#### **PUBLIC VERSION**

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

Dlaintier	)	No 07 60 11
Plaintiff,	) }	No. <u>07-5276</u>
<b>v.</b>	)	Appeal from the United
	)	<b>States District Court for</b>
WHOLE FOODS MARKET, INC.	)	the District of Columbia,
	)	Civ. No. 07-cv-01021-PLF
and	)	
	)	<b>EMERGENCY MOTION -</b>
	)	RULING REQUESTED
VILD OATS MARKETS, INC.,	)	BY NOON, EDT,
Defendants.	)	<u>AUGUST 20, 2007</u>
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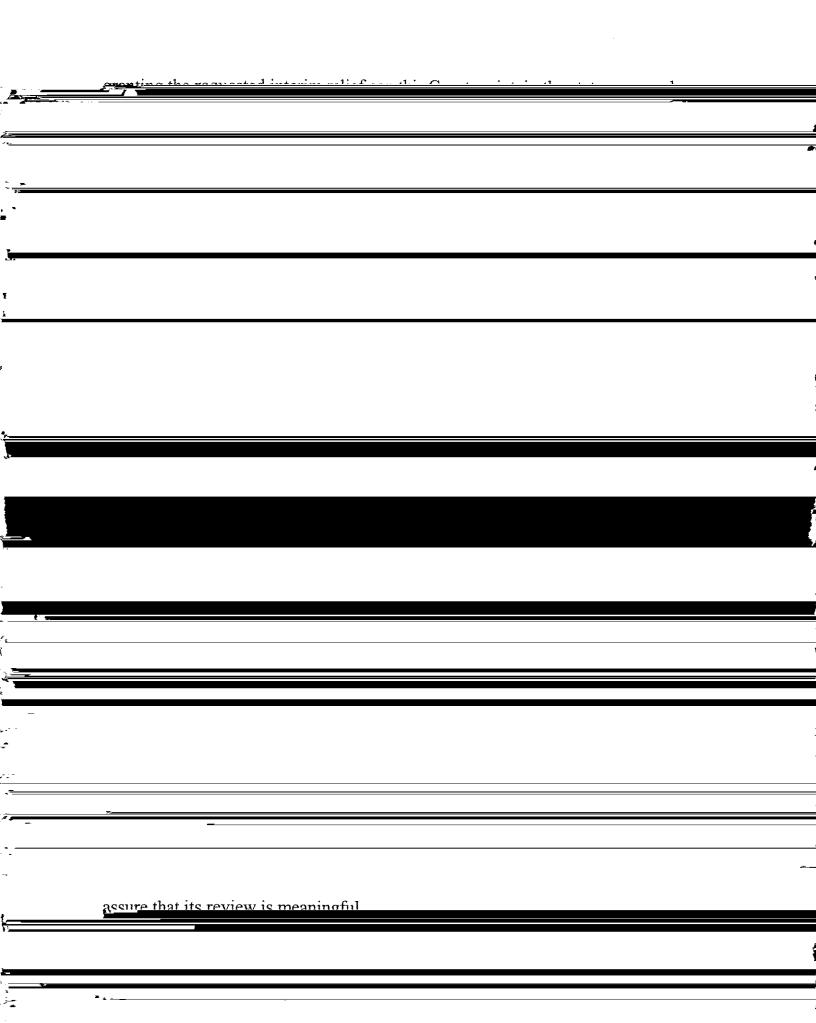
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		COMMISSION IS LIKELY TO SUCCEED ON THE MERITS OF APPEAL			
	A.	The Commission Made a Strong Showing of Entitlement to Injunctive Relief			
	В	Defendante Have Failed to Patista the Commission's Drawmative			
-		Entitlement to a Preliminary Injunction			
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## **Preliminary Statement**

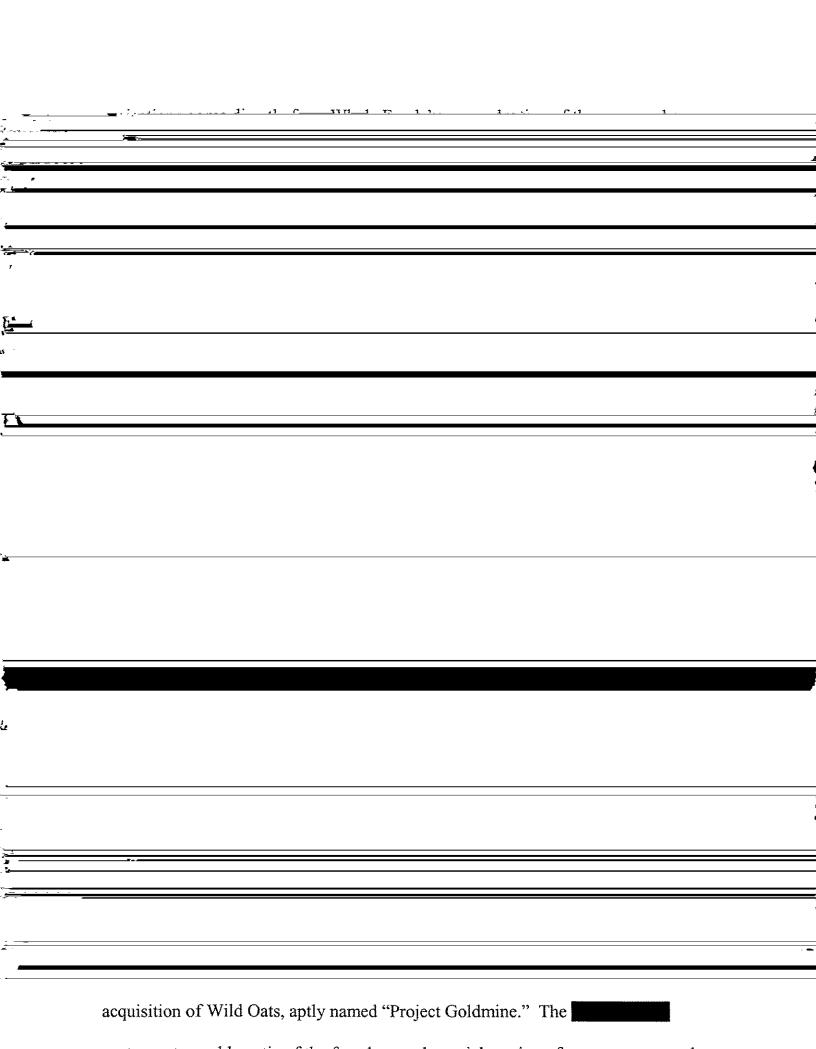
Plaintiff-appellant Federal Trade Commission ("Commission") seeks

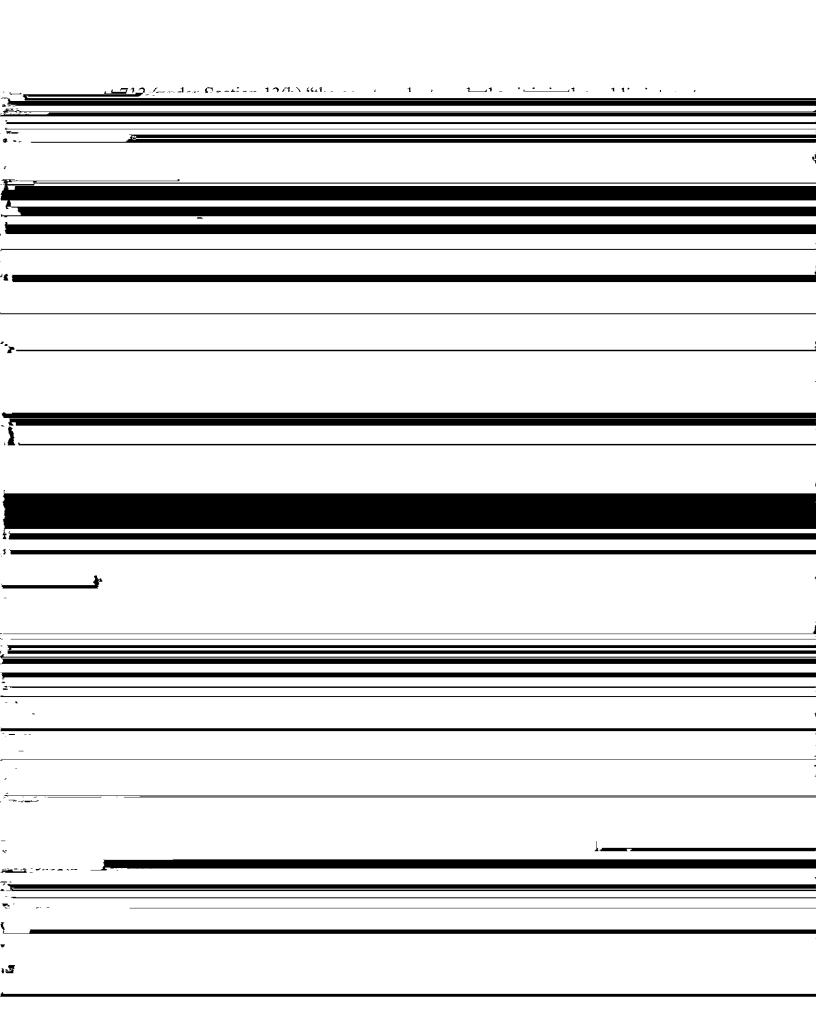
÷	emergency relief to enjoin pending appeal the acquisition by Whole Foods Market,	
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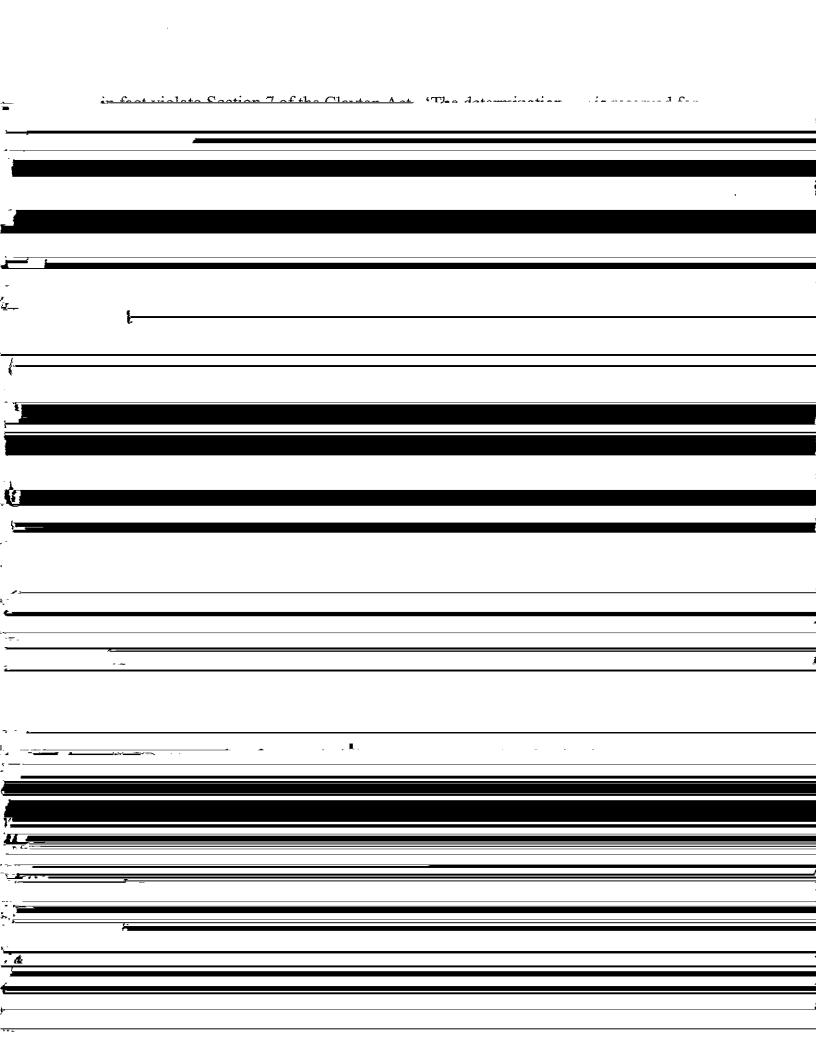


his Board of Directors, saying that by buying Wild Oats and closing a significant number of its stores Whole Foods would avoid "nasty price wars" and prevent monse from maina Wild Date on a arringhaped into the new

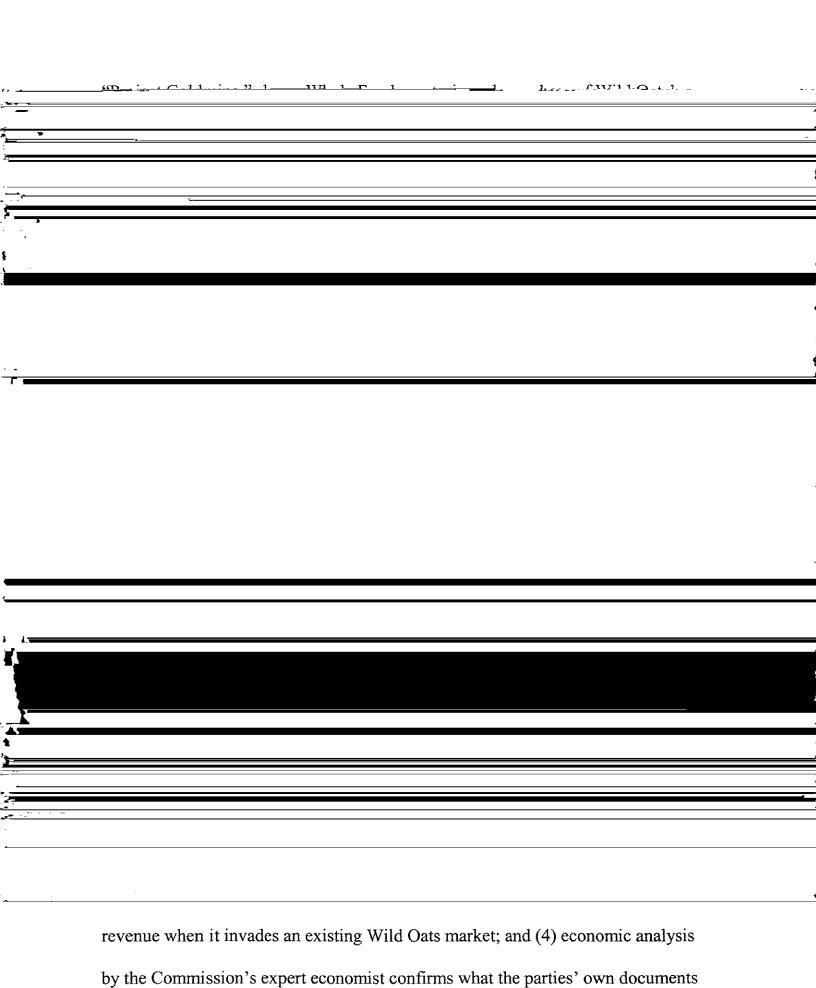
An injunction nending anneal is necessary and in the nublic interest to allow	
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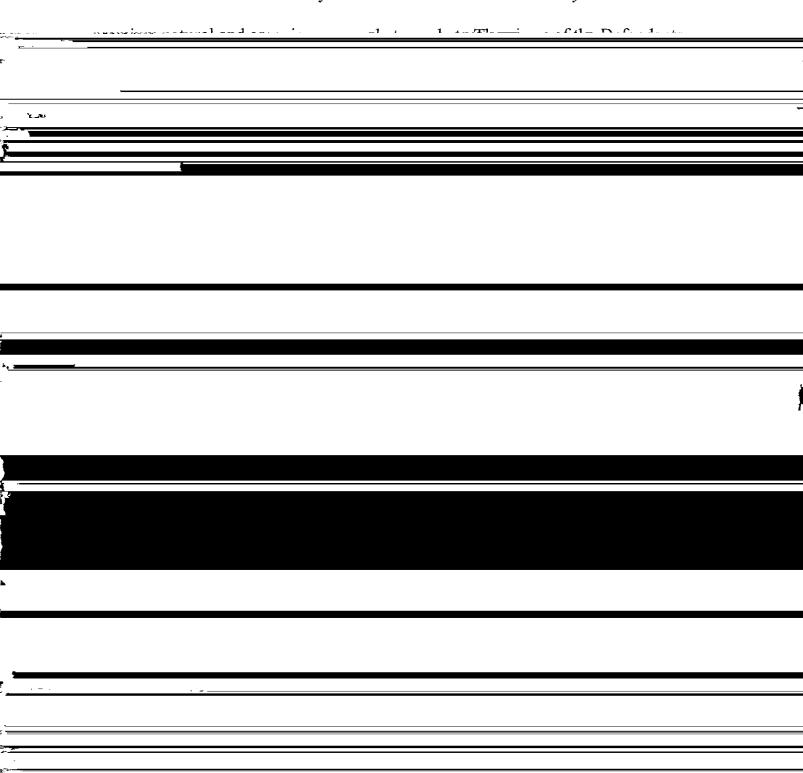


	watchers acknowledge <sup>2</sup> Whole Foods seeks a dominant position in this
	WAIGHEIX ACKTIOWICUPE WHOLE PROOF SEEKS A HOMINANI MOCHION IN THE
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1	distinctive market, by buying out its nearest competitor. In Heinz, this Court
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executive observed, "... I'd say that WFM currently has a dominant position in the marketplace ...." Exhibit 37 (PX00774); Similarly, Wild Oats called Whole Foods "the leading full-service competitor." Exhibit 39 (PX00469).

Such characterizations by the Defendants are consistent only with a



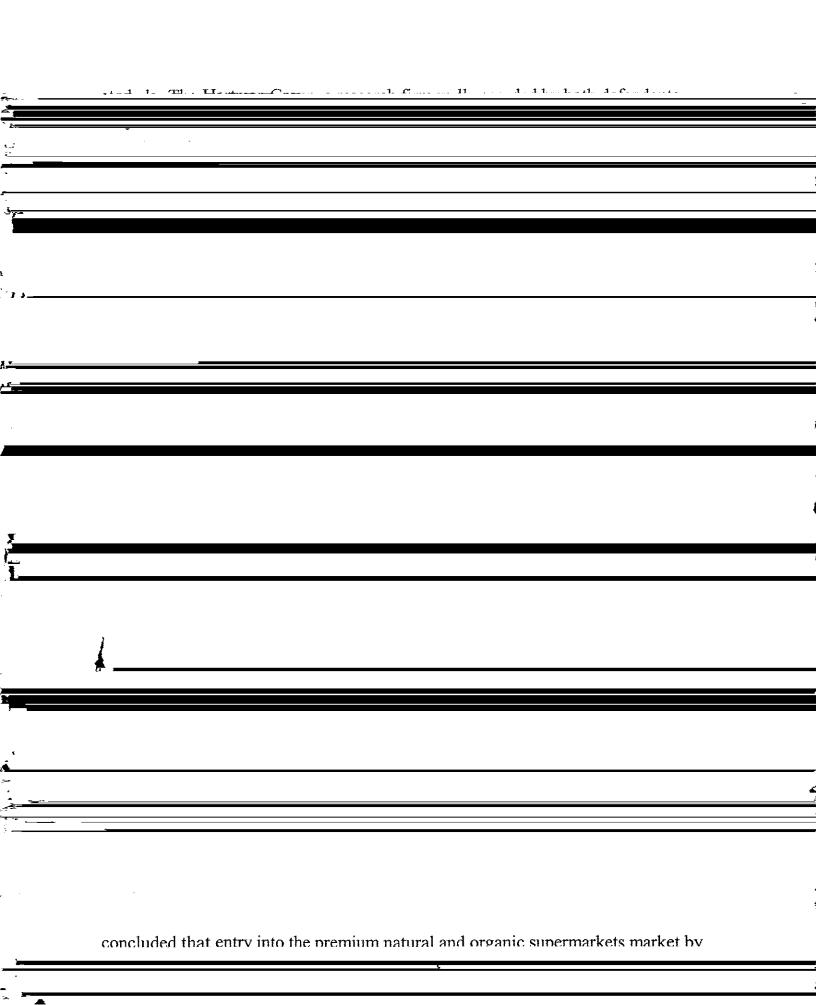
defendant must present to rebut it successfully." *Heinz*, 246 F.3d at 725, *quoting Baker Hughes*, 908 F.2d at 991.

Defendants made no serious attempt to rebut the Commission's case,

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natural and organic supermarkets do not constitute a relevant product market.

Defendants certainly could not (and did not) attempt to deny that the commanding market shares of Whole Foods and Wild Oats in that market would make their combination presumptively unlawful. Nor did defendants attempt to rebut the Commission's *prima facie* case by pointing to extraordinary features of this

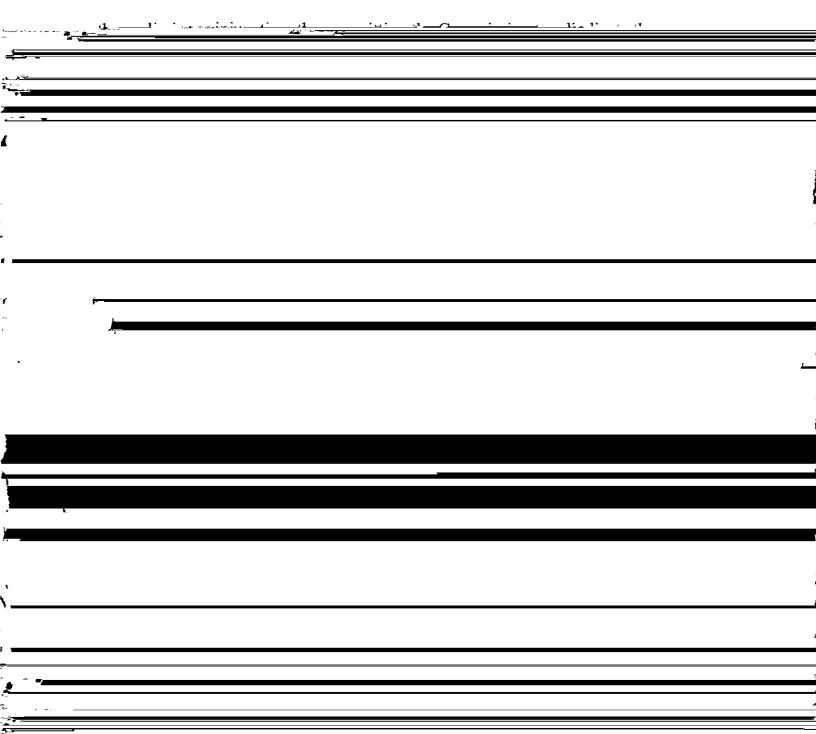


(a) The court assigned no weight to contemporaneous, high-level statements and strategic documents authored by senior executives, describing their view of the market realities and of the effect of the

be diverted to a Wild Oats store then operated by Whole Foods. As a result, a small but significant and nontransitory increase in prices by the Whole Foods store will not cause an actual loss of business by the company as great as defendants' expert or the Court predicted. See Opinion at 30. Instead, another company store will retain at least a portion of that business and the small but significant and nontransitory increase in prices will be profitable to the company as a whole. This error caused the court to reject the Commission's product market definition. (e) The court disregarded the abundant evidence that Wild Oats and Whole Enode uniquely constrain each other's arising

the Court of Appeals." *Heinz*, 246 F.3d at 714-15. If so, a preliminary injunction should issue, and full adjudication proceeds before the Commission.

The many problems encountered and created by the district court simply confirm that there are "serious, substantial" merits issues requiring plenary adjudication. *Heinz*, 246 F.3d at 714-15. The district court should have granted



The relief the Commission seeks by this motion is protection against interim competitive harm, and preservation of the ability to afford effective relief after adjudication on the merits. *Weyerhaeuser*, 665 F.2d at 1087. The task of

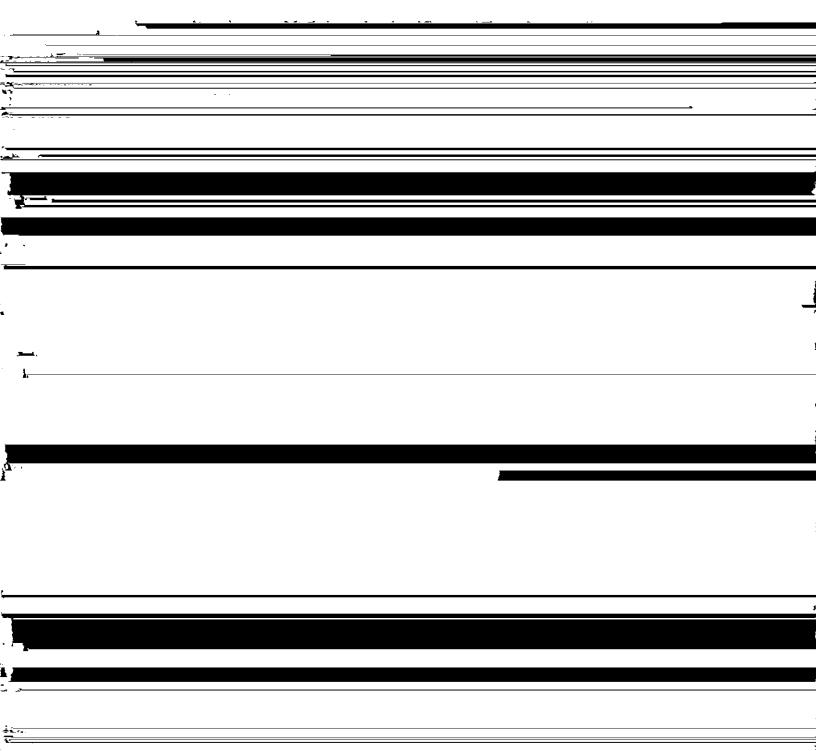
Wild Oats stores and dismantle all of those stores' employment and supply relationships. It strains credulity to suppose that the Commission will be in a position to fashion "adequate ultimate relief" under these circumstances. See

606 n.5 (1966)). Here, Whole Foods proposes to close a

in allowing defendants' private equity claim to outweigh serious public concerns.

Id.; Warner Communications, 742 F.2d at 1165.

The equitable considerations discussed above regarding the need for a preliminary injunction -i.e., the prospect of the immediate and irreversible loss of competition in the market, and the impracticability of "unscrambling the eggs" -



### **CONCLUSION**

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anneal should	he granted		

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JEFFREY SCHMIDT Director

WILLIAM BLUMENTHAL General Counsel

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