

Too Hot to Handle: Internal Party Documents in *Whole Foods* And Other Modern Merger Challenges

Darren S. Tucker & Kevin L. Yingling

Documents are an essential part of any government merger investigation or trial. Indeed, the significance of documents in antitrust cases is underscored by the primacy that 4(c) documents are given by antitrust regulators during the initial Hart-Scott-Rodino waiting period and the substantial document requests accompanying a second request investigation. Some antitrust practitioners likely recall the days of searching through company warehouses to respond to a government subpoena or request for documents. Today, although the initial searches are more likely performed by information technology personnel, the volume of documentary material has expanded almost exponentially. The costs and burdens of analyzing these materials for both the merging parties and the government have always been substantial and only appear to be increasing, although some recent reforms have been beneficial. With all of the time and money expended on producing and reviewing documents, it seems only reasonable to wonder what exactly will be proved with all of this paper. Of course, the critical question is what the courts make of all this.

In the recent *Whole Foods* preliminary injunction hearing, documentary evidence played a particularly prominent role in the government's case. The FTC relied on a large number of documents, including several with colorful statements from Whole Foods' CEO John Mackey. The court nevertheless disregarded most of the FTC's documentary evidence without explanation, leaving practitioners to wonder what role, if any, documents can play in merger challenges.

Types of Business Documents

Broadly speaking, there are two categories of documents at issue in a government merger challenge: ordinary course of business documents and merger-related documents. Ordinary course of business documents can be thought to exist along a continuum from transactional documents to subjective analytical materials. Important merger-related documents are almost exclusively subjective because they are predictive in nature. The antitrust agencies can obtain all of these types of documents through a combination of the Hart-Scott-Rodino filing, voluntary requests, administrative subpoenas, and, if the case goes to trial, requests for production under Federal Rule of Civil Procedure 34.

Documentary evidence assists antitrust investigators in formulating their overall view of competition in the marketplace and can play a significant part in their decision whether to sue to block a merger. Courts have also relied on the internal documents of merging parties to help determine if a merger violates Section 7 of the Clayton Act. However, judges in the past two decades generally have shown greater skepticism toward certain kinds of documents and have avoided basing decisions on them.

■ **Darren S. Tucker and Kevin L. Yingling** are attorneys at O'Melveny & Myers LLP in Washington, D.C. Darren Tucker is a member of the editorial board of The Antitrust Source. O'Melveny represented third-party intervenors Wal-Mart and Trader Joe's in the *Whole Foods* preliminary injunction action discussed in this article. The views expressed in this article are those of the authors and not of O'Melveny & Myers LLP or any of its clients.

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Business Records. There appears to be nearly universal acceptance that transactional and other quantitative business records are useful in proving or disproving that a merger may substantially lessen competition.¹ Even commentators who have expressed skepticism about the merits of relying on other types of documents in merger review acknowledge the importance of business records in understanding the relevant antitrust market and potential competitive effects.² Examples of these this types of documents include win/loss reports, customer lists, pricing records, sales records, responses to requests for proposals, and sales contracts. These documents reflect the competitive significance of the company in selling its products and may indicate other competitors in the market and the extent of competition between the merging firms. The data points from these documents may be incorporated by economists into merger models to predict the likely competitive effects of a transaction. Although the information in these documents is likely to be reliable, it is not infallible.³ After all, they were created by humans.

Analytical Ordinary Course of Business Documents. Courts and regulators have also frequently relied on more subjective documents drafted by the merging parties in the ordinary course of business because they are written in response to the day-to-day workings of the marketplace, not with an eye toward gaining regulatory approval of a merger.

Analytical business documents have played a significant role in several merger cases premised on unilateral effects theories. In *FTC v. Staples*, the court relied heavily on ordinary course of business documents that showed competition was most robust among office supply superstores and not other retail formats.⁴ The district judge found that in “document after document, the parties refer to, discuss, and make business decisions based upon the assumption that ‘competition’ refers to other office superstores only.”⁵ In *FTC v. Swedish Match*, the court rejected outright the conflicting testimony from the FTC’s and the defendants’ expert economists about the relevant market.⁶ Instead, the judge turned, in part, to the “internal documents of Swedish Match and National,” which showed that “price-based substitution between loose leaf and moist

¹ See, e.g., *United States v. Syufy Enters.*, 903 F.2d 659, 669–70 (9th Cir. 1990) (“The documentary evidence bears out this testimony. Syufy has at all times paid license fees far in excess of the national average”); *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1166–67 (N.D. Ca. 2004) (discussing quarterly “win/loss analysis” documents and stating that “these documents arguably negate a showing of localized competition between Oracle and PeopleSoft more than they support such a finding.”); *United States v. SunGard Data Sys., Inc.*, 172 F. Supp. 2d 172, 188 (D.D.C. 2001) (citing to defendants’ data regarding substantial losses to products outside the government’s proposed relevant market); *FTC v. Freeman Hosp.*, 911 F. Supp. 1213, 1225 (W.D. Mo. 1995) (finding the acquired hospital Oak Hill “less competitively significant” because “[a]ccording to internal monthly operating statistics regularly compiled by Freeman and Oak Hill, . . . Oak Hill’s private pay percentage of its patient census has steadily declined”); *United States v. Baker Hughes Inc.*, 731 F. Supp. 3, 9 (D.D.C. 1990) (discussing internal analysis of bid results), *aff’d*, 908 F.2d 981 (D.C. Cir. 1990); *United States v. Ivaco, Inc.*, 704 F. Supp. 1409, 1415 (W.D. Mich. 1989) (“Internal corporate documents disclosed substantial and continuous price competition . . . indicating that the firms’ pricing policies were responsive to their competitors’ behavior.”).

² See John Harkrider, *Proving Anticompetitive Impact: Moving Past Merger Guidelines Presumptions*, 2005 Col. Bus. L. Rev. 317, 343 (2005) (“In making this argument [against using documents written by low-level management or salespeople], I wish to exclude transactional documents such as sales call reports. These documents frequently include valuable data concerning how firms respond to competition and can provide valuable input to bidding models and natural experiments.”).

³ INTERNATIONAL COMPETITION NETWORK, MERGER WORKING GROUP, INVESTIGATIVE TECHNIQUES SUBGROUP, A PRIVATE SECTOR PERSPECTIVE ON TOOLS AND TECHNIQUES USED IN MERGER INVESTIGATIONS 12 (2004) (“Even the ‘raw data’ from documents may not be quite as objective and useful as one might think.”).

⁴ *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997).

⁵ *Id.* at 1079.

⁶ *FTC v. Swedish Match*, 131 F. Supp. 2d 151 (D.D.C. 2000).

snuff is generally lacking.”⁷ The court held that the market was limited to loose leaf chewing tobacco. Throughout its opinion, the court cited several contemporaneous documents created by the parties, including market surveys and internal presentations and memoranda, as well as public SEC filings and annual reports.

Analytical business documents have also been featured in coordinated effects cases. For example, the district judge in *FTC v. Cardinal Health* listed the merging companies’ internal documents as one of three reasons for finding collusive anticompetitive effects likely after the merger.⁸ During the trial, the Commission offered “internal documents from each of the Defendants discussing the existence of excess capacity in the market and its adverse effects on Defendants’ sell margins.”⁹ These internal documents included market analyses and strategy documents as well as documents evaluating the proposed mergers in the industry.

Reliance on ordinary course documents is not limited to the government. Defendants have also prevailed against the government by pointing to these documents. Most recently, in *FTC v. Foster* the district court relied, in part, on the companies’ internal documents in finding that there were a number of other competitors in the market.¹⁰ The court also found that the merging firms’ “business records . . . confirm that barriers to entering the northern New Mexico market do not place other firms at a significant competitive disadvantage.”¹¹ In *United States v. SunGard*, the court relied on internal company documents stating that internal solutions, which the government sought to exclude from the relevant product market, were a competitive alternative.¹² The judge discounted the government’s evidence from the defendants’ business documents as ambiguous and insufficient to satisfy its burden of proof.¹³

Although documents created in the ordinary course of business provide an attractive source of information on the marketplace, there are several difficulties that may cause these documents to be unreliable. One is that the business people who create these documents are not antitrust economists or attorneys and are, therefore, likely to describe conduct and outcomes in ways that are not cognizable in a merger analysis. This problem is particularly nettlesome because business people often use terminology similar to antitrust parlance (e.g., market, entry barriers, dominance), but without the same legal meaning. Indeed, as commentators have admonished numerous times (and the antitrust agencies explicitly recognize), business people often use the term

⁷ *Id.* at 162.

⁸ *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 63 (D.D.C. 1998) (“The FTC at trial showed, through Defendants’ own internal documents and public statements, that they perceived that the excess capacity currently in the marketplace was the primary factor fueling so called ‘irrational’ pricing.”).

⁹ *Id.*

¹⁰ *FTC v. Foster*, No. CIV 07-352, 2007 WL 1793441 (D.N.M. May 29, 2007).

¹¹ *Id.* at *24.

¹² *United States v. SunGard Data Sys., Inc.*, 172 F. Supp. 2d 172, 187–88 (D.D.C. 2001) (quoting a SunGard document that stated “Our primary competitor across all product lines is the Internal Solution” and a Comdisco document that claimed “Our largest competitor remains the internal solution.”).

¹³ *See id.* at 189 (“Although plaintiff points to several documents . . . to argue that the cost of an internal hot site is exponentially higher than that of shared hot site services, some of these exhibits do not differentiate between internal high availability and an internal hot site.”). In discussing a SunGard document (Exhibit 58) that stated that internal solutions were more expensive than shared hot sites “by a factor between 5 and 15,” the court held that “the government’s reliance on its Exhibit 58 is insufficient evidence.” *Id.*

“market” for business segments that are not antitrust markets.¹⁴ More fundamental is the problem that the authors of these documents may simply be wrong in their analysis.¹⁵

Merger-Related Documents. Merger-related documents are created by companies in connection with a specific transaction and would not have otherwise been prepared. High-level merger evaluation documents are typically provided to the agencies with the pre-merger notification filing. These documents are the agencies’ first look at the companies’ internal thinking and may, therefore, disproportionately color their view of the transaction.¹⁶

The most controversial use of parties’ internal merger documents is reliance on so-called hot or intent documents. As defined by the FTC, a hot document is one that “predicts that the merger will produce an adverse price or non-price effect on competition.”¹⁷ Intent documents “disclose the purpose or intent of the acquiring or acquired firm in effecting a merger.”¹⁸

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Over-reliance on this type of evidence by investigators and judges is properly criticized on several fronts. First, these documents may reflect merely business bravado rather than a calculated assessment of the post-merger market place. The leading antitrust treatise has questioned the weight that should be given to statements that “may have been made by an overly exuberant acquisition proponent within the firm who had little or nothing to go on.”¹⁹ Second, the statements may have been written by lower-level employees with no decision-making authority for the company. Finally, the language itself may be ambiguous or not relevant to the market at issue. Courts should, therefore, carefully probe for these concerns before crediting hot or intent documents.

Nevertheless, thoughtful, reasoned, and unambiguous predictions about the anticompetitive effects of a merger by high-level decision makers are entitled to some weight. Areeda’s treatise states that “evidence of anticompetitive intent cannot be disregarded, as it is clearly pertinent to the basic issue in any horizontal merger case.”²⁰ One practitioner asserts that a “form of credible evidence is high-level strategic documents predicting the merger’s impact on competition. An Item 4(c) document stating that the purpose of the transaction is to eliminate a competitor and increase price is highly probative.”²¹ Even commentators who are hostile to most documentary evidence have “hastened to note that evidence of corporate managers’ beliefs, intentions, perceptions or motivations regarding their line of business could be relevant, as a legal matter, to merger analysis.”²² The defendants’ economic expert in *Whole Foods*, while serving at the FTC,

¹⁴ U.S. Dep’t of Justice & Federal Trade Comm’n, Commentary on the Horizontal Merger Guidelines 11 (2006) (“The Agencies are careful, however, not to assume that a ‘market’ identified for business purposes is the same as a relevant market defined in the context of a merger analysis.”), available at <http://www.usdoj.gov/atr/public/guidelines/215247.htm>.

¹⁵ Geoffrey A. Manne & E. Marcellus Williamson, *Hot Docs vs. Cold Economics: The Use and Misuse of Business Documents in Antitrust Enforcement and Adjudication*, 47 ARIZ. L. REV. 609, 619–20 (2005) (“Business people are boundedly rational. They make mistakes; they focus on idiosyncratic things; they are limited in their capacity to collect and process information; and they take actions knowing that they do not have perfect information and that the decision is risky.”).

¹⁶ See Scott A. Sher, *Documents Kill: The Importance of a Company’s Everyday Business Documents in the Antitrust Merger Review Process*, MERGERS & ACQUISITIONS ADVISOR 6 (Feb. 2002) (“The antitrust agencies attribute great significance to Item 4(c) documents; in fact, these documents provide the agencies with the only true ‘inside’ look at a merger during the initial review process—all other information available to the government is found within the public domain.”).

¹⁷ Federal Trade Comm’n, Horizontal Merger Investigation Data, Fiscal Years 1996–2005 at 5 n.18 (2007).

¹⁸ 4A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 964a (2d ed. 2006).

¹⁹ *Id.* ¶ 964c.

²⁰ *Id.* ¶ 964a.

²¹ Harkrider, *supra* note 2, at 336–37.

²² Manne & Williamson, *supra* note 15, at 650.

recognized that in “some cases, there are ‘hot’ documents that indicate that the authors of the documents see an anticompetitive potential in the proposed transaction. Of course, such documents can be extremely important in merger investigations and in litigation.”²³

In analyzing purportedly hot documents, the courts have been quick to dispense with unreliable statements. In *United States v. Baker Hughes*, the district court dismissed in a footnote the government’s hot document, which predicted the merger would permit the acquirer to “‘manipulate the market more effectively’ and gain ‘more flexibility in price setting,’” by finding that the document related to a geographic market not at issue in the litigation.²⁴ Likewise, in finding for the FTC, the court of appeals in *FTC v. University Health* explicitly did not rely on a document that claimed that the merger would “[r]educe competition.”²⁵ The judge in *United States v. Oracle* sardonically dismissed as mere “spice”²⁶ the Justice Department’s reliance on a 2002 report by Oracle’s Co-President when he was an analyst with Morgan Stanley that stated “the back office applications market for global companies is dominated by an oligopoly comprised of SAP, PeopleSoft, and Oracle.”²⁷ Although this was not a merger-related document, it does illustrate the courts’ suspicion toward provocative documents generally.

In most other modern cases, the courts ignore the government’s anticompetitive intent documents, even when the government wins. For instance, the opinions in *Staples* and *Swedish Match* both fail to make any mention of the hot or motive documents cited by the FTC. In *Heinz*, the circuit court made only an oblique reference to anticompetitive merger documents, while the district court does not mention the evidence at all.²⁸

Regulators appear to place greater weight on merger hot documents than the courts. Between the FTC’s fiscal years 1996–2005, the FTC challenged 88 percent of mergers where the investigation found hot documents.²⁹ This compared with an enforcement rate of 64 percent in investigations with no hot documents.³⁰ Although the presence of hot documents is not as significant as complaining customers or high concentration, they do raise the risk of an agency challenge by a non-trivial amount.

Moreover, the FTC and the DOJ have frequently highlighted provocative documents in their efforts to enjoin a transaction. In *Staples*, the FTC wrote in its court filings that “eliminating competition is a primary motivation for the deal” before citing to several confidential Staples’ documents allegedly showing anticompetitive motive.³¹ In suing to block the acquisition of Intuit by

²³ David Scheffman, Dir. FTC Bureau of Econ., Sources of Information and Evidence in Merger Investigations, Address Before the Association of the Bar of the City of New York (June 14, 2002), available at <http://www.ftc.gov/speeches/other/scheffmanabanybar.pdf>.

²⁴ *United States v. Baker Hughes Inc.*, 731 F. Supp. 3, 12 n.8 (D.D.C. 1990), *aff’d*, 908 F.2d 981 (D.C. Cir. 1990).

²⁵ *FTC v. University Health, Inc.*, 938 F.2d 1206, 1220 n.27 (11th Cir. 1991). The district court had found the document ambiguous. *See id.*

²⁶ *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1125 (N.D. Cal. 2004) (noting there were a “plethora of exhibits” with “some of these . . . for spice (e.g., Ex P2290)”).

²⁷ Plaintiffs’ Proposed Findings of Fact at 47, 84, *United States v. Oracle Corp.*, No. C04-0807 (N.D. Cal. July 8, 2004) (citing plaintiffs’ document P2290).

²⁸ *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 717 (D.C. Cir. 2001) (“Heinz’s own documents recognize the wholesale competition and anticipate that the merger will end it.”), *rev’g* 116 F. Supp. 2d 190 (D.D.C. 2000).

²⁹ Federal Trade Comm’n, Horizontal Merger Investigation Data, Fiscal Years 1996–2005 tbl. 5.1 (2007) (22 of 25 matters).

³⁰ *Id.* tbl. 5.2 (95 of 149 matters).

³¹ Plaintiff’s Memorandum of Points and Authorities in Support of Motions for Temporary Restraining Order and Preliminary Injunction at 13, *FTC v. Staples, Inc.*, No. 97-0701 (D.D.C. filed Apr. 10, 1997). The brief also argued that “[a]nticompetitive motive as shown here [in these Staples’ documents] is highly probative of the likely effect of the proposed merger on competition.” *Id.* at 13 n.13.

Microsoft in the personal finance software market, the DOJ quoted from a memorandum written by Intuit's Chairman that the merger would "eliminat[e] 'a bloody share war'" and "'enrich[] the terms of trade we can negotiate with [customers].'"³² The DOJ also cited in its complaint a document from a Microsoft manager stating that without the merger, customers "'are in a stronger position to play us off against each other. As a combination, we would be dominant.'"³³ In *United States v. First Data*, the complaint alleged that "[a]n internal merger planning document acknowledged the likely effect of First Data's acquisition of Concord on pricing . . . : the '[c]ombination of [the merging parties] allows FDC [First Data Corp.] more leeway to set market pricing.'"³⁴ Most recently, as discussed below, the FTC relied to a significant degree on several hot documents in its case against the Whole Foods merger.

The Commission has also relied on hot documents in administrative adjudication. Recently, the FTC Commissioners found in *Evanston Northwestern Healthcare Corp.* that the documentary evidence, as well as econometric analysis, demonstrated that price increases after the merger were attributable to the consummated merger.³⁵ In pre-merger documents, records from board meetings between the merging parties' board members and medical staff leaders state that Evanston representatives saw the merger as a chance to not "'compete with self' in covered zip codes (e.g., 60% to 70% market shares)."³⁶ The President and CEO of Highland Park wrote: "Everybody progresses to see the community benefit that would be derived as well as the economic benefit of not being out there doing battle with one another in what will be a common battle ground if you want to call it that."³⁷

The Commissioners found that the "documents are probative because they reflect the merging parties' unvarnished contemporaneous analyses of the parties' market positions by their most senior officials. The statements are not simple bravado or unsubstantiated hyperbole from middle managers or sales representatives."³⁸ The FTC acknowledged that the parties' argument that intent documents do not prove a Section 7 violation was correct. However, the Commission found that the "documents are probative not because they reflect the desire of [the parties' CEOs], but because they contain the informed analysis of experienced executives about when, why, and how the transaction would enable the merged hospitals to increase prices."³⁹

³² Complaint at 3, *United States v. Microsoft Corp.*, No. 3:95-CV-01393 (N.D. Ca. Apr. 27, 1995), available at <http://www.usdoj.gov/atr/cases/f0100/0184.htm>.

³³ *Id.* at 3–4.

³⁴ Complaint at 14, *United States v. First Data Corp.*, No. 1:03CV2169 (Oct. 23, 2003), available at <http://www.usdoj.gov/atr/cases/f201400/201400.pdf>.

³⁵ *Evanston Northwestern Healthcare Corp.*, FTC Docket No. 9315 (Aug. 6, 2007) (opinion of the Commission), available at <http://www.ftc.gov/os/adjpro/d9315/070806opinion.pdf>.

³⁶ *Id.* at 65.

³⁷ *Id.* at 15. The CEO concluded by stating "it would be real tough for any of the Fortune 40 companies in this area whose CEOs either use this place [Highland Park] or that place [Evanston Hospital and Glenbrook] to walk from Evanston, Highland Park, Glenbrook and 1700 of their doctors." *Id.*

³⁸ *Id.* at 66.

³⁹ *Id.* at 66. Other Commission decisions have relied on some arguably ambiguous hot merger documents. See *Chicago Bridge & Iron Co.*, FTC Docket No. 9300 (Jan. 6, 2005) (opinion of the Commission) ("Respondents' own strategic planning documents predicted that the merged firm would 'dominate' the relevant markets."), available at <http://www.ftc.gov/os/adjpro/d9300/050106opionpublicrecorversion9300.pdf>.

The Whole Foods Case

On February 21, 2007, Whole Foods and Wild Oats entered into a merger agreement, under which Whole Foods would acquire Wild Oats. Both companies operated high-end supermarkets with an emphasis on organic and perishable products. Following a pre-merger review, the FTC filed a complaint on June 6, 2007, in the U.S. District Court for the District of Columbia alleging that Whole Foods' acquisition of Wild Oats would substantially lessen competition for premium natural and organic supermarkets in twenty-one markets.

High-level merger-related documents were at the forefront of the FTC's preliminary injunction action against Whole Foods' acquisition of Wild Oats. The companies' ordinary course of business documents also proved to be a critical battleground between the litigants in shaping the court's assessment of the relevant market and competitive effects. Even the expert economists relied substantially on internal documents in forming their opinions. Surprisingly, the district court did not mention the bulk of the FTC's documentary evidence and seemed to rely heavily on the defendants' expert to interpret the evidence.

The FTC's Use of Documentary Evidence. The FTC's complaint was notable for its many colorful quotations from Whole Foods' documents, particularly those of CEO John Mackey.⁴⁰ For example, Mackey advised a member of his board that

By buying [Wild Oats] we will . . . avoid nasty price wars in Portland (both Oregon and Maine), Boulder, Nashville, and several other cities which will harm [Whole Foods'] gross margins and profitability. By buying [Wild Oats] . . . we eliminate forever the possibility of Kroger, Super Value, or Safeway using their brand equity to launch a competing national natural/organic food chain rival to us. . . . [Wild Oats] may not be able to defeat us but they can still hurt us . . . [Wild Oats] is the only existing company that has the brand and number of stores to be a meaningful springboard for another player to get into this space. Eliminating them means eliminating this threat forever, or almost forever.⁴¹

The complaint also quoted from other Mackey documents describing the features that differentiated Whole Foods from conventional retailers and noted that conventional retailers' sales of organic products had "never hurt Whole Foods."⁴²

In its pre-trial brief, the FTC revealed that Mackey had posted anonymous messages on Internet financial message boards critical of Wild Oats. The Commission cited one posting that suggested significant head-to-head competition between Whole Foods and Wild Oats: "Whole Foods is systematically destroying their viability as a business—market by market, city by city."⁴³

Yet, for all the attention on Mackey's hot documents, the FTC actually had far more compelling documentary evidence that supported its merger analysis. The FTC offered several types of documents that suggested that premium natural and organic supermarkets were a distinct relevant

⁴⁰ The complaint was also notable for the fact that the FTC's alleged relevant product market differed from prior grocery store mergers. Instead of an all supermarkets product market, as in prior supermarket enforcement actions, here the FTC alleged a market limited to premium natural and organic supermarkets.

The FTC also deviated from its all supermarkets product market in a settled case involving the acquisition of supermarkets in Puerto Rico. Wal-Mart Stores, Inc., FTC Docket No. C-4066 (Nov. 21, 2002) (complaint), available at <http://www.ftc.gov/os/2002/11/walmartamigocomp.pdf>. In that case, the FTC alleged a product market consisting of supermarkets, supercenters, and club stores, such as Sam's Club and Costco.

⁴¹ Complaint at 1–2, FTC v. Whole Foods Market, Inc., No. 07-1021 (D.D.C. June 6, 2007), available at <http://www.ftc.gov/os/caselist/0710114/070605complaint.pdf>.

⁴² *Id.* at 9.

⁴³ Plaintiff Federal Trade Commission's Corrected Brief on Its Motion for Preliminary Injunction at 6, FTC v. Whole Foods Market, Inc., No. 07-1021 (D.D.C. Aug. 1, 2007), available at <http://www.ftc.gov/os/caselist/0710114/080107corbrief.pdf>.

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product market.⁴⁴ The Commission cited documents describing differences between stores in its alleged relevant product market from other types of supermarkets. For instance, the parties' documents described their emphasis on high-quality perishables, avoidance of products with synthetic additives, and creating a "lifestyle" retail environment. Wild Oats documents prepared in the ordinary course of business indicated that the opening of a competing premium natural and organic supermarket—particularly Whole Foods—resulted in substantially greater revenue attrition than entry by other types of supermarkets. Similarly, the FTC pointed to Whole Foods' documents indicating that the company was uniquely concerned about new store openings by Wild Oats and Earth Fare (another premium organic supermarket). The FTC also cited several documents authored by Mr. Mackey indicating his belief that traditional supermarkets, even those offering organic products, do not constrain the pricing of Whole Foods.

As evidence of its relevant geographic market, FTC relied on the defendants' site reports, which typically focused on customers within a three-to-six-mile distance of proposed new stores.

To establish unilateral competitive effects from the merger, the FTC offered a wide array of internal documents kept in the ordinary course of business by Whole Foods and Wild Oats. One group of documents indicated that in local markets where only one of the merging parties had a store, that company was viewed by both parties as having a "monopoly" and able to charge higher prices. Some company documents referred to these areas as "cash cows" and "non-competitive." Other business documents indicated that Wild Oats viewed Whole Foods as its primary competitor and that it viewed competition from natural and organic food stores as distinct from traditional grocery stores.

The FTC was also able to cite to ordinary course of business documents describing the reaction of one merging party to the entry of the other in a local market. For example, as part of its 2007 budgeting process, Wild Oats estimated that the vast majority of its revenue losses were attributable to new Whole Foods stores. According to other documents, Whole Foods and Wild Oats responded to entry by the other by cutting prices, remodeling stores, and increasing in-store services. Similar competitive reactions did not occur in response to conventional supermarkets, according to the FTC.

Wild Oats also created "Competitive Intrusion Plans" and other planning documents that suggested uniquely robust competition with Whole Foods. These exhibits described Wild Oats' strategy for competing against nearby and soon-to-be-opened Whole Foods stores, plans to open new stores, and plans to reduce prices and improve service to better compete against Whole Foods. The FTC asserted that no other competitor commanded this level of attention in Wild Oats' strategic documents and that these plans had begun to bear fruit by late 2006.

In addition to the bombastic statements from Whole Foods' CEO and the legion of ordinary course of business documents from both merging grocers, the FTC also relied on merger-related materials. The deal valuation workbooks, audaciously called "Project Goldmine," estimated the revenues that Whole Foods expected to capture after closing each Wild Oats store.⁴⁵ The FTC

⁴⁴ Given that the FTC was seeking to prove a unilateral effects theory of competitive harm, there was substantial overlap in the documents it presented to prove the relevant product market and competitive effects.

⁴⁵ The FTC indicated in its post-trial brief that the Goldmine estimate exceeded 33% and that other documents estimated at least a 45% revenue capture rate. The Goldmine documents indicated that these diversions could be largely maintained for over ten years. *See* Plaintiff Federal Trade Commission's Proposed Findings of Fact ¶ 334, *FTC v. Whole Foods Market, Inc.*, No. 07-1021 (Aug. 3, 2007). On Whole Foods' Web site, John Mackey claims that this capture rate may be as high as 50%. John Mackey's Blog: Whole Foods Market, Wild Oats, and The Federal Trade Commission, http://www.wholefoodsmarket.com/blogs/jm/archives/2007/06/whole_foods_mark.html (last visited

argued that these diversion estimates were high enough to establish that the two stores were in their own product market.

Whole Foods' Response.

1. REASONS TO DISCOUNT THE FTC'S DOCUMENTARY EVIDENCE. The defendants asserted that the FTC's documentary evidence had little bearing on the relevant issues. They argued that documents indicating a company official's intent, such as the "nasty price wars" document, are not reliable evidence on which to gauge the competitive effects of a merger. While agreeing that "[b]usiness documents revealing the parties' and their competitors' actions in the marketplace can significantly inform the antitrust analysis of a merger," the defendants pointed to the D.C. Circuit's *Baker Hughes* decision and Areeda's treatise as authority that subjective, predictive testimony by company official should be given little, if any, weight.⁴⁶ Intent evidence is unreliable, claimed the defendants, because company officials are not familiar with all of the workings of the marketplace (or even their own company), the officials may boast or exaggerate their intentions, and such statements can be easily misinterpreted.

The Project Goldmine and Competitive Intrusion documents, argued the defendants, had no relevance to product market definition. Rather, the documents indicated only that shoppers at either Wild Oats or Whole Foods tended to regard the other store as their next best substitute. According to the defendants, the FTC was masquerading a unilateral effects analysis as a product market analysis, and the documents gave no indication of what customers would do in response to a SSNIP by the merged company. These documents, like the Mackey statements, were nothing more than a "side show."⁴⁷

Finally, the defendants argued that the "cash cow" and similar documents were selective excerpts from the defendants' documents and were unreliable. Quoting from Areeda, the defendants explained that "a businessperson often uses colorful and combative vocabulary far removed from the lawyer's linguistic niceties."⁴⁸ Reliance on a small number of colorful documents was not a substitute for conducting a proper econometric analysis.

2. THE DEFENDANTS' DOCUMENTARY EVIDENCE. The defendants also relied on documentary evidence—albeit to a lesser degree than the FTC—to support their case. Defendants pointed in particular to ordinary course of business documents indicating company officials' concerns regarding competition from conventional supermarkets. Whole Foods was particularly concerned about traditional supermarkets, such as Safeway and Delhaize, remodeling and repositioning their stores and offering more perishables and natural foods. Whole Foods also pointed to contemporaneous documents indicating that Whole Foods and traditional supermarkets cross-check their prices. In addition, defendants offered market research studies conducted in the ordinary course of business showing widespread cross-shopping, i.e., the same consumers who shop at Whole Foods and Wild Oats also shop at traditional supermarkets and frequently purchase the same types of products.

Sept. 26, 2007) ("[W]e believe approximately 50% of the volume their store does will transfer to our store, with the other 50% migrating to our other competitors (these estimates are based on our past experience with similar situations).")

⁴⁶ Joint Memorandum of Points and Authorities of Whole Foods Market, Inc. and Wild Oats Markets, Inc. in Opposition to Motion for a Preliminary Injunction at 68–69, *FTC v. Whole Foods Market, Inc.*, No. 07-1021 (D.D.C. July 20, 2007).

⁴⁷ Transcript of Motion Hearing at 18, 21–22 (Volume II), *FTC v. Whole Foods Market, Inc.*, No. 07-1021 (D.D.C. Aug. 1, 2007).

⁴⁸ Joint Reply Memorandum of Points and Authorities of Whole Foods Market, Inc. and Wild Oats Markets, Inc. in Opposition to Motion for a Preliminary Injunction at 9, *FTC v. Whole Foods Market, Inc.*, No. 07-1021 (D.D.C. Aug. 1, 2007) (quoting 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* § 1506 (2d ed. 2003)).

Defendants, like the FTC, claimed that site analyses could help determine the geographic market. Whole Foods' claimed that these documents did not support the FTC's one-size-fits-all approach, but rather indicated that the reach of each Whole Foods store varied based on a number of different factors and was far from uniform.⁴⁹

The Decision and Appeal. On August 16, 2007, the district court denied the FTC's request for a preliminary injunction.⁵⁰ In reaching its decision, the court relied heavily on the testimony of the defendants' economist, David Scheffman, as well as declarations submitted by the defendants. The opinion largely ignored the company documents cited by the FTC, including the Mackey documents trumpeted in the FTC's complaint and briefs.

On August 17, 2007, the FTC filed an emergency motion for an injunction pending appeal from the Court of Appeals for the D.C. Circuit. In its brief, the FTC explained that the district court had "utterly ignored the bulk of the Commission's case, including clear and authoritative statements by the principals that the rationale for the transaction is to eliminate competition."⁵¹ The Commission argued that it was reversible error to assign "no weight to contemporaneous, high-level statements and strategic documents authored by senior executives, describing their view of the market realities and of the effect of the merger."⁵²

On August 23, 2007, the court of appeals denied the FTC's motion, explaining: "Although the FTC has raised some questions about the district court's decision, it has failed to make a 'strong showing that it is likely to prevail on the merits of its appeal.' The FTC must show that the district court, in denying the preliminary injunction, abused its discretion by making clearly erroneous factual findings or errors of law. At this stage, the FTC has failed to meet that burden."⁵³ With the injunction dissolved, the parties closed the transaction on August 28, 2007.

Analysis of the Whole Foods Decision. As noted, the FTC's documentary evidence received virtually no attention in the district court's opinion. Nowhere does the opinion discuss or even mention the "nasty price wars" document, Mackey's Internet postings, the "cash cow" documents, or the Competitive Intrusion documents. Given that these documents constituted a primary source of the FTC's evidence on market definition and competitive effects, the court's failure even to acknowledge them is surprising and a significant shortcoming in the court's analysis. The FTC was undoubtedly correct that the court had "ignored the bulk of the Commission's case."

There are several possible reasons why the court disregarded nearly all of the FTC's documentary evidence. One possible explanation is that the court viewed documentary evidence in a merger case as generally irrelevant or not sufficiently probative. Support for this interpretation is found in the court's substantial reliance on the testimony of defendants' expert economist and declarations by the defendants' officers to define the product market and analyze the competitive effects.

This reading of the case, however, discounts a number of considerations. First, the district court's opinion states several times that documentary evidence is relevant. The judge wrote that

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⁴⁹ Joint Reply Memorandum of Points and Authorities of Whole Foods Market, Inc. and Wild Oats Markets, Inc. in Opposition to Motion for a Preliminary Injunction at 18–19, FTC v. Whole Foods Market, Inc., No. 07-1021 (D.D.C. Aug. 1, 2007).

⁵⁰ For a summary of the district court's opinion, see Carlton Varner & Heather Cooper, *Product Markets in Merger Cases: The Whole Foods Decision*, ANTITRUST SOURCE, Oct. 2007, <http://www.abanet.org/antitrust/at-source/07/10/Oct07-Varner.pdf>.

⁵¹ Emergency Motion for the Federal Trade Commission for an Injunction Pending Trial at 2, FTC v. Whole Foods Market, Inc., No. 07-5276 (Aug. 17, 2007), available at <http://www.ftc.gov/os/caselist/0710114/0710114emergmot.pdf>.

⁵² *Id.* at 13 (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962)).

⁵³ Order, FTC v. Whole Foods Market, Inc., No. 07-5276 (D.C. Cir. Aug. 23, 2007) (per curiam).

the declarations submitted by the defendants “are entitled to little weight to the extent that they are ‘in conflict with contemporaneous documents.’”⁵⁴ Second, the court noted the importance of *Brown Shoe’s* “practical indicia”⁵⁵ to help courts “ensure that the market definition comports with business reality.”⁵⁶ Third, and most important, the court did, in fact, rely on a number of documents, particularly for market definition. The court cited Whole Foods documents discussing an increase in competition from traditional supermarkets, the prevalence of cross-shopping by consumers at other supermarkets, and the impact of conventional supermarkets when opening a new store. Perhaps most significant, the court relied to a substantial degree on defendants’ site location reports to determine the geographic market.

A second possible explanation for the court’s approach to documentary evidence is that the court only considered ordinary course of business documents as proper evidence. This view would account for the court’s acceptance of the defendants’ documentary evidence and rejection of the FTC’s intent evidence (since these were merger-specific) and Mackey’s Internet postings (since these were not prepared as part of his duties as CEO). There is direct support in the opinion for this interpretation. The court described several documents on which it relied as “prepared in the ordinary course of business.”⁵⁷ Other documents cited by the court—such as historical market studies, site reports, and old e-mails—also clearly fall into the category of ordinary course documents.

There are two problems with this reading of the case, however. The first is that some of the documents the court described as being prepared “in the ordinary course of business” were actually documents prepared in connection with the transaction. For example, the court relied on the merger-related Goldmine documents, which were prepared by Whole Foods’ bankers for the purpose of evaluating the Wild Oats transaction. But even putting aside the merger-related documents, we are still left with the question of why the court did not address the FTC’s other documentary evidence. The colorful Mackey documents were only a small part of the FTC’s case. The FTC also relied on dozens of ordinary course of business documents. The court’s failure to discuss these documents strongly suggests that the deciding factor was something other than whether a document was prepared in the ordinary course.

Our view is that the court’s overall treatment of documentary evidence is generally consistent with other recent merger cases. Judges have tended to ignore entirely or discount substantially intent documents submitted by the government that forecast anticompetitive effects. Instead, courts have relied on ordinary course of business documents that support their view of the economic theory of the case and discredited problematic documents that suggested the opposite result or did not otherwise fit the theory.

⁵⁴ *FTC v. Whole Foods Markets, Inc.*, No. 07-1021, slip op. at 2–3 n.4 (D.D.C. Aug. 16, 2007) (quoting *United States v. Gypsum Co.*, 333 U.S. 364, 396 (1948)). However, defendants’ declarations to the court were not tested by the crucible of cross examination at trial. *Cf. United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1139–42 (N.D. Cal. 2004) (discussing the cross examination of the government’s witness, Philip Wilmington, an EVP at PeopleSoft and finding that since he “was not aware of what PeopleSoft’s own documents reveal about Lawson as a competitor . . . the court finds Wilmington’s testimony concerning Lawson’s absence from the up-market largely incredible”). The judge in *Whole Foods* did not permit time for the examination of non-expert witnesses.

⁵⁵ *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

⁵⁶ *Whole Foods*, slip op. at 9. The court went on to conclude that these indicia did not support the FTC’s market definition. *See id.* at 61.

⁵⁷ *Id.* at 41 (“Whole Foods’ internal documents, prepared in the ordinary course of business, indicate that Whole Foods believes it faces ‘eroding product differentiation’ as other supermarkets continue to stock many of the same products that Whole Foods offers.”); *id.* at 60 (“Whole Foods created documents in the ordinary course of business documenting the proportion of Wild Oats current sales that might transfer to Whole Foods after the merger.”).

The *Whole Foods* court's failure to discuss the FTC's extensive documentary evidence (with the exception of the Goldmine documents) probably reflects the considerable time pressure facing the court more than anything else. As the court itself noted, "[t]his lawsuit has been litigated on a very fast track," with fact and expert discovery completed within forty-two days of the filing of the complaint, briefs filed within the next seven days, and a two-day hearing beginning six days later.⁵⁸ Only fifteen days after the hearing, on August 16, 2007, the court issued its ninety-three page opinion. Such a compressed schedule was needed, according to the court, "to provide the losing side . . . sufficient time to proceed promptly to the court of appeals for a decision before the consummation of the proposed merger, scheduled for August 31, 2007."⁵⁹ Typical of Section 7 hearings, the factual record was extensive.⁶⁰

Given the time pressure under which the court was operating, it appears that the court relied on the parties' economic experts to help it comb through the mountain of evidence in the case. This result is not surprising given the economic nature of merger analysis, but it was almost a foregone conclusion since the judge chose not to hear from any fact witnesses at trial. Ironically, because the economic data was not rich enough to permit sophisticated analysis, the economists for both sides relied extensively on non-quantitative evidence, including internal company documents. In the end, the court found defendants' expert Dr. Scheffman more compelling than the FTC's expert, Dr. Murphy, and, therefore, came to largely adopt Dr. Scheffman's interpretation of the documents. For example, in his critical loss analysis, Dr. Scheffman did not calculate the "actual loss" through econometric means, but estimated the actual loss by reviewing the defendants' market study documents. The court accepted Dr. Scheffman's interpretation of these documents and others.

Conclusion

Not long ago, many viewed the *Arch Coal*⁶¹ and *Oracle* decisions as portending a diminished role for customer evidence in merger litigation. Similarly, we would not be surprised to see the *Whole Foods* decision read to suggest a lesser significance for documents at trial, particularly for hot and intent documents. This view would seem to be misguided.

In the last two decades, courts have paid scant attention to motive and hot documents in merger litigation. Practitioners should take comfort in knowing that a "smoking gun" document is unlikely to be the leading cause of an enforcement action and even less likely to be a deciding factor in a judicial decision. The *Whole Foods* case reaffirms that even highly inflammatory documents will not be automatically accepted at face value by the courts. At the same time, the *Whole Foods* decision reinforces the importance of ordinary course of business documents. The court relied primarily on these documents to determine the geographic market and supported its product market and competitive effects analysis with numerous cites to the defendants' documents. Moreover, the opinion commends this type of evidence on several occasions.

The Whole Foods case reaffirms that even highly inflammatory documents will not be automatically accepted at face value by the courts. At the same time, the Whole Foods decision reinforces the importance of ordinary course of business documents.

⁵⁸ *Whole Foods*, slip op. at 2; see also *id.* at 3 ("Unfortunately, the Court, too, 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."). Another hearing for injunctive relief with similar time constraints was the *SunGard* case. See *United States v. SunGard Data Sys., Inc.*, 172 F. Supp. 2d 172, 192 n.24 (D.D.C. 2001) ("There is no question that time pressures may have prevented any thorough analysis of the many customers that will be affected by the proposed acquisition.").

⁵⁹ *Whole Foods*, slip op. at 3.

⁶⁰ The record included 35 deposition transcripts, 16 declarations, 5 expert reports, 1511 exhibits, 2 days of testimony, and closing arguments. See *id.* at 2–3.

⁶¹ *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004).

Although the *Whole Foods* court's treatment of documents in general was not that far afield from other modern merger cases, it does seem to raise the specter of a more troubling phenomenon: the willingness of courts to delegate fact finding to expert economists rather than wrestling with the diverse facts and complex theories themselves. In *Whole Foods*, the court did not even acknowledge the bulk of the FTC's documentary evidence and excluded at the outset all fact witnesses from testifying at trial. No one doubts that economics should be the animating principle in antitrust law and the important role of an economist to explain that framework at trial. Unfortunately, when confronted by burgeoning caseloads and other constraints, courts may be inclined to forgo the arduous task of independently squaring the facts with the economic theory and, instead, permit whichever economist appears more credible to sift through the evidence for them. Although this may function as a serviceable shortcut, it may reduce merger cases to simply picking the more polished expert. ●