitrust product market (here, premium natural and organic supermarkets) is whether a hypothetical monopolist in such a market could impose a small but significant non-transitory increase in price ("SSNIP").[17] A critical loss analysis seeks to determine the point at which a hypothetical monopolist's gain from such a SSNIP would be neutralized by the loss of sales volume due to the price increase. The theory behind critical loss analysis is that a hypothetical monopolist will stop short of imposing a price increase that will reduce profits.

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[16] This analysis was presented late because it was based on price data that Professor Murphy had only succeeded in making useful for economic analysis on the eve of the hearing, given the expedited litigation schedule. [Tr. 40, 7/31/07 a.m.; JA __] ("[T]he data we received for Whole Foods turned out to be quite difficult to use. And at the time of my report, we had not been able to figure out a way to suitably use the Whole Foods pricing data."); *see also* [Tr. 26, 7/31/07 a.m.; JA __].

[17] FTC and USDOJ, Horizontal Merger Guidelines, § 1.1, http://www.ftc.gov/bc/docs/horizmer.htm. *See Heinz,* 246 F.3d at 718.

There was no dispute about the steps that are taken in a critical loss analysis. First, using the hypothetical monopolist's profit margin and the amount of the hypothesized SSNIP, the economist calculates the "critical loss" value – the tipping point at which the price increase becomes unprofitable. [PX2884-004-05, ¶ 9-10; JA __.] The analysis then turns to a calculation of the predicted amount of "actual loss" to see whether it is equal to or greater than the critical loss value. [PX2884-005, ¶ 11; JA __.]

Dr. Scheffman failed to calculate any estimate of the actual loss from the available quantitative evidence. Instead, Dr. Scheffman admitted that he *assumed* a value for actual loss that would "far exceed" the critical loss threshold. [PX2066-043, ¶ 117]; PX2884-005, ¶ 11; JA __.][18] Specifically, Dr. Scheffman assumed that consumers would readily switch to conventional grocery stores if the merged firm raised prices, on grounds that some consumers already "cross-shop" – *i.e.*,

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[18] Q: There is no estimate of actual loss in your rebuttal report, precise estimate; is that correct?

Dr. Scheffman: That's correct.

Q: There is no estimate of actual loss in approximately the hundreds of pages you submitted as your report and attachments. Is that correct?

Dr. Scheffman: Yes.

Tr. 18, 7/31/07 p.m.

patronize both kinds of store. [PX2066-050, ¶ 134; JA __.] Dr. Scheffman's application of the test ignored the "Project Goldmine" prediction that Whole Foods would capture [ ] customers of any Wild Oats store it closed – despite more convenient or more economical alternatives.[19]

Dr. Scheffman also conducted a study of Whole Foods' prices – based on register prices at Whole Foods stores on a single day in June 2007. By then, the Commission's action seeking to block the merger had already been filed. Dr. Scheffman opined from this post-complaint data that Whole Foods' "prices are determined at the region level (not at the store level) and prices across stores are the same." [PX2066-16, ¶ 289]; JA __.] Professor Murphy criticized this pricing study as methodologically unsound and inconsistent with the testimony of Whole Foods executives that Whole Foods uses price zones that depend on the presence or absence of specific competitors. [PX2884-003, 21-25; JA __.] The one-day post-litigation snapshot simply could not detect the episodes of strong local competition between Whole Foods and Wild Oats that these companies' business

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[19] Q: You considered these diversion projections when doing your competitive analysis, correct?

Dr. Scheffman: No, I didn't discuss them in either report.

Tr. 73, 7/31/07 p.m.

documents and data evidenced. *Id.*

In rebuttal, Professor Murphy conducted his own critical loss analysis and concluded that – if done correctly, using an empirically based value for actual loss – Dr. Scheffman's results would be reversed. [PX2884-003; JA __.] Professor Murphy calculated that the Project Goldmine revenue capture rate would be [ ] the amount needed to make a 5 percent price increase profitable for the owner of both stores, and [ ] the amount needed to make a 1 percent price increase profitable. [PX2884-016-17, ¶ 32, PX2884-027; JA __.] Professor Murphy concluded that the gains Whole Foods would realize by closing competing Wild Oats stores would give Whole Foods an incentive not only to close stores, but also to raise prices after doing so. [PX2884-019-20, ¶ 37; JA __.]

E. The District Court's Treatment of the Relevant Expert Testimony.

The district court did not mention five of Professor Murphy's seven econometric studies, and rejected his study of entry events, without explanation. The district court credited Dr. Scheffman's critical loss analysis, and adopted his ultimate conclusion that the relevant product market is "at least as broad as the retail sale of food and grocery items in supermarkets." Op. at 31; [JA __].

The district court did not address the questions raised by the Commission regarding Dr. Scheffman's testimony: his critical loss analysis used a non-

empirical assumption instead of calculating actual loss; he failed to consider the revenue that Whole Foods predicted it would capture from the Wild Oats stores it closed; his assumptions regarding the products for which consumers "cross-shop"; or the lack of empirical or methodological soundness in his pricing analysis, which looked at post-litigation prices from one day only.

SUMMARY OF ARGUMENT

1. a. The language and legislative history of Section 5 establish that Congress entrusted the Commission with the primary authority to adjudicate whether a challenged merger violates the antitrust laws, subject only to review by the federal courts of appeals. The language and legislative history of Section 13(b) establish that it was designed to strengthen the Commission's adjudicative powers, by preserving its ability to render effective relief at the conclusion of administrative adjudication.

b. Consistent with the language and legislative history of those provisions, this Court has held that the power of a district court in a Section 13(b) proceeding is limited to determining whether the Commission has raised "serious, substantial, difficult and doubtful" questions creating a "fair ground" for litigation in administrative proceedings or whether a preliminary injunction pending those proceedings is otherwise in the public interest. *Heinz,* 246 F.3d at 714-15.

c. The district court did not apply that standard in this case. To the contrary, the court specifically stated the Commission had the burden of "proving" the relevant market, and treated as dispositive the Commission's supposed failure to meet that burden. Op. at 11, 64. Indeed, elsewhere its decision, the court suggested that the Commission needed to prove its case on the merits in the 13(b) proceeding itself. The court's failure to apply this Court's standard was clear legal error.

2. The error of the court below is all the more evident in its treatment of the evidence adduced. The Commission presented extensive evidence that showed Whole Foods and Wild Oats to be uniquely close competitors – evidence that not only provided express support for the product market definition the Commission advanced, but also directly showed the likelihood of harm to competition and consumers. As this Court (and other appellate courts, as well as the antitrust agencies' Horizontal Merger Guidelines) have recognized, the ultimate issue in a merger challenge is whether the transaction is likely to create, maintain or facilitate an exercise of market power (i.e., the power to profitably increase or maintain prices above a competitive level). Beyond that, this Court has stated that all probative evidence that the transaction is likely to have those results should be considered.

a. The district court ignored – indeed did not even mention – the most probative direct evidence respecting the market in which competition would be reduced, which were the statements and documents of the merging parties themselves. Nor did the court consider opinions of the Commission's economic expert which took account of, and corroborated, that direct evidence. The district court's failure to consider this evidence not only violated core requirements for sound merger analysis and infected the district court's assessment of the Commission's likelihood of success on the merits but also disabled the district court from accurately assessing whether the record before it presented a fair ground for litigation. This was also legal error.

b. The court below relied instead principally on types of evidence that are exceptionally unreliable, under the precedents of this Court and the Supreme Court. It relied extensively, for example, on made-for-litigation declarations that were contradicted by the contemporaneous documentary and testimonial evidence. It also relied heavily and uncritically upon expert opinions that had been impeached as lacking any empirical foundation. The Supreme Court has specifically warned against reliance on expert opinion that is based on an unsupported assumption. The district court's reliance on these opinions not only violated the basic standards governing the use of expert testimony, but it prevented

the court from accurately assessing whether the record met the standard for issuance of a preliminary injunction in a Section 13(b) proceeding set forth by this Court.

4. Finally, despite the merging parties' contention that this appeal is moot, this case continues to present a live controversy. Although the parties have been allowed to close the transaction, this appeal seeks interim injunctive relief that remains available, in the form of an order that would halt the further absorption of Wild Oats into Whole Foods during the administrative adjudication on the merits.

5. This Court should enter an order stopping Whole Foods from closing or rebranding the remaining Wild Oats stores, and remand the case to the district court with instructions to resolve any specific issues that may arise regarding this interim relief.

ARGUMENT

I. STANDARD OF REVIEW.

In reviewing a preliminary injunction ruling, this Court "do[es] not afford deference when the appeal presents a substantial argument that the trial court's decision was premised upon an erroneous legal conclusion." *Ayuda, Inc. v. Thornburgh,* 948 F.2d 742, 757 (D.C. Cir. 1991) (citing *Foundation on Economic Trends v. Heckler,* 756 F.2d 143, 152 (D.C. Cir. 1985)). "When the district court's estimate of the probability of success depends on an incorrect or mistakenly applied legal premise, 'the appellate court furthers the interest of justice by providing a ruling on the merits * * *.'" *Air Line Pilots Ass'n v. Eastern Air Lines, Inc.,* 863 F.2d 891, 895 (D.C. Cir. 1988) (quoting *NRDC v. Morton,* 458 F.2d 827, 832 (D.C. Cir. 1972)).

The gravamen of this appeal is that the district court evaluated the Commission's preliminary injunction request under an improper legal standard, imposing on the Commission the burden of establishing its case on the merits, rather than that of showing that there are "serious, substantial" questions that warrant an injunction pending administrative adjudication. *See Heinz,* 246 F.3d at 714-15. This is an issue of law, which requires *de novo* review in order to ensure that the precedents of this Court are followed. To the extent that the ruling below

may be seen as based on underlying factual findings, such findings remain subject to review for clear error. *Serono Labs., Inc., v. Shalala,* 158 F.3d 1313, 1318 (D.C. Cir. 1998).

II. THE DISTRICT COURT APPLIED THE WRONG STANDARD FOR PRELIMINARY INJUNCTIONS IN SECTION 13(b) MERGER CASES.

The district court committed fundamental legal error by subjecting the Commission's preliminary injunction action to a standard contrary to that established by this Court. This Court has recognized, in keeping with the intent of Congress in creating the Commission and in enacting Section 13(b), that the Commission is not required to "prove" any aspect of its case in order to secure a preliminary injunction in aid of its own adjudicative and remedial powers; rather, it need only show "serious, substantial" questions requiring plenary administrative consideration. The district court's contrary approach ignores the statutory scheme, and effectively usurps the adjudicative role of the Commission.

A. Congress Has Given Primary Adjudicative Responsibility to the Commission.

In creating the Commission to be an expert agency, Congress made clear that it was not to act simply as a prosecutor, but would exercise primary adjudicative authority over cases within its jurisdiction.[20] Section 5(b) of the Act, 15 U.S.C. § 45(b), provides not only that the Commission shall issue charges when it has reason to believe that there is a violation of the FTC Act, but that the Commission shall, after a hearing, make findings of fact, determine whether the FTC Act has been violated, and enjoin any such violation. As Representative Covington, author of the original bill establishing the Commission, declared

> The function of the Federal [T]rade [C]ommission will be to determine whether an existing method of competition is unfair and, if it finds it to be unfair, to order discontinuance of its use. In doing this, it will exercise power of a judicial nature * * * . The Federal Trade Commission will, it is true, have to pass upon many complicated issues of fact, but the ultimate question for decision will be whether the facts found constitute a violation of the law against unfair competition. In deciding that ultimate question the commission will exercise power of a judicial nature * * * .

51 Cong. Rec. 14932-3 (1914). The plenary authority granted the Commission by

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[20] The Commission was "conceived to be a body * * * especially qualified to pass on questions of competition and monopoly." GERARD C. HENDERSON, THE FEDERAL TRADE COMMISSION – A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE 22, 98 (1924). The Supreme Court has recognized this Congressional intent and the Federal Trade Commission's unique role in trade regulation matters. *See, e.g., FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986); *Humphrey's Executor v. United States,* 295 U.S. 602, 624 (1935).

Section 5(b) is subject solely to review in the federal courts of appeals. 15 U.S.C. § 45(c).

Congress enacted Section 13(b) to *strengthen* the Commission's historical adjudicative role in competition matters. Section 13(b) makes the ultimate issue in a 13(b) proceeding whether a preliminary injunction is "in the public interest." The provision was designed

> to *maintain* the statutory or 'public interest' standard which is now applicable, and not to impose the traditional 'equity' standard of irreparable damage, probability of success on the merits, and that the balance of hardships favors the petitioner. * * * [that standard] is not appropriate for the implementation of a Federal stature by an independent regulatory agency where the standard of the public interest measures the propriety and need for injunctive relief.

H.R. Conf. Rep. No. 624, 93rd Cong., 1st Sess. 31 (1973) (emphasis added). More specifically, it provides that such an injunction should issue "upon a showing that, weighing the equities and considering the Commission's likelihood of success, such action would be in the public interest." 15 U.S.C. § 53(b). This provision thus safeguards the Commission's ability to render effective relief at the conclusion of the administrative adjudication entrusted to it, rather than being forced either to disentangle already-merged parties, or to resort to the All Writs Act to halt a merger before consummation. *FTC v. Weyerhaeuser Co.,* 665 F.2d 1072, 1081(D.C. Cir. 1981) (R. Ginsburg, J.).

B. This Court Has Given Effect to the Statutory Scheme by Requiring Only a Showing of Serious, Substantial Questions to Support a Preliminary Injunction.

This Circuit has fashioned a Section 13(b) standard that reflects these statutes and their legislative history and safeguards the public interest in having the Commission instead of the district courts judge the merits of antitrust matters entrusted to the agency.[21] In *Heinz*, this Court recognized that "[i]n enacting [Section 13(b)] Congress * * * demonstrated its concern that injunctive relief be *broadly available* to the FTC," by incorporating a unique public interest standard, rather than the more stringent, traditional equity standard for injunctive relief. *Heinz*, 246 F.3d at 714 (quoting *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C. Cir. 1980)(emphasis added)); *see also Weyerhaeuser,* 665 F.2d at 1084 (Section 13(b) "posts a clear entrance sign for FTC provisional relief applications * * *.")

This Court, and other appellate courts, have long recognized the district

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[21] As then-Judge Ginsburg observed, preliminary injunction proceedings are ill-suited for complex antitrust determinations, in comparison with plenary proceedings. *See Weyerhaeuser*, 665 F.2d at 1083 (district court's ruling in a Section 13(b) case "must be made under time pressure and on incomplete evidence" and "[t]he risk of an erroneous assessment is therefore higher than it is after a full evidentiary presentation."). The court below itself noted that "[u]nfortunately the court * * * has had to act under severe time constraints (and with fewer resources than counsel has had) in evaluating the evidence and arguments, reaching its decision and attempting quickly to articulate that decision in a reasonably thorough and comprehensible opinion." Op. at 3; [JA __].

courts' limited role under Section 13(b). "'The district court is not authorized to determine whether the antitrust laws have been or are about to be violated. That adjudicatory function is vested in the FTC in the first instance.'" *Heinz,* 246 F.3d at 714 (quoting *FTC v. Food Town Stores, Inc.,* 539 F.2d 1339, 1342 (4th Cir. 1976)). "The only purpose of a proceeding under § 13 is to preserve the status quo until [the] F.T.C. can perform its function." *Food Town,* 539 F.2d at 1342.

The district court's consideration of the merits is limited to determining whether there is "fair ground for thorough investigation, study, deliberation and determination *by the FTC* in the first instance and, ultimately by the Court of Appeals." *Heinz,* 246 F.2d at 714-715 (emphasis added.). A "fair ground" exists if the Commission raises "serious, substantial, difficult and doubtful" questions on the merits. *Id.* Other courts have adopted the same standard. *See, e.g., FTC v. Univ. Health, Inc.,* 938 F.2d 1206, 1218 (11th Cir. 1991); *FTC v. Warner Commc'ns, Inc.,* 742 F.2d 1156, 1160 (9th Cir. 1984).[22]

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[22] Indeed, two judges of this Court have described this standard as requiring only that the Commission show a "fair and tenable chance" of success. *FTC v. Beatrice Foods Co.,* 587 F.2d 1225, 1229 (D.C. Cir. 1978) (Appendix to Statement of MacKinnon and Robb, JJ.) (quoting *FTC v. Lancaster Colony Corp.,* 434 F. Supp. 1088, 1090 (S.D.N.Y. 1977)). The court below improperly dismissed this formulation out of hand, citing another district court ruling and a decision of the Eighth Circuit. Op. at 6. However, this Court has never disavowed the formulation of Judges MacKinnon and Robb, and the Second Circuit has found no difference between that standard and the standard this Court adopted in *Heinz. See United States v. Sun and Sand Imports, Ltd.,* 725 F.2d 184, 188 n. 5 (2d Cir. 1984)

Even the traditional common law standard for *private* parties, moreover, does not require the movant to show "a mathematical probability of success" in the sense of a 50 percent or greater likelihood that it will ultimately prevail. *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977). As this Court recognized in *Holiday Tours*, the courts have long rejected "a wooden 'probability' requirement," where the equities favor maintenance of the status quo. *Id.* This principle is applicable, *a fortiori*, in a case like the present one, in which Congress has specifically relieved the Commission of the burden of establishing irreparable injury under the normal equitable standard. Accordingly, if the "fair ground" standard is to be given effect, it must afford the Commission the ability to preserve the status quo in cases in which the merits are closely disputed, even if the evidence is in equipoise or the district court harbors doubts about the Commission's ultimate likelihood of prevailing.

The proper application of the Section 13(b) standard in a merger case must also reflect the substantive standard that will govern the ultimate decision under Section 7 of the Clayton Act. Even in a plenary proceeding on the merits under Section 7, the government is not required to prove that a merger will in fact lessen competition. Congress used the phrase "'may be substantially to lessen

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("We do not believe that there is any significant difference between the 'serious question' standard and the 'fair and tenable chance' standard.")

competition' to indicate that its concern was with probabilities, not certainties." *Heinz,* 246 F.3d at 713 (quoting *Brown Shoe Co. v. United States,* 370 U.S. 294, 323 (1962)).[23] Section 7 is "intended to arrest anticompetitive acquisitions in their incipiency" – before any anticompetitive effect can occur, much less be proven. *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 362 (1963).

In sum, when the Commission seeks a preliminary injunction under Section 13(b), for an alleged violation of Section 7, its burden is to show "fair ground" that it will ultimately be able to show that the effect of the merger "may be substantially to lessen competition." The courts have therefore recognized that "[d]oubts are to be resolved against the transaction" and in favor of a preliminary injunction. *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 906 (7th Cir. 1989) (Posner, J.) (citation omitted). "A certainty, even a high probability, need not be shown." *Id.*

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[23] Section 7 is a "prophylactic measure" intended "primarily to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil." *United States v. E.I. du Pont de Nemours & Co.,* 353 U.S. 586, 597, 626 (1957); *see also Heinz,* 246 F.3d at 717 (acquisition was the "least pro-competitive" option.). Section 7 "plac[es] a heavy burden of proof upon anyone seeking to justify growth by purchase * * *." *FTC v. Coca-Cola Co.,* 641 F. Supp. 1128, 1138 (D.D.C. 1986) (Gesell, J.), *vacated as moot,* 829 F.2d 191 (D.C. Cir. 1987).

C. The District Court Departed From This Court's Legal Standard.

The district court did not determine whether the Commission had shown that there was a "fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance." The district court, to be sure, recited that language, but it certainly did not apply that standard. As discussed above, the court simply concluded that the Commission had not demonstrated that it was likely to succeed in an administrative proceeding – and then stopped. That approach flies in the face of this Court's jurisprudence, as well as the language and legislative history of Sections 5(b) and 13(b), in which Congress has sought to preserve the Commission's ability to act as the principal adjudicative body with respect to the antitrust and consumer protection matters entrusted to it.

In particular, the court below court followed an erroneous view – previously adopted only by the Eighth Circuit – that the definition of the relevant market does not fall under the "serious, substantial" standard – but instead must be proven as if at a plenary trial:

> [T]his case hinges – almost entirely – on the proper definition of the relevant product market. * * * The government also has the burden of proving the relevant geographic market."

Op. at 10; [JA __], *citing FTC v. Tenet Health Corp.*, 186 F.3d 1045, 1052 (8th

Cir. 1999);[24] *see also* Op. at 11; [JA __] ("If the FTC shows that the merger may lessen competition in any one of the alleged geographic markets, it is entitled to injunctive relief."). The district court took the position that the Commission must first "establish[]" the relevant product and geographic markets before the court examines whether the merger's effect "may be substantially to lessen competition," within the meaning of Section 7 of the Clayton Act. Op. at 11; [JA __].

There is no justification for singling out market definition – an issue that is often dispositive in merger cases, as it was in the district court – and subjecting it to a standard more rigorous than the *Heinz* "serious, substantial" one. Indeed, the burden imposed by the district court is *more* stringent than that for private litigants. *See Univ. of Texas v. Camenisch,* 451 U.S. 390, 394-95 (1981) (in the usual case, a party "is not required to prove his case in full at a preliminary injunction hearing.").

The district court further showed that it was applying an erroneous standard when it cited at length a portion of the *Heinz* decision that recited the standard articulated in *United States v. Baker Hughes, Inc.,* 908 F.2d 981, 982-83 (D.C. Cir. 1990). Op. at 12; [JA __]. *Baker Hughes* set forth this court's treatment of the

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[24] In *Tenet,* the Eighth Circuit relied on its earlier ruling in *FTC v. Freeman Hospital,* 69 F. 3d 260, 268 n.12 (8th Cir. 1995), in which it expressly refused to apply this Court's "serious, substantial" standard to market definition.

burden of proof for purposes of Section 7. The district court stopped its quotation just short of this Court's explicit reminder that *Baker Hughes* "was decided at the merits stage as opposed to the preliminary injunctive relief stage." *Heinz,* 246 F. 3d at 715. *Heinz* used the *Baker Hughes* "analytical approach" to Section 7 to structure its consideration of the parties' presentations, but took care to evaluate the Commission's case under the "serious, substantial" standard appropriate to preliminary injunction proceedings under Section 13(b). *Heinz,* 246 F.3d at 714-15. Here, the district court erroneously conflated the standard for a plenary Section 7 trial with the standard for a preliminary injunction.

The district court bracketed its discussion of the evidence on the relevant product market with statements that erroneously adopted the standard appropriate for a plenary trial. The statements detailed above preceded the district court's consideration of the evidence on the relevant product market. Then, after discussing its view of the evidence on this issue, the district court again revealed that it had applied not the *Heinz* "serious, substantial" standard but a standard appropriate for a final adjudication on the merits: "the FTC has not met its burden to prove that 'premium natural and organic supermarkets' is the relevant product market in this case for antitrust purposes." Op. at 64; [JA __].

Thus, the district court directly flouted this Court's standard for merger

injunctions under Section 13(b), requiring the Commission to "prove" a relevant product market at the preliminary injunction stage, rather than assessing whether there was indeed "fair ground" for plenary administrative adjudication of the disputed issues.

III. THE DISTRICT COURT FAILED TO ASSESS WHETHER THE COMMISSION HAD RAISED "SERIOUS, SUBSTANTIAL" QUESTIONS ON THE MERITS.

The gravity of the district court's error becomes more apparent when one looks beyond its incorrect articulation of the "fair ground" standard to its treatment of the record before it. In the court below, the Commission adduced extensive evidence that showed Whole Foods and Wild Oats to be uniquely close competitors. Although the court below approached the issues almost entirely in terms of market definition, *see* Op. at 8-11, 23-68, the Commission's evidence not only provided express support for the product market definition the Commission advanced, but also directly showed the likelihood of harm to competition and consumers. This was appropriate, because the ultimate inquiry in a merger case is whether the merger enhances market power and, as this Court has observed, "[m]arket share is just a way of estimating market power, which is the ultimate consideration * * * [w]hen there are better ways to estimate market power, the court should use them." *Baker Hughes*, 908 F.2d at 992 (quoting *Ball Mem'l*

Hosp. v. Mutual Hosp. Ins., 784 F.2d 1325, 1336 (7th Cir. 1986)). Particularly where, as in this case, the antitrust concern is based on the unilateral loss of competition between two uniquely close competitors, there are substantial factual and analytical overlaps between the market definition exercise and the competitive effects analysis.[25] Market definition and competitive effects can thus be thought of as "two sides of the same coin," and direct evidence of competitive effects is itself highly relevant to the proper definition of the product market.[26]

The evidence presented here included clear, authoritative statements by the

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[25] As the Merger Guidelines explain, anticompetitive unilateral effects may result when a price increase would prompt the diversion of sales to the merger partner. If such uniquely close competitors are allowed to merge, sales that would have otherwise been lost are "recaptured" by the merged entity, leaving consumers without a meaningful alternative to defeat a price increase. If the merger enables the combined firm unilaterally to raise prices by a SSNIP for a non-transitory period due to the loss of competition between the merging parties, the merger plainly is anticompetitive, and the merging firms constitute a relevant antitrust market because the merged entity is considered to be a "monopolist" under the Guidelines. *See* Merger Guidelines, § 2.2.

[26] Market definition, while long an important tool, is a means to an end – to enable some measurement of market power – not an end in itself. Where direct evidence of anticompetitive effects is presented, courts have recognized that traditional market definition may be altogether unnecessary to the adjudication of antitrust claims. *See generally FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986); *Toys "R" Us, Inc. v. FTC,* 221 F.3d 928, 937 (7th Cir. 2000). This issue's potential relevance to the ultimate adjudication of the lawfulness of the acquisition provides additional reason why this case merits "thorough investigation, study, deliberation and determination by the FTC." *Heinz*, 246 F.3d at 715.

principals on the effect of the merger, as well as detailed econometric studies. The district court ignored the majority of the Commission's evidence – including virtually all of the Commission's proffered evidence on the merger parties' view of the transaction and 5 of the 7 econometric studies performed by the Commission's economic expert – and instead accepted uncritically the conclusions of defendants' expert, despite the serious flaws in his work established by the Commission.

As the following discussion demonstrates, the district court's evaluation of the evidence would not pass muster even under the "clear error" standard that would be applicable to a plenary adjudication of a Section 7 case. But for present purposes, what is most abundantly clear is that the district court failed to take seriously the standard of Section 13(b). Even giving full credit to the evidence adduced by defendants, an objective assessment of the record below would lead any reasonable adjudicator to conclude that, at a minimum, the Commission had "raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals." *Heinz*, 246 F.3d at 714-15. The district court's treatment of the evidence conclusively shows that it ignored that standard.

A. The District Court Failed to Analyze the Commission's Evidence, Which Greatly Exceeded the Applicable Standard.

The Commission presented extensive unvarnished, contemporary evidence in the form of the parties' own statements and documents that the parties were each others' next best substitutes as premium natural and organic supermarkets, *see* pp. 7-9 above ; that conventional supermarkets were unlikely to be able to reposition themselves to effectively compete with those premium natural and organic supermarkets, *see* pp. 10-11 above; and that the purpose and effect of the merger were to terminate the fierce price and non-price competition between Whole Foods and Wild Oats. *See* pp. 11-13 above. Such direct evidence of "industry or public recognition" of the relevant market and the likely effects to be felt in it is particularly salient, "because we assume that economic actors usually have accurate perceptions of economic realities." *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 219 n. 4 (D.C. Cir. 1986) (Bork, J.); *see Brown Shoe Co. v. United States,* 370 U.S. at 325. *See also FTC v. Coca-Cola Co.*, 641 F. Supp. 1128, 1132 (D.D.C. 1986) (Gesell, J.) ("[a]nalysis of the market is a matter of business reality – a matter of how the market is perceived by those who strive for profit in it."), *vacated as moot*, 829 F.2d 191 (D.C. Cir. 1987). In the present case, such evidence established that premium natural and organic supermarkets

constitute a distinct market for antitrust purposes.[27]

Indeed, this Court and other courts have treated contemporaneous, course of business evidence showing the merging parties' own views of the transaction as the gold standard of probative evidence. *See, e.g., Heinz,* 246 F.3d at 717 ("Heinz's own documents recognize the wholesale competition and anticipate that the merger will end it"); *FTC v. PPG Indus.*, 798 F.2d 1500, 1504 (D.C. Cir. 1986) ("buyers' and sellers' perceptions"); *FTC v. Warner Communications*, 742 F.2d 1156, 1163 (9th Cir. 1984) ("record company documents"); *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 49 (D.D.C. 1998) ("internal documents presented at trial reveal that the Defendants themselves do not view the other forms of distribution to be viable competitors or substitutes").

The district court, however, mentioned only isolated fragments of the contemporaneous evidence, selecting a few statements that it believed appeared to support its product market definition. Op. at 41; [JA __]. The district court *wholly*

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[27] The validity of a more refined relevant market within a broader market is well recognized. *See California v. American Stores,* 697 F. Supp. 1125, 1129 (C.D. Cal. 1988) (supermarkets), *aff'd in part and rev'd on other grounds,* 872 F.2d 837 (9th Cir. 1989), *rev'd on other grounds,* 495 U.S. 271 (1990); *Photovest v. Fotomart Corp.,* 606 F.2d 704, 712 (7th Cir. 1979) ("drive-thru retail photo processing"); *FTC v. Staples, Inc.,* 970 F. Supp. 1066, 1075 (D.D.C. 1997) (sale of consumable office supplies through office superstores was a sound relevant product market, notwithstanding that "[t]he products in question are undeniably the same no matter who sells them" and many types of retailers do sell them.).

ignored the vast majority of these statements – including the companies' highly probative strategic plans and statements to investors. That the district court considered *none of this latter evidence* in denying the preliminary injunction is a reversible abuse of discretion, whether reviewed *de novo* or for clear error.

1. Evidence of the parties' perceptions and characterizations.

As discussed above, contemporaneous business documents of both Whole Foods and Wild Oats consistently recognized, prior to the merger, that each was "the only game in town," and accordingly enjoyed the ability to set prices higher, in those markets in which only one or the other was active. *See* pp. 7-9 above. Indeed, the very purpose of the acquisition was to avoid "nasty price wars" that Whole Foods' Mackey feared from Wild Oats (or from a company that could acquire it to launch a competitive assault on Whole Foods), but not from other supermarkets. *See* pp. 11-12 above. As Mackey put it to his Board of Directors,

> [Wild Oats] is the only existing company that has the brand and number of stores to be a meaningful springboard for another player to get into this space. Eliminating them means eliminating this threat forever, or almost forever.

[PX 773 at 001; JA __.] Far from empty boasting, Mr. Mackey's statements (including statements to the SEC and investors) and the companies' strategic analyses, should be treated as "economic actors[']usually * * * accurate

perceptions of economic realities." *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d at 219 n. 4. This most probative evidence showed that the transaction was directed entirely to the suppression of the head-to-head competition between Whole Foods and Wild Oats, in a distinct product market.[28]

In addition, the district court missed the truly striking fact that Wild Oats had made concrete plans to reduce its prices to meet Whole Foods head-on. Wild Oats' 2007 Business and Financial Plan called for the company to "Reduce Retail Pricing. Wild Oats Grocery and Natural Living ([ ] on WFMI). [

] investment needed for [ ] with WFMI." [PX458 at 005; JA __.] Accordingly, the evidence showed that the merger involves two companies in a unique competitive relationship, and would deprive consumers of a significant price reduction.

Failure to address precisely this kind of evidence was critical in this Court's reversal of the denial of a preliminary injunction in *Heinz*:

> the district court failed to address the record evidence that the [merger partners] do in fact price against each other * * * and that, where both are present in the same areas, they depress each other's prices.

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[28] While intent is not an element of a section 7 violation, evidence of intent is highly probative of market definition. *United States v. Baker Hughes, Inc.*, 731 F. Supp. 3, 12 n.8 (D.D.C.), *aff'd*, 908 F.2d 981(D.C. Cir. 1990) (stating intent to eliminate a company as a competitor was probative of geographic market definition).

Heinz, 246 F.3d at 718. The district court's failure even to mention this most highly probative evidence is, therefore, reversible error.

In analyzing how much to pay for Wild Oats, Whole Foods projected that it would capture [ ] from the many Wild Oats stores it planned to close. [PX00553 ; JA __.] These "Project Goldmine" analyses predicted that a [ ] percentage of customers from each closed Wild Oats would switch to Whole Foods rather than one of the many other food retailers nearby.[29] Project Goldmine's predictions correlated strongly with Whole Foods' previous experience.[30]

Professor Murphy explained that the Project Goldmine evidence supported a "uniqueness of substitutability between Wild Oats and Whole Foods." [PX2878-030, ¶ 70, PX2881; JA __.] In other words, after their local Wild Oats store had closed, [ ] of Wild Oats customers would drive past more conveniently located, less expensive, conventional supermarkets to find a Whole

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[29] The district court cited only Project Goldmine's lowest estimates, despite the fact that the merger would violate Section 7 if its effect "may be substantially to lessen competition" in a single local market. Op. at 60; [PX553; JA __].

[30] *See, e.g.,* [PX2874 at 238-40; JA __] (Whole Foods captured [ ] revenue after a Wild Oats store was closed in Fort Collins, Colorado, despite the presence of numerous conventional supermarkets that were closer than the Whole Foods store.).

Foods store. The merger would harm consumers by depriving them of their first choice and forcing them to travel farther in order to find the closest substitute.

2. The expert economic evidence.

The district court erroneously rejected Professor Murphy's conclusions, without explanation, and ignored five of his seven econometric studies – mentioning the other two only in passing. Op. at 34-36; [JA __].

In addressing whether premium natural and organic supermarkets constitute a distinct market, one of the key inquiries Professor Murphy undertook was to ascertain whether the behavior of one such company is affected by the presence of another in the same area. He explained that it would be misleading to try to make such an assessment by looking at the effect of Wild Oats's exit from a local market. Exit events present a muddled picture, because usually the firm that exits has been faltering for some time; thus, the immediate post-exit effect understates the true impact. [Tr. 91-92, 7/31/07 a.m.; JA __.] In addition, there was little available information on such exit events. [PX2878-019, ¶ 47; JA __.] Professor Murphy explained that "entry by sellers of products that are the best substitutes for those offered by Whole Foods and Wild Oats will tend to have the largest effects on Whole Foods[] and Wild Oats[] * * *." [PX2878-018, ¶ 45; JA __.] The district court summarily rejected the use of entry events for this purpose, without

explanation. [Op. at 35; JA __].

Professor Murphy's analyses of the effects of entry were thus based on the sensible premise that a key way to detect whether competition between Whole Foods and Wild Oats uniquely matters is to look at markets that make the transition from one participant to two. He discovered that entry by a second premium natural and organic supermarket into a Whole Foods or Wild Oats monopoly market has a significant and lasting effect, while entry by other food retailers has little or no effect. *See* pp. __ above. Thus, a merger that keeps more local markets as monopolies by halting the merger partners' plans to invade each other's territories, and that creates new local monopolies by closing Wild Oats stores that compete with existing Whole Foods stores, prevents the kind of competitive benefits that resulted from entry by a premium natural and organic supermarket. [PX2878-037-38, ¶¶ 80-81; JA __.]

Professor Murphy made significant findings that consistently demonstrated that Whole Foods and Wild Oats have a unique competitive relationship with each other that is *not* replicated by competition from conventional supermarkets. For example, he conducted a study using data from North Carolina that showed that Whole Foods' prices were [ ] following entry by Earth Fare, a regional premium natural and organic supermarket. [PX2883-002-03, ¶¶ 2-3,

PX2883-010; JA __.] Entry by a conventional supermarket, on the other hand, had little or no effect on Whole Foods' prices. *Id.* Similarly, the presence of Wild Oats in a market reduced Whole Foods' profit margins by .7 percent, storewide. [PX2878-027; JA__.][31] Again, conventional supermarkets did not have this effect. [PX2878-029, ¶ 69, PX2882-009; JA __.]

The extremely expedited litigation schedule, which was driven by the merging parties' financing, made it impossible for Professor Murphy to "clean" some of the most probative data and analyze it within the time allotted. On the eve of trial, Professor Murphy was able to demonstrate that Whole Foods only marginally lowered its prices in response to market entry by Safeway Lifestyle in Boulder, Colorado, but clearly and dramatically lowered its prices in anticipation of Wild Oats' entry into that market. Tr. 26-27, 7/31/07 a.m.; [JA __]. The court excluded Dr. Murphy's testimony on this point as untimely. *See* [Tr. 122-23, 7/31/07a.m., Tr. 4, 7/31/07p.m.; JA __.][32] However tenable that ruling might have

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[31] Appellees singled out this calculation as statistically insignificant. However, its level of statistical significance is well within recognized levels for consideration of evidence as probative. *See* Federal Judicial Center, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (2d Ed. 2000) at 192 (findings may have practical significance even though not statistically significant at the 95% confidence level.)

[32] Professor Murphy's analysis was based on price data, which he had only succeeded in making useful for economic analysis on the eve of the hearing.

been if the Commission were required to "prove" its case in the a Section 13(b) proceeding, that evidence would certainly have been "timely" when presented in a later administrative proceeding; and it should have been considered by the district court in determining whether there was a fair ground for litigation in those proceedings.

In sum, by ignoring the evidence from the parties directly bearing on market definition and the likelihood that the merger would create market power, and the expert testimony corroborating that direct evidence, the district court made it impossible to fairly and accurately to determine whether the record presented a fair ground for litigation, or, indeed, whether the Commission's challenge was likely to succeed on the merits.

B. The Evidence the District Court Did Rely on Was Flawed.

The evidence the district court did rely on consisted largely of made-for-litigation declarations that were contradicted by the documentary and testimonial evidence, and expert opinions that had been impeached as lacking any empirical foundation.

[Tr. 37, 7/31/07 a.m.; JA __] ("[T]he data we received for Whole Foods turned out to be quite difficult to use. And at the time of my report, we had not been able to figure out a way to suitably use the Whole Foods pricing data."); *see also* [Tr. 24, 7/31/07 a.m.; JA __.]

Instead of crediting statements made in the ordinary course of business, the court relied on litigation artifacts: post-litigation declarations from the merging parties' employees. *See United States v. Gypsum Co.*, 333 U.S. 364, 396 (1948) (where they conflict with contemporaneous business documents, made-for-litigation declarations are entitled to little weight.). These declarations are in fact contradicted by the documentary evidence. The district court cited one employee declaration for the notion that Whole Foods does not regard Wild Oats as a significant competitor in areas where both operate. Op. at 58; [JA __]. Whole Foods' ordinary course documents say the opposite.[33] The district court was persuaded by another employee declaration that Whole Foods did not price competitively against Wild Oats in Portland, Maine, or other areas of New England. Op. at 73; [JA __]. The documents reveal that the same Whole Foods employee specifically gave permission to match prices and launch specials to compete with Wild Oats in [ ], while another vowed to compete vigorously with Wild Oats on price in [ ].[34] The district court further cited Whole Foods

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[33] *See, e.g.*,[PX773 at 001; JA __] (CEO explaining that the deal will enable Whole Foods to "avoid nasty price wars."); [PX1372; JA __] (markets without [ ] are not viewed as competitive by [ ].).

[34] [PX2617-001; JA __] ([ ]); [PX 1312-001; JA __] ("I can't wait until we open our Portland [Maine] store next year and squash them [Wild Oats] with both higher quality and lower prices.")

employee declarations for the proposition that Wild Oats was [ ]. Op. at 73; [JA __.] This is contradicted by numerous documents.[35]

The district court devoted much attention to anecdotal evidence showing that there is *some* overlap in the products offered by Whole Foods and more conventional food stores; that Whole Foods has a range of customers who sometimes buy *some* things at other stores; and that various conventional food stores check a small number of Whole Foods' prices. Op. at 36-61; [JA __]. But these observations have nothing to do with whether Whole Foods and Wild Oats are such close substitutes for each other that their combination will deprive consumers of competition and allow the merged entity to raise prices. The fact that there is some degree of competition between the merger partners and other food retailers does not mean that all food retailers are in the same antitrust market.[36]

The district court also placed great weight on the undisputed, but entirely nonprobative, fact that when a Whole Foods or a Wild Oats first enters a market, it captures customers who formerly shopped at other food retailers. [Op. at 32-34; JA __]. Of course that is true. Any innovator captures customers from somewhere –

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[35] *See. e.g.,* [PX1008; JA __] (Whole Foods "having to match some ridiculously low special pricing at Wild Oats"); [PX187; JA __] (Whole Foods reduced Boulder prices to match Wild Oats' buy-one-get-one-free promotion); [PX16-005-006; JA __.]

[36] *See* Merger Guidelines § 2.21; [PX 2878 at 004 ¶ ¶ 8-9; JA __.]

for instance, the first automobiles were sold to horse-and-buggy drivers. Courts like those in *Photovest* and *Staples* have recognized that an innovative retailing scheme can create a new product market for antitrust purposes – though of necessity the innovators' customers are captured from conventional photo processors or conventional office supply stores. The district court ignored the fact that when a premium natural and organic supermarket enters a market, its innovative offering satisfies a previously-unsatisfied consumer demand. Other food retailers are simply bad substitutes for them.[37]

The district court's decision relied heavily on Dr. Scheffman's testimony, uncritically accepting Dr. Scheffman's conclusions and glossing over the fundamental defects in his analysis that were revealed at trial. In so doing, the court ignored the repeated admonitions of the Supreme Court that courts must be

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[37] Even a monopolist may be constrained in its pricing by the existence of a distant, poor, substitute – though it is no less a monopolist in the relevant product market. *See United States v. Alum. Co. of Am.,* 148 F.2d 416, 426 (2d Cir. 1945) ("substitutes are available for almost all commodities, and to raise the price enough is to evoke them."). *See also* Areeda & Hovenkamp, ANTITRUST LAW, ¶ 506a, 2d Ed. (2002) ("[t]he existence of substitutes does not necessarily preclude 'monopoly' power. It depends on how close the substitutes are in the minds of buyers, on how many buyers consider them to be close, and upon the price-output decisions of those producing substitutes"); Jonathan Baker, *Unilateral Competitive Effects Theories in Merger Analysis,* 11 ABA Antitrust L.J. 21, 24-25 (1997) (imperfect substitutes in pharmacy networks and cable television insufficient to constrain post-merger market power.).

cautious in their reliance on expert testimony, and that such testimony must be fully supported by the factual record. As the Court stated in *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993):

> When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict. Cf. *J. Truett Payne Co., Inc.*, 451 U.S. at 564-565 (referring to expert economic testimony not based on "documentary evidence as to the effect of the discrimination on retail prices" as "weak" at best). Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them.

Id. at 242. These admonitions have been followed in numerous other antitrust cases. *See Concord Boat v. Brunswick Corp.*, 207 F.3d 1039, 1057 (8th Cir. 2000); *Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1247 (11th Cir. 2002).

In its extensive reliance on Dr. Scheffman's testimony respecting his critical loss analysis, the district court lost sight of these principles. The district court entirely failed, for example, to address Dr. Scheffman's admission that *he had made no effort to calculate* "actual loss." *See* pp. 19-20 above. This was a guess – and, by plugging it into his calculation, Dr. Scheffman produced a result that is no more than a guess. In colloquial terms, this was a simple case of "garbage in, garbage out."

Professor Murphy provided a correct, empirically-based critical loss analysis, to rebut Dr. Scheffman's. Professor Murphy concluded that "the

substantial diversions between Whole Foods and Wild Oats (in those markets where they compete head-to-head) reflected in the Project Goldmine spreadsheet shows that Whole Foods believes that Wild Oats customers simply will not move their purchases to stores outside the proposed * * * market in competitively relevant numbers." [PX2884-016-17 ¶ 32; JA __.] Dr. Scheffman entirely ignored this evidence. *See* pp. 19-21above.

The district court also relied on Dr. Scheffman's assumption that, due to "cross shopping" – the tendency of customers to do business at both appellees' stores and conventional grocery stores – consumers would readily switch purchases to conventional grocery stores in response to post-merger price increases. Op. at 30-32; [JA __]. This conclusion directly contradicted the industry sources that appellees regularly used in their strategic planning, which state that consumers shop for different products at the different types of stores:

> While this same consumer shops at both retailers, they tend to shop at each for different things. Wild Oats for fresh and specialty items, Safeway for canned and packaged goods.

[Tr. 30, 7/31/07 p.m.; JA __.]

Also, the district court relied on Dr. Scheffman's nonprobative pricing study. Dr. Scheffman acknowledged numerous problems with his one day pricing survey, including (1) the very real possibility that a survey of prices after the tender

offer was announced was unreliable;[38] (2) his failure to take coupons or discounts into account, and (3) his failure to determine whether appellees offered more coupons in markets in which they competed with each other. *E.g.*, [Tr., 38 - 39 7/31/07 p.m.; JA __.] In response, Professor Murphy testified that "The dispersion of prices on a single day does not provide a reliable basis for characterizing the general pricing behavior of Whole Foods, *and does not meet even minimal standards of analysis.*" [PX2883-002, ¶1 (emphasis added); JA __.]

Once discredited, Dr. Scheffman's testimony was not rehabilitated – yet the district court based its decision on his flawed opinions.

* * * * *

Instead of considering the Commission's *prima facie* case under the "serious, substantial" standard, and then considering whether the merging parties had successfully rebutted it, as required by *Heinz*, the district court merely outlined the parties' opposing contentions without analysis (Op. at 16-22; [JA __]), then adopted the merging parties' proposed findings of fact, in large part.[39] It made no

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[38] *See, e.g., Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1384 (7th Cir. 1986) ("Post-acquisition evidence that is subject to manipulation by the party seeking to use it is entitled to little or no weight.")

[39] The district court's opinion contains long, verbatim passages from those proposed findings. Op. at 25-34, 36-44; [JA __]. This was most striking with respect to Dr. Scheffman's testimony, which essentially became the opinion

effort to evaluate the Commission's case under the "serious, substantial" standard. Rather, the district court completely "failed to address the record evidence" on dispositive points. *See Heinz*, 246 F.3d at 717

IV. THIS APPEAL PRESENTS A LIVE CONTROVERSY.

Whole Foods' motion to dismiss on grounds of mootness contends that, by closing its acquisition of Wild Oats as soon as the district court ruled, Whole Foods has insulated the district court's fundamentally flawed ruling from this Court's review. Under clear precedent of the United States Supreme Court and this Court, Whole Foods cannot meet its "heavy burden" of showing mootness. *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953).

> [T]o say that [a] case has become moot means that the defendant is entitled to a dismissal as a matter of right. * * * The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.

Id. at 632 (citations omitted).

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of the court – without "reveal[ing] the discerning line for decision." *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 657 (1964). *Compare* Op. at 26; [JA __] with DPFF 148, 149, 150; [JA __]; Op. at 27; [JA __] with DPFF 150, 151, 152; [JA __]; Op. at 28; [JA __] with DPFF 153, 154, 155; [JA __]; Op. at 29; [JA __] with DPFF 155, 156, 158, 159, 160, 161; [JA __]; Op. at 30; [JA __] with DPFF 162, 157, 163; [JA __]; Op. at 31; [JA __] with DPFF 164; [JA __]; Op. at 32; [JA __] with DPFF 166, 165, 167, 168; [JA __]; Op. at 33; [JA __] with DPFF 167, 168; [JA __]. Although the fact that a district court copied a large part of one party's findings of fact will rarely be a sufficient ground for reversal, standing by itself, in this case it highlights the district court's failure to apply the *Heinz* standard.

Dismissal on grounds of mootness is appropriate only when "an event occurs which renders it impossible for [a] court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever." *Mills v. Green,* 159 U.S. 651, 653 (1895). It is well established that "even the availability of a partial remedy is sufficient to prevent [a] case from being moot." *Byrd v. EPA,* 174 F.3d 239, 244 (D.C. Cir. 1999) (quoting *Calderon v. Moore,* 518 U.S. 149, 150 (1996), and *Church of Scientology v. United States,* 506 U.S. 9, 13 (1992) (internal quotation marks omitted.). The available remedy need not be "fully satisfactory" to avoid mootness. *Church of Scientology,* 506 U.S. at 13.[40]

This Court's ruling in *Weyerhaeuser* shows both that consummation of a transaction does not moot a challenge under Section 13(b), and that a full range of injunctive relief maintaining the status quo remains available in a situation like the present one. *Weyerhaeuser* rejected the argument that consummation of the merger mooted the FTC's appeal of the denial of a preliminary injunction. 665 F.2d at 1077.

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[40] *See also Spencer v. Kemna,* 523 U.S. 1 (1998) (where habeas petitioner's incarceration and parole have ended before petition is finally adjudicated, case-or-controversy requirement is satisfied if "some 'collateral consequence' of the conviction * * * exist[s]"; *Gull Airborne Instruments, Inc., v. Weinberger,* 694 F.2d 838, 846 (D.C. Cir. 1982) (disappointed bidder's appeal of denial of preliminary injunction was not necessarily rendered moot by the passage of time; "[i]f * * * the contract has not been fully or satisfactorily performed, then injunctive relief may still be available and appropriate.").

Weyerhaeuser recognized that "the precedent relevant in these circumstances" comes from the numerous cases in which courts had ruled that appropriate relief could still be fashioned, even though the principal form of relief originally sought may no longer be possible. *Id.* For example, in *Indus. Bank of Washington v. Tobriner,* 405 F.2d 132, 1322-23 (D.C. Cir. 1968), a bank had sued to "enjoin [the] D.C. Commissioners from issuing a tax deed," but – in the absence of an injunction pending appeal – they issued the deed while the appeal was pending. This Court held that the case was not moot, "since 'it has long been established that where a defendant with notice in an injunction proceeding completes the acts sought to be enjoined the court may by mandatory injunction restore the status quo.'" *Id.* at 1323 (quoting *Porter v. Lee,* 328 U.S. 246, 251 (1946)). There was no suggestion that the fact that the original relief requested was no longer available made the case moot. The fact that the Commission sought a full-stop injunction in this case, as in *Weyerhaeuser,* does not deprive this Court of the power to afford other meaningful injunctive relief to halt or undo the integration of Wild Oats into Whole Foods.

It is clearly possible to fashion an order freezing the parties' integration,

both to protect consumers from further interim harm the acquisition may cause them and to preserve the possibility of reconstituting Wild Oats as an independent competitor. Without such relief, an effective reconstruction of Wild Oats may be impracticable after the administrative proceeding (and eventual appeals therefrom).

Although the parties have consummated the merger on paper, a significant portion of the Wild Oats assets – both tangible, like the Wild Oats stores themselves, and intangible, like the Wild Oats brand – remain viable and distinct from Whole Foods at this time. Whole Foods has acknowledged that the integration of Wild Oats will take several years. Whole Foods has retained approximately 90 percent of Wild Oats' store employees. *Q4 2007 Whole Foods Market Earnings Conference Call -- Final*, Fair Disclosure Wire, Nov. 20, 2007 (John Mackey); JA __.] Whole Foods has closed nine Wild Oats stores; of the 63 that remain, Whole Foods "plan[s] to close one * * * in the first quarter [of 2008], then close seven more stores over the next few years." *Id.* "Some stores are planning to rebrand as soon as early 2008." *Id.*

Thus, the consummation of the merger does not mean that the integration of the two companies is complete. Maintaining the current status quo would preserve, to the greatest extent possible, that opportunity for meaningful relief.

V. THIS COURT SHOULD ENTER AN INJUNCTION TO PREVENT FURTHER INTEGRATION OF WILD OATS INTO WHOLE FOODS.

No further judicial proceedings are necessary before an order maintaining the status quo is entered. This Court should enter an injunction preventing Whole Foods from closing or rebranding any additional Wild Oats stores, to prevent further harm to consumers during the plenary adjudication. Such an injunction is squarely within this Court's judicial competence and authority. *See* 28 U.S.C. § 2106 (court of appeals "may affirm, modify, vacate, set aside or reverse any judgment, decree, or order * * * or require such further proceedings to be had as may be just under the circumstances." This Court's authority under Section 2106 "to fashion an appellate remedy in the interest of justice * * * permits the provision of the relief * * * that would have been available * * * from the [district] court if it had done what should have been done." *Jacksonville Port Auth. v. Adams,* 556 F.2d 52, 57(D.C. Cir. 1977) (reversing denial of temporary restraining order). Once such an order is entered, the district court on remand will be able to oversee any specific issues that may arise.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below and enter an order enjoining any further integration of Wild Oats into whole Foods, pending a final administrative adjudication on the merits. The Commission further respectfully requests that this Court remand the matter to the district court with instructions to oversee implementation of this injunctive relief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32(a), I certify that the attached Brief for Appellant Federal Trade Commission was prepared using WordPerfect X3, and 14-point Times New Roman, a proportionally-spaced typeface. It contains 13789 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(2).

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ADDENDUM OF STATUTES

LEXSTAT 15 USC 18

*** CURRENT THROUGH P.L. 110-155, APPROVED 12/21/2007 ***
*** with gaps of 110-139, 140, 141, 143 and 110-154 ***

TITLE 15. COMMERCE AND TRADE
CHAPTER 1. MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

Go to the United States Code Service Archive Directory

15 USCS § 18

§ 18. Acquisition by one corporation of stock of another

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce or in any activity affecting commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided,* That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Secretary of Transportation, Federal Power Commission, Surface Transportation Board, the Securities and Exchange Commission in the exercise of its jurisdiction under section 10 of the Public Utility Holding Company Act of 1935 [*15 USCS § 79j*], the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Board, or Secretary.

LEXSTAT 15 USC 53

*** CURRENT THROUGH P.L. 110-155, APPROVED 12/21/2007 ***
*** with gaps of 110-139, 140, 141, 143 and 110-154 ***

TITLE 15. COMMERCE AND TRADE
CHAPTER 2. FEDERAL TRADE COMMISSION; PROMOTION OF EXPORT TRADE AND PREVENTION OF UNFAIR METHODS OF COMPETITION
FEDERAL TRADE COMMISSION

Go to the United States Code Service Archive Directory

15 USCS § 53

§ 53. False advertisements; injunctions and restraining orders

(a) Power of Commission; jurisdiction of courts. Whenever the Commission has reason to believe--
(1) that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 12 [*15 USCS § 52*], and
(2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 5 [*15 USCS § 45*], and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 5 [*15 USCS § 45*], would be to the interest of the public,

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement. Upon proper showing a temporary injunction or restraining order shall be granted without bond. Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under *section 1391 of title 28, United States Code*. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.

(b) Temporary restraining orders; preliminary injunctions. Whenever the Commission has reason to believe
(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and
(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided, however,* That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: *Provided further,* That in proper cases the Commission may seek, and after

proper proof, the court may issue, a permanent injunction. Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under *section 1391 of title 28, United States Code*. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.

(c) Service of process of the Commission; proof of service. Any process of the Commission under this section may be served by any person duly authorized by the Commission--

(1) by delivering a copy of such process to the person to be served, to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served;

(2) by leaving a copy of such process at the residence or the principal office or place of business of such person, partnership, or corporation; or

(3) by mailing a copy of such process by registered mail or certified mail addressed to such person, partnership, or corporation at his, or her, or its residence, principal office, or principal place or business.

The verified return by the person serving such process setting forth the manner of such service shall be proof of the same.

(d) Exception of periodical publications. Whenever it appears to the satisfaction of the court in the case of a newspaper, magazine, periodical, or other publication, published at regular intervals--

(1) that restraining the dissemination of a false advertisement in any particular issue of such publication would delay the delivery of such issue after the regular time therefor, and

(2) that such delay would be due to the method by which the manufacture and distribution of such publication is customarily conducted by the publisher in accordance with sound business practice, and not to any method or device adopted for the evasion of this section or to prevent or delay the issuance of an injunction or restraining order with respect to such false advertisement or any other advertisement,

the court shall exclude such issue from the operation of the restraining order or injunction.

CERTIFICATE OF SERVICE

I certify that I caused to be served a copy of the foregoing papers on the following counsel by hand and by electronic means:

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