



VOLUME 4 | NUMBER 1 | SPRING 2008

# Competition Policy International

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A Perspective on the *Whole Foods* Decision:  
Would the Most Important Evidence Please Stand Up?

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In the old game show, *To Tell the Truth*, panelists tried to convince the audience that they were the one associated with a particular story. They had to weave facts and details into the story to make it sound like the events had happened to them. The audience had to try to figure out which facts were likely to be consistent with the actual story. At the end, the host asked the real person associated with the story to stand up.

Analyzing a merger has many similarities to this old game show. While hopefully no one in a merger analysis is actively trying to mislead, the decision makers must still sort through a plethora of facts to determine which are consistent with a theory that would condemn a merger versus a theory that would clear a merger. This is a particularly difficult exercise in a retail merger. There are no customers to interview and there are no customers' documents from which one can glean how they might behave in the event of changes in the competitive environment. Which facts are meaningful and which are simply details that serve only to obscure the story? Which facts should be given weight and which should be ignored? And, how much weight should documentary and testimonial evidence be given as compared to economic evidence?

An examination of these issues in the *Whole Foods* matter shows that what the U.S. Federal Trade Commission (FTC) and the district court thought the evi-

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dence showed, and what weight to give various evidence, differed so significantly that they reached entirely different conclusions about the matter.

## I. The Evidence Focused On by the FTC

The FTC began investigating this transaction in February 2007. In looking through the companies' documents, they must have been struck immediately by the parties' descriptions of their respective businesses. First, the products the merging parties carried were premium natural and organic products as opposed to more run-of-the mill products offered in traditional grocery stores. Second, the positioning of the stores and the type of customers they attracted were not those of traditional supermarkets. Whole Foods' and Wild Oats' customers are buying something more than just the food product—they are seeking a shopping “experience,” where environment can matter as much as price. Both Whole Foods' and Wild Oats' internal documents demonstrated that they viewed their stores as not just supermarkets, but a destination for something more. John Mackey, Whole Foods' CEO explained:

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“Superior quality, superior service, superior perishable product, superior marketing, superior branding, and superior store experience working together are what makes Whole Foods so successful.”<sup>1</sup>

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Wild Oats' Vice President of Marketing had a similar view:

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“Succeeding in this business is about staying true to your message and mission but also . . . creating a community that will attract new customers. [ . . . ] It's about mind, body and soul through food, information, vitamins and supplements, recipes, books, body care—you name it. Wild Oats is more than a retail chain—it's about a lifestyle, and that's how we market ourselves.”<sup>2</sup>

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1 Memorandum in Support of Plaintiff's Motions for Temp. Restraining Order and Preliminary Injunction at 14, *Whole Foods*, 502 F. Supp. 2d 1 [hereinafter Plaintiff's Memorandum for TRO], available at <http://www.ftc.gov/os/caselist/0710114/070710PublicVersionTromemo.pdf>.

2 *Id.*

The Commission was also confronted with the parties' characterizations of competition. The former CEO of Wild Oats stated that, "[T]here's really only two players . . . of any substance in the organic and all natural, and that's Whole Foods and Wild Oats."<sup>3</sup> Similarly, Whole Foods referred to markets where only Wild Oats was present as "monopoly markets,"<sup>4</sup> with a Regional President further demonstrating how such a "monopoly market" could price: "[P]rices were higher at [the newly opened Wild Oats store in Tampa, Florida, because] [b]eing the only game in town gives them that freedom. [ . . . ] Their pricing was high since they are the only large natural food store in the area."<sup>5</sup>

Whole Foods even acknowledged that without competition from another premium natural and organic grocery store "we potentially become slow and lazy. Our prices go up and our customer service goes down."<sup>6</sup> Thus, it focused its attention on challenging Wild Oats with the intent of creating "monopoly markets" for themselves. As Mr. Mackey explained:

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"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."<sup>7</sup>

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The evidence went beyond the parties' mere characterizations of each other as significant competitors. The FTC found examples of intense competition between the companies as well, including:

- Whole Foods' reduction of prices 10 percent across the board in response to a planned opening of a Wild Oats store in Boulder;
- Whole Foods complaining of low margins in Louisville because of "having to match some ridiculously low special pricing" at Wild Oats;
- Increased spending on remodeling and updating stores, and adding amenities when confronting one another; and

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3 *Id.* at 1.

4 *Id.* at 4, 27.

5 *Id.* at 27, n.11.

6 *Id.* at 24.

7 *Id.* at 27.

- Whole Foods responding to a 20 percent-off sale by Wild Oats with price-matching, free samples, and taste tests.

Finally, the FTC found evidence of what Whole Foods' CEO, John Mackey, thought the impact of the transaction would be. In a memo to the Board, Mr. Mackey explained:

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“By buying them 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. OATS may not be able to defeat us but they can still hurt us. Furthermore, we eliminate forever the possibility of Kroger, Super Value, or Safeway using their brand equity to launch a competing national natural/organic food chain to rival us.”<sup>8</sup>

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He reiterated this view in testimony:

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“So it is either Whole Foods buy them or we potentially see someone like Kroger or Safeway or Tesco or God knows who else, a private equity firm, buys them and recapitalize them, potentially bring in new management. And we would rather not see that happen.”<sup>9</sup>

[...]

One of the motivations is to eliminate a competitor. I will not deny that. That is one of the reasons why we are doing this deal. That is one of the reasons we are willing to pay \$18.50 for a company that has lost \$60 million in the last six years. If we can't eliminate those stores, then Wild Oats, frankly, isn't worth buying.”<sup>10</sup>

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Further evidence of the impact of the merger was found in the company's plans to close down stores. The FTC alleged that the proposed transaction

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8 *Id.* at 1.

9 *Id.*

10 *Id.* at Ex. 2, 75:13-21; Plaintiff FTC's Corrected Brief on Its Motion for Preliminary Injunction at 2, *Whole Foods*, 502 F. Supp. 2d 1.

THE FTC ALLEGED THAT THE PROPOSED TRANSACTION WOULD ELIMINATE FUTURE COMPETITION IN SEVEN LOCAL AREAS WHERE WHOLE FOODS HAD PLANS TO OPEN STORES IN PROCESS AND WHERE WHOLE FOODS AND WILD OATS HAD PLANNED TO COMPETE WITH ONE ANOTHER.

would eliminate future competition in seven local areas where Whole Foods had plans to open stores in process and where Whole Foods and Wild Oats had planned to compete with one another, including areas “located within: Fairfield County, Connecticut; Miami, Florida; Naples, Florida; Nashville, Tennessee; Palo Alto, California; Reno, Nevada; and Salt Lake City, Utah.”<sup>11</sup> Whole Foods believed the impact on competition would have been so great that they were even willing to pay USD 2 to 3 million per Wild Oats store that Whole Foods would acquire and then close.<sup>12</sup>

In addition, the FTC used internal business documents in an attempt to demonstrate how Whole Foods’ acquisition of Wild Oats basically put an end to the opening of Wild Oats’ flagship store in Boulder, Colorado where Whole Foods thought it would face significant competition:

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“[A]s we approach the opening on the new Wild Oats flagship in Boulder in March . . . [m]y goal is simple—I want to crush them and am willing to spend a lot of money in the process. We are going to run a [redacted] day strategy against Oats that includes many different aspects but value is a key component.”<sup>13</sup>

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As much as the merging parties focused on each other, the Commission found evidence that the merging parties were dismissive of other competitors. A Whole Foods document stated, “Safeway . . . and other conventional [stores] . . . can’t really effectively focus on Whole Foods core customers without abandoning 90% of their own customers.”<sup>14</sup> The FTC pointed to a Whole Foods study that found entry by other premium and natural organic supermarkets had greater effect on Whole Foods sales and margins than did entry by other retailers.

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11 *Whole Foods*, 502 F. Supp. 2d at 38 (citation omitted).

12 Plaintiff’s Memorandum for TRO, *supra* note 1, at 4-5, Ex. 7.

13 *Id.* at 18.

14 *Id.* at 4, 30.

The Commission also, relying on research conducted by Dr. Murphy, an economist from the University of Chicago, found evidence that Whole Foods' store-level margins were lower in areas where a Wild Oats store is present. The evidence, as Dr. Murphy presented it, was that Whole Foods' entry in certain markets had a significant impact on Wild Oats' sales and margins, and that this effect was greater than the effects of entry by other stores. By inference, he concluded that an exit of Wild Oats would lead to an increase in Whole Foods' sales and margins.

The FTC did not find any systematic evidence that Whole Foods' prices were affected by the existence or non-existence of a Wild Oats store. While they pointed to documents suggesting that Wild Oats forced Whole Foods to lower prices, they never backed the claim up with concrete evidence, nor did they conduct an economic study to that effect. Interestingly, CRA International has written that it presented evidence to the FTC prior to the court challenge that Whole Foods and Wild Oats did not meaningfully constrain each other's prices in markets where both chains operated.<sup>15</sup> CRA undertook an econometric analysis of the impact of a Whole Foods store opening near a Wild Oats store or a Wild Oats store closing near an existing Whole Foods store. The findings were that Whole Foods did not meaningfully respond to Wild Oats' exit from a trade area by raising prices, nor did Wild Oats meaningfully respond to Whole Foods' entry by lowering prices. We do not know the basis on which the Commission rejected this evidence in making its decision to block the transaction.

## II. The Evidence Focused On by the Merging Parties

The merging parties seized on the lack of systematic pricing evidence. The lack of this evidence was as important to the merging parties as the affirmative evidence they did have. The parties did an economic study of their own where Dr. Scheffman analyzed the register price of all items carried in multiple Whole Foods and Wild Oats stores in a region for one specific day, as no historical data was available due to system capacity. This study revealed that there was no systematic pricing pattern based on the presence or absence of competition from premium natural and organic supermarkets.<sup>16</sup>

But the pricing study was not the key component of the parties' case. Rather, they relied heavily on a critical-loss analysis conducted by Dr. Scheffman. Such an analysis seeks to determine how many sales must be lost for a price increase to be unprofitable. As a first step, a critical-loss analysis must determine how many marginal customers there are (i.e., those "who would switch where he or

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<sup>15</sup> CRA Int'l, *U.S. District Court Clears Way for Whole Foods-Wild Oats Merger 1* (Nov. 2007), available at [http://www.crai.com/pubs/pub\\_7768.pdf](http://www.crai.com/pubs/pub_7768.pdf).

<sup>16</sup> *Whole Foods*, 502 F. Supp. 2d at 39.

she shops in a response to a . . . small but significant and nontransitory price increase”<sup>17</sup>). Dr. Scheffman found that:

- “[O]n average, the opening of a new Whole Foods store generated substantially more sales of natural and organic products than existed in the area prior to the opening”;
- “[I]n every instance, the new Whole Foods store generated substantially more in sales than the Wild Oats store previously had”;
- “A significant number of Whole Foods customers ‘cross-shop’ between Whole Foods and other supermarkets, such as Delhaize, Kroger, Safeway, Albertsons, Ahold, Publix, and H-E-B”;
- “Wild Oats customers also cross-shop at conventional supermarket”;
- “[S]ome Whole Foods’ customers shop in other stores as often as once a week”; and
- “Research by other supermarket chains also shows that their customers are cross-shopping at Whole Foods.”<sup>18</sup>

Based on evidence that marginal consumers constituted a significant portion of the business, he concluded that the likely loss of sales would make a price increase unprofitable.

The parties also focused their arguments around the fact that they intently focused on competition from other grocery store operators. For instance, Whole Foods’ internal business documents showed that Whole Foods not only checks its prices against the prices of other supermarkets, but also performs a competitive assessment of other supermarkets with regard to “prices, product offerings, configuration, and other attributes.”<sup>19</sup> Additionally, according to a 2006 study by the Natural Marketing Institute, “there is a significant overlap of private label offerings between Whole Foods, Safeway, Kroger, Costco, and Ahold, although each retailer has put effort into diversifying their product line.”<sup>20</sup> Whole Foods’ Senior Coordinator for Private Label also explained that, “[b]ecause more than [redacted] of Whole Foods shoppers cross-shop at Trader Joe’s, other supermarkets, and mass market stores, we want customers to purchase from Whole Foods more of the products they purchase from competing stores.”<sup>21</sup>

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<sup>17</sup> *Id.* at 17.

<sup>18</sup> *Id.* at 20, 26-27.

<sup>19</sup> *Id.* at 29, n.14.

<sup>20</sup> *Id.* at 30.

<sup>21</sup> *Id.*



The same focus on other supermarket competitors exists when Whole Foods looks at new sites for stores, as it considers every significant supermarket chain in the area a potential competitor and in projecting sales at the new store, it presumes that the vast majority of its sales will come from other large supermarket chains. Wild Oats' internal documents show similar consideration of all other supermarkets when it conducts its site selection process. The parties not only appeared to consider other chains when opening new stores, but as Whole Foods' Co-President A.C. Gallo stated:

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“[E]very time [Safeway, Giant Eagle, Giant, Stop & Shop, Harris Teeter, Food Lion, and Publix] open[s] a new store or remodel[s] an existing one with better perishables and natural foods we see a hit. [...] [Shoppers that] come to us for certain special items do not have to come to us as frequently now.”<sup>22</sup>

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As much as Whole Foods' and Wild Oats' own documents showed the parties considered other supermarkets as significant competitors, the parties pointed to evidence that other supermarkets believed they competed with Whole Foods and Wild Oats. From evidence about other supermarkets routinely price-checking Whole Foods and adjusting prices as a result, to the number of new private-label organic product offerings at various supermarkets, the parties pointed to the internal business documents of other supermarkets to demonstrate that these supermarkets acted as a constraint on Whole Foods.<sup>23</sup>

### III. The Evidence Focused On by the Court

#### A. MARKET DEFINITION

In a 93-page decision, district court Judge Paul Friedman analyzed a variety of evidence presented by the parties. His opinion focused extensively on the evidence concerning the proper definition of the relevant product market.<sup>24</sup> The court looked in particular at the economic evidence in concluding, “because so many people are cross-shopping for natural and organic foods and are marginal rather than core customers, the actual loss from a [small but significant and non-

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<sup>22</sup> *Id.* at 31.

<sup>23</sup> *Id.* at 29, 44-48.

<sup>24</sup> *Id.* at 14.

transitory price increase] would exceed the critical loss.”<sup>25</sup> From this finding, the court concluded that, “the relevant product market within which to evaluate the proposed transaction must be at least as broad as the retail sale of food and grocery items.”<sup>26</sup>

The court also relied on evidence presented by Dr. Scheffman concerning the effect of Whole Foods’ entry, including:

- When Whole Foods enters a market, it “generates substantial sales that are overwhelmingly captured from the local traditional or conventional supermarkets and grocery retailers regardless of whether there are other [premium natural and organic supermarkets] in the areas”<sup>27</sup>; and
- Combined Whole Foods and Wild Oats revenues after entry of Whole Foods are much greater than the revenues of the Wild Oats store prior to entry.

The court considered the evidence presented by Dr. Murphy that margins and volume in nearby Wild Oats stores decreased after Whole Foods entered. The

THE COURT IMPLICITLY ACCEPTED, FOR PURPOSES OF ANALYSIS, THAT SUCH EVIDENCE WAS CORRECT. WHERE THE COURT DISAGREED, HOWEVER, WAS WITH THE INTERPRETATION OF THAT EVIDENCE.

court implicitly accepted, for purposes of analysis, that such evidence was correct. Where the court disagreed, however, was with the interpretation of that evidence. While Dr. Murphy concluded by analogy that if Whole Foods closed a Wild Oats store that prices at the Whole Foods store would increase, the court was unwilling to make that leap. It was “unwilling to accept the assumption that the effects on Wild Oats from Whole Foods’ entries provide a mirror from

which predictions can reliably be made about the effects on Whole Foods from Wild Oats’ future exits if this transaction occurs.”<sup>28</sup>

While the opinion began with a discussion spanning about 13 pages of the economic evidence, the court then considered evidence on a variety of subjects. First, the court considered the nature of consumer demand for natural and organic products, focusing on evidence presented by the defendants’ food marketing expert as well as the deposition transcripts. The court noted that “a typical

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25 *Id.* at 19.

26 *Id.*

27 *Id.* at 20.

28 *Id.* at 21.

Whole Foods store carries all the traditional categories of products”<sup>29</sup> and Whole Foods and Wild Oats “target a large base of supermarket shoppers who shop for larger categories of food products in competition with other supermarkets.”<sup>30</sup> It cited various testimony of the parties’ employees in recognizing that they emphasize high levels of customer service and “have an emphasis on ‘social and environmental’ responsibility.”<sup>31</sup> The court pointed to Whole Foods’ internal documents indicating that it faced “eroding product differentiation,” and to evidence that Whole Foods’ supermarket competitors reacted to consumer demands for fresh, natural, and organic foods, such as by launching their own private-label store brands of natural and organic foods.<sup>32</sup>

In considering whether consumers would switch retailers in the event of a price increase, the court found evidence that “the majority of natural and organic goods sold in the United States are sold by so-called ‘conventional’ supermarkets” and that Whole Foods and Wild Oats customers cross-shop at conventional supermarkets and vice versa.<sup>33</sup>

The court recited the various evidence that showed that Whole Foods and Wild Oats competed with conventional supermarkets and vice versa. While the information as to other supermarkets’ views of Whole Foods was largely redacted, the several pages devoted to that subject show that the evidence must have been extensive and persuasive. In addition, the court cited evidence from Whole Foods’ documents and testimony, in particular:

- (i) Whole Foods’ pricing against other supermarkets and being price-checked by them, and
- (ii) Whole Foods’ consideration of every significant supermarket chain as a potential competitor when it reviews a potential store location.<sup>34</sup>

Finally, the court analyzed the parties’ actual prices and pricing strategies in rejecting the notion that Whole Foods and Wild Oats uniquely constrained each other. It pointed to evidence that:

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<sup>29</sup> *Id.* at 22.

<sup>30</sup> *Id.* at 23.

<sup>31</sup> *Id.* at 23, 28.

<sup>32</sup> *Id.* at 25.

<sup>33</sup> *Id.* at 27.

<sup>34</sup> *Id.* at 29.

- “Whole Foods does not have any specific competitive policies, practices, or strategies directed specifically at Wild Oats”;<sup>35</sup>
- Wild Oats’ prices are generally higher than Whole Foods’<sup>36</sup>; and
- The proportion of Wild Oats’ sales that might transfer to Whole Foods after a merger is a small portion of Wild Oats’ sales.<sup>37</sup>

## B. ANALYSIS OF HARM TO COMPETITION

The court then turned to an analysis of the competitive effects of the transaction, holding that the evidence overcame any presumption of anticompetitive effects.

First, the court was swayed by evidence that, “Whole Foods and Wild Oats pricing practices do not differ based on the presence or absence of the other in the area.”<sup>38</sup> Whole Foods does not have price zones or other pricing policies that depend on whether a Whole Foods store competes with a Wild Oats store. In one example, after Wild Oats closed its store, the Whole Foods store experienced no increase in margins.<sup>39</sup>

Second, in light of the evidence that Wild Oats’ prices are consistently higher, the court held that it offers no unique constraint on Whole Foods.<sup>40</sup> In fact, evidence that Whole Foods often does not price-check Wild Oats for that reason was of significant weight to the court.<sup>41</sup>

Third, the court pointed to evidence from the parties and their experts that there had been significant repositioning and entry by other retailers into premium natural and organic products and that such repositioning and entry is continuing. Going through numerous retailers’ strategies in some detail, the court concluded that there are “firms that have already proven themselves adept at repositioning and proving competitive in the premium natural and organic food field.”<sup>42</sup>

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35 *Id.* at 33.

36 *Id.*

37 *Id.* at 34.

38 *Id.* at 39.

39 *Id.* at 40.

40 *Id.*

41 *Id.* at 41.

42 *Id.* at 41-43.

As interesting as what evidence the court focused on is what evidence the court did not discuss at all. There was no mention of two fundamental pieces of evidence emphasized by the FTC.

First, the court made no mention of the various statements by Whole Foods—through its CEO and in its documents—that indicated this deal was motivated by a desire to eliminate significant competition and “avoid nasty price wars.” This is somewhat puzzling in light of the significant focus the FTC placed on this evidence. Perhaps the court accepted the argument made by Whole Foods’ counsel during the closing arguments that the CEO is very literal, believes all acquisitions reduce competition, and dislikes all of his competitors.

Second, the court did not address the FTC’s evidence that Whole Foods was planning to close stores and that such store closings were inherently anticompetitive. The court may have simply found addressing this unnecessary; once it determined the product market expanded beyond the stores of the merging parties, the mere closing of a handful of stores would not be expected to have any impact on competition.

The inevitable question raised by the *Whole Foods* decision is why was the result different than in the seemingly similar *FTC v. Staples*<sup>43</sup> matter? The simple answer is the pricing data. In *Staples*, there was evidence that Staples priced higher in markets without office superstore competition and that it set price zones based on the extent of office superstore competition.<sup>44</sup>

But, the more complicated answer is that the court in *Whole Foods* was persuaded by a range of evidence. The bulk of the opinion was not about the critical-loss analysis, nor Dr. Scheffman’s one-day pricing study. It was about how Whole Foods set its prices, who it price-checked, what its competitors were doing, what Whole Foods’ documents said about those competitors, and the like.

## IV. Evidence the Appeals Court Will Be Asked to Focus On

The Commission has appealed the district court’s opinion to the U.S. Court of Appeals for the DC Circuit. The crux of the Commission’s appeal is that the district court simply ignored evidence presented by the FTC. First, they summarized the contents of the various documents of the parties:

- characterizing Whole Foods and Wild Oats as the only two players of substance in the organic and all natural arena;

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43 970 F. Supp. 1066 (D.D.C. 1997).

44 *Id.* at 1078.

- suggesting that repositioning is difficult; and
- suggesting that the purpose of the merger was to eliminate competition.<sup>45</sup>

They also criticized the court's reliance on declarations of the parties, rather than these documents.<sup>46</sup> However, that criticism is too simplistic. The parties' declarations were peppered with preexisting documents that supported the declarants' statements.<sup>47</sup>

Second, they contend that the district court ignored various econometric analyses by Dr. Murphy. One was a study that showed Whole Foods cut its prices where it faced competition from Earth Fare, a regional chain of premium natural and organic supermarkets. From this, Dr. Murphy concluded something similar would occur where Wild Oats entered. Another was a study that indicated that Whole Foods only marginally lowered its prices in response to market entry by Safeway Lifestyle in Boulder, Colorado, but dramatically lowered prices in anticipation of Wild Oats' entry. The judge had excluded the latter study as untimely.<sup>48</sup>

Finally, the FTC argues that the expert evidence the district court relied on was flawed.<sup>49</sup> Here, they focus on Dr. Scheffman's testimony. They note that the district court "entirely failed, for example, to address Dr. Scheffman's admission that *he had made no effort to calculate 'actual loss'.*" (emphasis added)<sup>50</sup> They also deny any basis for Dr. Scheffman's assumption of the fact that "cross shopping" meant that consumers would readily switch to conventional grocery stores in the event of a price increase. They pointed to a document indicating that consumers shop at different stores for different products.

As of the time of this article, Whole Foods and Wild Oats had not filed a brief in response, but they will no doubt argue that the judge examined the evidence properly. They will focus on the fact that the court cited the parties' documents as well as declarations containing those documents numerous times. They will note that those documents are consistent with actions of the parties that the

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45 See Proof Brief for Appellant Federal Trade Commission at 7-13, *FTC v. Whole Foods Mkt., Inc.*, No. 07-5276 (D.C. Cir. Jan. 14, 2008) [hereinafter Appellant Proof Brief].

46 *Id.* at 13.

47 See Paul H. Friedman & Gorav Gindal, *Federal Trade Commission v. Whole Foods Market, Inc. — A View From the Dugout*, 8 *THE THRESHOLD* 3, 3 (Fall 2007) [hereinafter *A View From the Dugout*], available at [http://www.dechert.com/library/Friedman and Jindal Fall 2007 - FTC - Whole Foods.pdf](http://www.dechert.com/library/Friedman%20and%20Jindal%20Fall%202007%20-%20FTC%20-%20Whole%20Foods.pdf).

48 Appellant Proof Brief, *supra* note 45, at 45-48.

49 *Id.* at 52.

50 *Id.*

court placed great weight on (e.g., that Whole Foods price-checked other stores, but did not price-check Wild Oats, and that Whole Foods examined all competitors in considering new store locations). The parties will point to the fact that the court considered Dr. Murphy’s primary analyses, but found that the analogy he tried to draw did not hold. They may well note that the FTC did not even attempt to cross-examine the industry expert, Dr. Stanton, nor did it make reference in its brief to his testimony which is cited some fifty-five times in the district court opinion.<sup>51</sup> And, they will likely note that some of Dr. Scheffman’s assumptions were supported by the expert industry testimony of Dr. Stanton.

One cannot predict how the U.S. Court of Appeals for the DC Circuit will rule in this matter. However, several conclusions about the role of the evidence can be drawn from this case. First, it should come as no surprise to anyone who has ever worked on either side of a merger investigation that the documents rarely support one view uniformly. For every document the FTC points to that suggests the parties focus most intensely on each other, the parties have a document from which one can draw the conclusion that the traditional supermarkets’ efforts to sell more organic and natural produce are of great concern to the parties.

Second, the expert reports played a fairly important role in this case and the court’s opinion, but it would be incorrect to characterize this case as a war of the experts. The documents and parties’ testimony played an equally large part, and in fact accounted for a larger portion of the district court’s opinion.

Finally, what is clear is that there is no “real evidence” in this case. There is no single piece of evidence that stands above the rest, no “magic bullet” expert testimony, no “smoking gun” statement by the parties’ CEOs. Instead, there is a variety of evidence that is probative on the salient issues of the case and it is how one feels about the bulk of that evidence that determines the outcome. The Commission felt it supported a challenge; the district court did not. How the court of appeals will assess the evidence remains to be seen. ▼

WHAT IS CLEAR IS THAT THERE IS NO “REAL EVIDENCE” IN THIS CASE. THERE IS NO SINGLE PIECE OF EVIDENCE THAT STANDS ABOVE THE REST, NO “MAGIC BULLET” EXPERT TESTIMONY, NO “SMOKING GUN” STATEMENT BY THE PARTIES’ CEOs

51 *A View From the Dugout*, *supra* note 47, at 7, n.8; see also *Whole Foods*, 502 F. Supp. 2d 1.