

Complaint

IN THE MATTER OF

**WHOLE FOODS MARKET, INC.,
AND
WILD OATS MARKETS, INC.****CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL
TRADE COMMISSION ACT**

*Docket No. 9324, File No. 071 0114
Complaint, June 27, 2007 – Decision, May 28, 2009*

This consent order addresses the \$700 million acquisition by Whole Foods Market Inc., of Wild Oats Markets, Inc. The combination of Whole Foods and Wild Oats would provide Whole Foods with market power post-acquisition in the premium natural and organic supermarkets market, leading to significant anticompetitive effects. Both the district court and administrative complaints alleged that the combined company would increase prices, and decrease the quality and number of offered services, if the merger were permitted to close. The consent order requires Whole Foods to divest 32 stores, along with associated Wild Oats intellectual property and related assets, leases, properties, and government permits. The Order to Maintain Assets will require Whole Foods to maintain the operating status of the open stores, and maintain all leases (open and dark stores) until divestiture is complete.

Participants

For the Commission: Tom Brock, Malcolm Catt, Sean Dillon, Jil Frumin, Kevin Hahm, Albert Kim, Kenneth A. Libby, Mazor Matzkevich, Brendan McNamara, Jonathan Platt, Stephanie Reynolds, Andrea Ryan, Jennifer Schwab, Jennifer Stiefvater, Laura Sullivan, Matt Tabas, Nicholas Widnell, and Michelle Yost.

For the Respondents: Jeffrey Brennan, Paul Denis, and James Fishkin, Dechert LLP, and Lanny Davis, Orrick, Herrington & Sutcliffe LLP.

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COMPLAINT**I. INTRODUCTION**

Whole Foods Market, Inc.'s ("Whole Foods") proposed acquisition of Wild Oats Markets, Inc. ("Wild Oats"), will substantially lessen competition and thereby cause significant harm to consumers. This merger, involving the two leading operators of premium natural and organic supermarkets, will increase prices and reduce quality and services in a number of geographic markets throughout the United States. Whole Foods' Chief Executive Officer John Mackey bluntly advised his Board of Directors of the purpose of this acquisition: "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 to rival 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."

To prevent this consumer harm, the Federal Trade Commission ("Commission"), pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, having reason to believe that Respondent Whole Foods and Respondent Wild Oats have entered into an agreement pursuant to which Whole Foods would acquire the voting securities of Wild Oats, that such agreement violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be

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in the public interest, hereby issues its complaint, stating its charges as follows:

II. THE PARTIES AND JURISDICTION**A. Whole Foods Market, Inc.**

1. Respondent Whole Foods is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 550 Bowie Street, Austin, Texas 78703.

2. Established in 1980, Whole Foods operates approximately 190 premium natural and organic supermarkets in more than 30 states and the District of Columbia.

3. Whole Foods is the largest operator of premium natural and organic supermarkets in the United States.

4. According to Whole Foods' Chief Executive Officer John Mackey, Whole Foods is "a company that is authentically committed to its mission of natural/organic/healthy foods. Its core customers recognize this authenticity and it creates a customer loyalty that will not be stolen away by conventional markets who sell the same products. Whole Foods has created a 'brand' that has real value for millions of people."

5. Whole Foods is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

B. Wild Oats Markets, Inc.

6. Respondent Wild Oats is a corporation organized, existing, and doing business under and by virtue of the laws of the State of

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Delaware, with its office and principal place of business located at 1821 30th Street, Boulder, Colorado 80301.

7. Wild Oats is the second largest operator of premium natural and organic supermarkets in the United States, currently operating numerous premium natural and organic supermarkets throughout the United States.

8. Founded in 1987, Wild Oats provides a broad selection of natural, organic, and gourmet foods, environmentally friendly products, and natural vitamins, remedies, and body care products. The firm was built “on the vision of enhancing the lives of our customers and our people with products and education that support health and wellbeing.” As Wild Oats’ Vice President of Marketing Laura Coblentz has described: “Wild Oats is more than a retail chain – it’s about a lifestyle, and that’s how we market ourselves.”

9. Wild Oats is, and at all times relevant herein has been, engaged in commerce as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. THE ACQUISITION

10. On February 21, 2007, Whole Foods and Wild Oats executed an agreement whereby Whole Foods proposes to acquire all of the voting securities of Wild Oats through WFMI Merger Co., a wholly-owned subsidiary of Whole Foods (the “Acquisition”). The purchase will be effected through a tender offer for all shares of Wild Oats common stock. The total cost of the Acquisition is expected to be approximately \$671 million in cash and assumed debt.

11. Respondent Whole Foods intends to then merge Wild Oats into Whole Foods; to close numerous Wild Oats stores; to sell

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several Wild Oats stores; and to operate the remainder as Whole Foods stores.

12. On June 5, 2007, the Commission authorized the commencement of an action under Section 13(b) of the Federal Trade Commission Act to seek a temporary restraining order and a preliminary injunction barring the Acquisition during the pendency of administrative proceedings to be commenced by the Commission pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. _ 45(b).

13. In authorizing the commencement of this action, the Commission determined that a temporary restraining order and a preliminary injunction are in the public interest and that it has reason to believe that the Acquisition would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act because the Acquisition may substantially lessen competition in the relevant markets alleged in this Complaint.

14. On June 7, 2007, United States District Judge Paul L. Friedman of the United States District Court for the District of Columbia issued an Order granting the Commission's motion for a temporary restraining order. The closing of the Acquisition is currently prohibited only by the District Court's restraining order.

IV. NATURE OF COMPETITION

15. "Natural foods" are foods that are minimally processed and largely or completely free of artificial ingredients, preservatives, and other non-naturally occurring substances.

16. "Organic foods" are foods that are produced using: agricultural practices that promote healthy ecosystems; no genetically engineered seeds or crops, sewage sludge, long-lasting pesticides or fungicides; healthy and humane livestock management practices including use of organically grown feed, ample access to fresh air and the outdoors, and no antibiotics or growth hormones; and food processing that protects the healthfulness of the organic

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product, including the avoidance of irradiation, genetically modified organisms, and synthetic preservatives.

17. Pursuant to the United States Department of Agriculture's ("USDA") Organic Foods Production Act of 1990 (the "Organic Rule"), all products labeled "organic" must be certified by a federally accredited certifying agency as satisfying USDA standards for organic foods. The Organic Rule further requires that retailers of products labeled "organic" use handling, storage, and other practices to protect the integrity of organically-labeled products, including: preventing commingling of organic and non-organic ("conventional") products; protecting organic products from contact with prohibited substances; and maintaining records that document adherence to the USDA requirements.

18. Premium natural and organic supermarkets offer a distinct set of products and services to a distinct group of customers in a distinctive way, all of which significantly distinguish premium natural and organic supermarkets from conventional supermarkets and other retailers of food and grocery items ("Retailers").

19. Premium natural and organic supermarkets are not simply outlets for natural and organic foods. Whole Foods' Chief Executive Officer John Mackey acknowledged that "Whole Foods isn't primarily about organic foods. It never has been. Organic foods is only one part of its highly successful business model." In announcing its fourth quarter results for 2006, Whole Foods stated that "Whole Foods Market is about much more than just selling 'commodity' natural and organic products. We are a lifestyle retailer and have created a unique shopping environment built around satisfying and delighting our customers." Specifically, Mr. Mackey has said that "[s]uperior quality, superior service, superior perishable product, superior prepared foods, superior marketing, superior branding, and superior store experience working together are what makes Whole Foods so successful." "[P]eople who think organic foods are the key don't understand the business model. . . ."

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20. To begin with, premium natural and organic supermarkets focus on perishable products, offering a vast selection of very high quality fresh fruits and vegetables (including exotic and hard-to-find items) and other perishables. As Whole Foods stated in its 2006 annual report, “We believe our heavy emphasis on perishable products differentiates us from conventional supermarkets and helps us attract a broader customer base.” Whole Foods’ Chief Executive Officer John Mackey has also emphasized the importance of high quality perishable foods to Whole Foods’ business model: “This [produce, meat, seafood, bakery, prepared foods] is over 70% of Whole Foods total sales. Wal-Mart doesn’t sell high quality perishables and neither does Trader Joe’s while we are on the subject. That is why Whole Foods coexists so well with [Trader Joe’s] and it is also why Wal-Mart isn’t going to hurt Whole Foods.”

21. Relative to conventional supermarkets and most other Retailers, premium natural and organic supermarkets target shoppers who are, in the words of one of the respondents, “affluent, well educated, health oriented, quality food oriented people. . . .” The core shoppers of premium natural and organic supermarkets have a preference for natural and organic products, and premium natural and organic supermarkets offer an extensive selection of natural and organic products to enable those shoppers to purchase substantially all of their food and grocery requirements during a single shopping trip.

22. Premium natural and organic supermarkets are differentiated from other Retailers in that premium natural and organic supermarkets offer more amenities and service venues; higher levels of service and more knowledgeable service personnel; and special features such as in-store community centers.

23. Premium natural and organic supermarkets promote a lifestyle of health and ecological sustainability, to which a significant portion of their customers are committed. Through the blending together of these elements and others, premium natural and organic supermarkets strive to create a varied and dynamic experience for shoppers, inviting them to make the premium natural

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and organic supermarket a destination to which shoppers come not merely to shop, but to gather together, interact, and learn, often while enjoying shared eating and other experiences. Premium natural and organic supermarkets expend substantial resources on developing a brand identity that connotes this blend of elements, and especially the qualities of trustworthiness (*viz.*, that all products are natural, that products labeled “organic” are properly labeled, that the store’s suppliers practice humane animal husbandry, and that the store’s actions are ecologically sound) and qualitative superiority to other Retailers.

24. Relative to most other Retailers, premium natural and organic supermarkets’ products often are priced at a premium reflecting not only product quality and service, but the marketing of a lifestyle to which their customers aspire.

25. As Whole Foods’ Chief Executive Officer John Mackey has acknowledged, “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. . . . Whole Foods core customers will not abandon them because Safeway has made their stores a bit nicer and is selling some organic foods. Whole Foods knows their core customers well and serves them far better than any of their potential competitors do.”

26. Mr. Mackey has also said that “[a]ll those [conventional supermarkets and club stores] you named have been selling organic foods for many years now. The only thing ‘new’ is that they are now beginning to sell private label organic foods for the first time. However, they’ve been selling organic produce and organic milk for many years now. Doing so has never hurt Whole Foods.”

27. Wild Oats’ most recent 10K filed with the Securities and Exchange Commission noted: “Despite the increase in natural foods sales within conventional supermarkets, [Wild Oats] believe[s] that conventional supermarkets still lack the concentration on a wide

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variety of natural and organic products, and emphasis on service and consumer education that our stores offer.”

28. Premium natural and organic supermarkets are also very different from mass-merchandisers, such as Wal-Mart and Target. According to Mr. Mackey, “Wal-Mart does a particularly poor job selling perishable foods. Whole Foods quality is better, its customer service is far superior, and the store ambience and experience it provides its customers is fun, entertaining and educational”

29. With respect to Trader Joe’s, Mr. Mackey stated: “TJ’s is a completely different concept than WFMI. WFMI’s business is all about perishables – fresh produce, fresh seafood, fresh meat, in store delis, juice bars, and bakeries. WFMI has stated that more than 50% of their sales are in these categories of products – categories which TJ’s doesn’t even have. TJ’s is primarily a discount private label company with a large wine selection.”

30. Unlike other natural and organic product retailers, premium natural and organic supermarkets offer an extensive selection of natural and organic products to enable shoppers to purchase substantially all of their food and grocery requirements during a single shopping trip. As a result, premium natural and organic supermarkets are appreciably larger than other natural and organic retailers in square footage, number of products offered, inventory for each product offered, and annual dollar sales.

31. Whole Foods and Wild Oats, respectively, are the largest and second largest operators of premium natural and organic supermarkets in the United States.

32. Whole Foods and Wild Oats are the only two nationwide operators of premium and natural organic supermarkets in the United States.

33. Consumers spent a combined total of \$6.5 billion in fiscal 2006 at Whole Foods and Wild Oats. Approximately 70% of that

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total was spent on perishable products, such as produce, meat, seafood, baked goods, and prepared foods.

34. Whole Foods and Wild Oats are one another's closest competitors in 21 geographic markets. Consumers in these markets have reaped price and non-price benefits of competition between Whole Foods and Wild Oats. The markets where the two compete head to head are: Albuquerque, NM; Medford, MA (suburban Boston); Saugus, MA (suburban Boston); Boulder, CO; Hinsdale, IL (suburban Chicago); Evanston, IL (suburban Chicago); Cleveland, OH; Denver, CO; Lakewood, CO; Ft. Collins, CO; West Hartford, CT; Henderson, NV; Indianapolis, IN; Kansas City-Overland Park, KS; Las Vegas, NV; Los Angeles-Santa Monica-Brentwood, CA; Louisville, KY; Omaha, NE; Pasadena, CA; Phoenix, AZ; Portland, ME; Portland, OR; St. Louis, MO; and Tualatin, OR.

35. Over the last five years, Whole foods has targeted markets for entry where, in Whole Foods' words, Wild Oats enjoyed a "monopoly." Consumers in those markets benefitted from the new competition in those markets.

36. There are other geographic markets in which only one or the other is present. In many of these markets, Wild Oats or Whole Foods plans, but for the proposed Acquisition, to enter and offer direct and unique competition to the other. Each has developed expansion plans that target the other's "monopoly" markets, as Whole Foods describes it. These markets include: Palo Alto, CA; Fairfield County, CT; Miami Beach, FL; Naples, FL; Nashville, TN; Reno, NV; and Salt Lake City, UT.

37. Whole Foods' Mr. Mackey has said that "Whole Foods has taken significant market share from OATS wherever they have opened competing stores – Boulder, Santa Fe, Denver, Boca Raton, Ft. Lauderdale, and St. Louis." Each of the parties, in anticipation of entry by the other, engages in aggressive price and non-price competition that conveys to shoppers benefits that go well beyond the benefits resulting from the presence or threatened entry in those

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geographic markets of other retailers. In addition, when Whole Foods or Wild Oats expects the other to enter one of its markets, it plans substantial improvements in quality, including renovations, expansions, and competitive pricing. As Mr. Mackey explained upon Whole Foods' entry into Nashville: "At least Wild Oats will likely improve their store there in anticipation of Whole Foods eventually opening and [customers will] benefit from that." Neither company responds in the same way to competition from conventional supermarkets or other Retailers.

38. Consumers have benefitted directly from the price and quality competition between Whole Foods and Wild Oats. If the Acquisition occurs, these benefits will be lost in the markets where the two currently compete and they will not occur in those markets where each is planning to expand.

V. RELEVANT MARKETS

39. A relevant product market in which to analyze the effects of the proposed Acquisition is the operation of premium natural and organic supermarkets.

40. A relevant geographic market in which to analyze the effects of the proposed Acquisition is an area as small as approximately five or six miles in radius from premium natural and organic supermarkets or as large as a metropolitan area.

VI. ENTRY CONDITIONS

41. Entry or repositioning into the operation of premium natural and organic supermarkets is time-consuming, costly, and difficult. As a result, entry or repositioning into the operation of premium natural and organic supermarkets in the relevant geographic markets is unlikely to occur or to be timely or sufficient to prevent or defeat the anticompetitive effects of the proposed Acquisition.

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VII. ANTICOMPETITIVE EFFECTS

42. The relevant markets are highly concentrated and would become significantly more concentrated after the proposed Acquisition. Premium natural and organic supermarkets' primary competitors are other premium natural and organic supermarkets. Shoppers with preferences for premium natural and organic supermarkets are not likely to switch to other retailers in response to a small but significant non-transitory increase in premium natural and organic supermarket prices.

43. The proposed Acquisition may substantially lessen competition in the following ways, among others:

a. the proposed Acquisition will eliminate one of only two or three premium natural and organic supermarkets and substantially increase concentration in the operation of premium natural and organic supermarkets in the relevant geographic markets, each of which already is highly concentrated;

b. the proposed Acquisition will eliminate substantial and effective price and non-price competition between Whole Foods and Wild Oats in the operation of premium natural and organic supermarkets in the relevant geographic markets, substantially reducing or eliminating competition in the operation of premium natural and organic supermarkets in each of those geographic areas;

c. the proposed Acquisition will eliminate one of only two or three premium natural and organic supermarkets in each of the relevant geographic markets, tending to create a monopoly in the operation of premium natural and organic supermarkets in each of those geographic areas;

d. the proposed Acquisition will eliminate the only existing company that can serve as a meaningful springboard for a conventional supermarket operator to enter the market for premium natural and organic supermarkets in each of the

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relevant geographic markets, tending to create a monopoly in the operation of premium natural and organic supermarkets in each of those geographic areas;

e. the proposed Acquisition will eliminate Whole Foods' closest competitor in geographic and product space in each of the relevant geographic areas, resulting in the loss of direct and unique price and non-price competition that conveys to shoppers benefits that go well beyond the benefits resulting from the presence or threatened entry of other retailers;

f. the proposed Acquisition will result in the closing of numerous Wild Oats stores, reducing or eliminating consumer choice in premium natural and organic supermarkets;

g. the proposed Acquisition will enable the combined Whole Foods/Wild Oats to exercise market power unilaterally; and

h. the proposed Acquisition will eliminate potential competition in numerous parts of the United States.

VIII. VIOLATIONS CHARGED**COUNT I – ILLEGAL ACQUISITION**

44. The allegations contained in paragraphs 1-45 are repeated and realleged as though fully set forth here.

45. Whole Foods' proposed acquisition of Wild Oats, if consummated, would substantially lessen competition in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. §18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

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COUNT II – ILLEGAL ACQUISITION AGREEMENT

46. The allegations contained in paragraphs 1-45 are repeated and realleged as though fully set forth here.

47. Whole Foods and Wild Oats, through the Agreement described in paragraph 10, have engaged in unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

NOTICE

Notice is hereby given to the Respondents that the twenty-seventh day of September, 2007, at 10 a.m., or such later date as determined by the Commission or by an Administrative Law Judge of the Commission, is hereby fixed as the time and Federal Trade Commission offices, 600 Pennsylvania Ave., N.W., Washington, D.C. 20580, as the place when and where a hearing will be had on the charges set forth in this Complaint, at which time and place you will have the right under the Federal Trade Commission Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

Pending further order of the Commission, the Commission will retain adjudicative responsibility for this matter. *See* § 3.42(a) of the Commission's Rules of Practice for Adjudicative Proceedings. The Commission hereby allows you 20 days from the date of service of this Complaint upon you to file either an answer or a dispositive motion. If you file a dispositive motion within that time, your time for filing an answer is extended until 10 days after service of the Commission's order on such motion. If you do not file a dispositive motion within that time, you must file an answer.

An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are

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without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission or the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under §3.46 of the Commission's Rules of Practice for Adjudicative Proceedings and the right to appeal the initial decision to the Commission under §3.52 of said Rules.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the Commission or the Administrative Law Judge, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions, and order.

An initial prehearing scheduling conference will be scheduled no later than 14 days after the last answer is filed by any party named as a respondent in the complaint. Unless otherwise directed, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Ave., N.W. Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within 5 days of receiving a respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

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NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the acquisition of Whole Foods by Wild Oats, or any other transaction that combines them, challenged in this proceeding violates Section 7 of the Clayton Act, as amended, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. An order preventing Whole Foods from acquiring Wild Oats, if the acquisition has not occurred at the time of the Commission's decision;
2. The divestiture of Wild Oats and any other associated or necessary assets in a manner that restores Wild Oats as a viable, independent competitor in the relevant markets, with the ability to offer such services as Wild Oats is now offering and planning to offer, if the acquisition has occurred at the time of the Commission's decision;
3. A prohibition against any transaction between Whole Foods and Wild Oats that combines their operations in the relevant markets except as may be approved by the Commission;
4. A requirement that, for a period of time, Whole Foods provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of its operations with any other company providing the operation of premium and natural organic supermarkets;
5. A requirement for Whole Foods to file periodic compliance reports with the Commission; and
6. Any other relief appropriate to correct or remedy the anticompetitive effects of the transaction or to restore Wild Oats as a viable, independent competitor in the relevant market.

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IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by the Secretary and its official seal to be affixed hereto, at Washington, D.C., this twenty-seventh day of June, 2007.

By the Commission.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”) having heretofore issued its complaint charging Whole Foods Market, Inc. (“Whole Foods” or “Respondent”) with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Respondent having been served with a copy of that complaint, together with a notice of contemplated relief, and Respondent having answered the complaint denying said charges but admitting the jurisdictional allegations set forth therein; and

The Respondent, its attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Secretary of the Commission having thereafter withdrawn the matter from adjudication in accordance with § 3.25(c) of its Rules; and

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The Commission having thereafter considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in conformity with the procedure prescribed in § 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following Order: to Maintain Assets:

1. Whole Foods is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its offices and principal place of business located at 550 Bowie Street, Austin, Texas 78703.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Order to Maintain Assets, the definitions used in the Consent Agreement and the attached Decision and Order shall apply. In addition, “Store To Be Maintained” means any operating store or closed store location identified as a part of the Assets To Be Divested or any operating store listed in Confidential Appendix D to the Decision and Order.

II.

IT IS FURTHER ORDERED that:

A. Respondent shall maintain the viability, marketability, and competitiveness of the Assets To Be Divested, and shall not cause the wasting or deterioration of the Assets To Be Divested, nor shall it cause the Assets To Be Divested to be operated in a manner inconsistent with applicable laws, nor shall it sell, transfer, encumber or otherwise impair the

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viability, marketability or competitiveness of the Assets To Be Divested. Respondent shall comply with the terms of this Paragraph until such time as Respondent has divested the Assets To Be Divested pursuant to the terms of the attached Decision and Order. Respondent shall conduct or cause to be conducted the business of the Assets To Be Divested in the regular and ordinary course and in accordance with past practice (including regular repair and maintenance efforts) and shall use reasonable best efforts to preserve the existing relationships with landlords, suppliers, customers, employees, and others having business relations with the Assets To Be Divested in the ordinary course of business and in accordance with past practice. Respondent shall exercise any option it has to extend the lease for any Store To Be Maintained whose lease would otherwise expire.

- B. Respondent shall not terminate the operation of any Store To Be Maintained. Respondent shall continue to maintain the inventory of each Store To Be Maintained at levels and selections (*e.g.*, stock-keeping units) consistent with those maintained by such Respondent at such Store in the ordinary course of business consistent with past practice. Respondent shall use best efforts to keep the organization and properties of each Store To Be Maintained intact, including current business operations, physical facilities, working conditions, and a work force of equivalent size, training, and expertise associated with the Store in a manner consistent with past practice. Included in the above obligations, Respondents shall, without limitation:
1. maintain operations and departments, and not reduce hours, at each Store To Be Maintained in a manner consistent with past practice;
 2. not transfer inventory from any Store To Be Maintained, other than in the ordinary course of business consistent with past practice;

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3. make any payment required to be paid under any contract or lease when due, and otherwise pay all liabilities and satisfy all obligations associated with any Store To Be Maintained, in each case in a manner consistent with past practice;
4. maintain the books and records of each Store To Be Maintained in a manner consistent with past practice;
5. not display, prior to the Commission's approval of the acquirer for a Store To Be Maintained, any signs or conduct any advertising (*e.g.*, direct mailing, point-of-purchase coupons, media advertisements) that indicates that Respondent is moving its operations at such Store To Be Maintained to another location, or that indicates such Store To Be Maintained will close;
6. not conduct, prior to the Commission's approval of the acquirer for a Store To Be Maintained, any "going out of business," "close-out," "liquidation" or similar sales or promotions at or relating to such Store To Be Maintained; and
7. not change, prior to the Commission's approval of the acquirer for a Store To Be Maintained, or modify in any material respect the existing advertising practices, programs and policies for such Store To Be Maintained, other than changes in the ordinary course of business consistent with past practice for locations of the Respondent not being closed or relocated.

Provided, however, that nothing in this Order shall require Respondent to resume the operations of any Store To Be Maintained that was not being operated by Respondent on the date Respondent signed the Agreement Containing Consent Orders.

III.

Order to Maintain Assets

IT IS FURTHER ORDERED that:

- A. At any time after Respondent signs the Consent Agreement in this matter, the Commission may appoint a monitor (“Interim Monitor”) to assure that Respondent expeditiously complies with all of its obligations and perform all of its responsibilities as required by Paragraph II of this Order and the Divestiture Agreement(s).
- B. The Commission shall select the Interim Monitor, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Interim Monitor, Respondent shall be deemed to have consented to the selection of the proposed Interim Monitor.
- C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondent shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondent’s compliance with the relevant requirements of this Order in a manner consistent with the purposes of this Order.
- D. If an Interim Monitor is appointed, Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:
 - 1. The Interim Monitor shall have the power and authority to monitor Respondent’s compliance with the divestiture and asset maintenance obligations and related requirements of this Order, and shall exercise such power and authority and carry out the duties and

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responsibilities of the Interim Monitor in a manner consistent with the purposes of this Order and in consultation with the Commission.

2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission.
3. The Interim Monitor shall serve until the later of:
 - a. the completion by Respondent of the divestiture of all the Assets To Be Divested; or
 - b. the completion by Respondent of the last obligation under this Order pertaining to the Interim Monitor's service;

provided, however, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of this Order.

4. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondent's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to the Assets To Be Divested and Respondent's compliance with its obligations under this Order, including, but not limited to, its obligations related to the relevant assets. Respondent shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondent's compliance with this Order.
5. The Interim Monitor shall serve, without bond or other security, at the expense of Respondent on such reasonable and customary terms and conditions as the

Order to Maintain Assets

Commission may set. The Interim Monitor shall have authority to employ, at the expense of the Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.

6. Respondent shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.
7. Respondent shall report to the Interim Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondent, and any reports submitted by the Commission-approved Acquirer with respect to the performance of Respondent's obligations under this Order or the Remedial Agreement. Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondent of its obligations under this Order.
8. Respondent may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,*

Order to Maintain Assets

that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.

- E. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.
- F. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor. The Commission shall select the Interim Monitor, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Interim Monitor, Respondent shall be deemed to have consented to the selection of the proposed Interim Monitor.
- G. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.
- H. The Interim Monitor appointed pursuant to this Order shall not be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

IV.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed (1)

Order to Maintain Assets

dissolution of the Respondent, (2) acquisition, merger or consolidation of Respondent, or (3) any other change in the Respondent that may affect compliance obligations arising out of this Order To Maintain Assets, including, but not limited to, assignment, the creation or dissolution of subsidiaries, or any other change in Respondent.

V.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondent, Respondent shall, without restraint or interference, permit any duly authorized representative(s) of the Commission:

- A. access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of the Respondent related to compliance with this Order, which copying services shall be provided by the Respondent at its expense; and
- B. to interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.

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VI.

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate on the earlier of:

- A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. With respect to each Store To Be Maintained, the day after Respondent's completion of the divestiture of Assets to Be Divested related to such Store To Be Maintained, as described in and required by the Decision and Order, or the expiration of the trustee's authority to divest such Store To Be Maintained.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having heretofore issued its complaint charging Whole Foods Market, Inc. ("Whole Foods" or "Respondent") with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Respondent having been served with a copy of that complaint, together with a notice of contemplated relief, and Respondent having answered the complaint denying said charges but admitting the jurisdictional allegations set forth therein; and

The Respondent, its attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by

Decision and Order

Respondent of all the jurisdictional facts set forth in the aforesaid Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn the matter from adjudication in accordance with § 3.25(c) of its Rules; and

The Commission having thereafter considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, and having duly considered the comments filed by interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in conformity with the procedure prescribed in § 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following Order:

1. Whole Foods is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its offices and principal place of business located at 550 Bowie Street, Austin, Texas 78703.
2. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

Decision and Order

ORDER**I.**

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. “Whole Foods” or “Respondent” means Whole Foods Market, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Whole Foods Market, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Wild Oats” means the former corporation Wild Oats Markets, Inc., which was organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1821 30th Street, Boulder, Colorado 80301, and which was acquired by Respondent Whole Foods.
- C. “Commission” means the Federal Trade Commission.
- D. “Closing Date” means the date on which Respondent (or the Divestiture Trustee) and a Commission-approved Acquirer consummate a transaction to divest any Asset To Be Divested pursuant to this Order.
- E. “Commission-approved Acquirer” means an entity that receives the prior approval of the Commission to acquire particular assets that the Respondent is required to divest pursuant to this Order.
- F. “Divestiture Trustee” means a trustee appointed by the Commission pursuant to the relevant provisions of this Order to effectuate the divestitures required by this Order [as distinguished from interim monitor].

Decision and Order

G. “Assets To Be Divested” means:

1. The name “WILD OATS,” all trademarks, trade dress, service marks, trade names, and other Wild Oats intellectual property associated with the Wild Oats stores (all hereinafter collectively “Wild Oats Associated Intellectual Property”);
2. The store locations listed on Appendix A of this Order;
3. The store locations listed on Appendix B of this Order; and
4. All assets, leases, fixtures, properties, government permits (to the extent transferable), tangible and intangible, related to or used in the stores operated at these locations at the Closing Date, but shall not include those assets consisting of or pertaining to any of Respondent’s other (non “WILD OATS”) trademarks, trade dress, service marks, or trade names, or any inventory, books and records, financial information, supplies or packaging related to or used in the stores operated at these locations.

H. “Divestiture Agreement” means any agreement between the Divestiture Trustee and a Commission-approved Acquirer and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Assets To Be Divested that have been approved by the Commission to accomplish the requirements of this Order.

I. “Interim Monitor” means a monitor appointed by the Commission pursuant to the Order to Maintain Assets in this matter.

J. “Store Employees” means all employees of Whole Foods currently working at the store locations listed on Appendix A of this Order, or who have, within the past six (6) months,

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worked at any store location listed on Appendix A or Appendix B of this Order.

- K. “Third Party Consents” means all consents and waivers from any person other than the Respondent, including all landlords, that are necessary to effect the complete divestiture of the Assets To Be Divested to the Commission-approved Acquirer(s) and that are necessary for the continued operation of the stores by the Commission-approved Acquirer(s).

II.**IT IS FURTHER ORDERED** that:

- A. Respondent shall divest the Assets To Be Divested, at a price from each Commission-approved Acquirer not less than zero dollars, absolutely and in good faith, in a manner that receives the prior approval of the Commission and solely to an acquirer (or acquirers) that receives the prior approval of the Commission. Such divestiture (or divestitures) shall be accomplished exclusively by the Divestiture Trustee pursuant to Paragraph II of this Order.
- B. The Commission hereby appoints The Food Partners LLC as Divestiture Trustee to divest the Assets To Be Divested. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondent shall execute a trustee agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order.
- C. Respondent shall consent to the following terms and conditions regarding the Divestiture Trustee’s powers, duties, authority, and responsibilities:

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1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest the Assets To Be Divested and to assure that Respondent has completed all of its obligations under Paragraph II.H. of this Order for any Asset To Be Divested.
2. The Divestiture Trustee shall have six (6) months from the date the Commission approves the trustee agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the six (6) month period, the Divestiture Trustee has received a good faith offer or offers for a particular store or stores, the divestiture period may be extended by the Commission as to such store(s) to allow the Divestiture Trustee to continue negotiations with such potential acquirer(s); *provided however*, the Commission may extend the divestiture period for any such store(s) only for a maximum of six (6) months; *provided further, however*, that if the Divestiture Trustee submits any proposed Divestiture Agreement(s) and proposed acquirer(s) to the Commission for approval before the end of the divestiture period for the particular store(s), as may be extended by the Commission, and if the Commission has not acted on such Divestiture Agreement(s), or the Closing Date has not occurred, by the end of the divestiture period, then the divestiture period for the store(s) covered by such Divestiture Agreement(s) shall automatically extend until the day after the Commission rejects such Divestiture Agreement(s) or the Closing Date(s) has occurred, whichever is the case; *provided further, however*, that the Divestiture Trustee's authority shall extend for such time until Respondent has completed all of its obligations under Paragraph II.H. of this Order for any particular Asset To Be Divested.

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3. The divestiture of the Assets To Be Divested may be made to one or more Commission-approved Acquirers, *provided, however*, that the Wild Oats Associated Intellectual Property shall be divested to only a single Commission-approved Acquirer; *provided further, however*, that any Commission-approved Acquirer of the Wild Oats Associated Intellectual Property may license, at its sole option, any other person(s) to use the Wild Oats Associated Intellectual Property at any location in any place in the United States.
4. Respondent shall provide to the Divestiture Trustee the information listed in Appendix C within ten (10) days of the date the Commission approves the trustee agreement. The Divestiture Trustee shall have reasonable access to the facilities listed in Appendix A and Appendix B. Subject to any demonstrated legally recognized privilege, Respondent shall provide any additional information requested by the Divestiture Trustee that is directly related to the Assets To Be Divested and shall cooperate with the Divestiture Trustee, *provided however*, that Respondent shall not be required to provide income statement and balance sheet financial information (other than as listed in Appendix C and updated quarterly gross sales data by store); other information related to Whole Foods' operation of the store(s); vendor information; any sku-level data; and team member (employee) information and files related to human resources, payroll or benefits. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission.
5. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price

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and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest expeditiously and at a price from each Commission-approved Acquirer not less than zero dollars. Each divestiture shall be made in the manner and to a Commission-approved Acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity for a particular location listed on Appendix A or Appendix B of this Order, and if the Commission determines to approve more than one such acquiring entity for such location, the Divestiture Trustee shall divest to the acquiring entity selected by Respondent from among those approved by the Commission; *provided further, however*, that Respondent shall select such entity within five (5) days after receiving notification of the Commission's approval.

6. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent, on such reasonable and customary terms and conditions as the Commission may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondent, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement

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contingent on the divestiture of the relevant assets that are required to be divested by this Order.

7. Respondent shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.
8. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested.
9. The Divestiture Trustee shall report in writing to Respondent and to the Commission every thirty (30) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
10. The Divestiture Trustee shall notify Respondent immediately upon signing any letter of intent or other significant event relating to the sale of the Assets To Be Divested that is required to be revealed by Respondent to accurately reflect its financial statements.
11. Respondent may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

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- D. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of a proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Divestiture Trustee, Respondent shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- E. Any Divestiture Agreement that has been approved by the Commission between the Divestiture Trustee and a Commission-approved Acquirer shall be deemed incorporated into this Order, and any failure by Respondent to comply with any term of such Divestiture Agreement shall constitute a failure to comply with this Order.
- F. Respondent shall:
 - 1. from the date any Divestiture Agreement is signed, not interfere with the hiring or employing by each Commission-approved Acquirer of Store Employees, and shall remove any impediments or incentives within the control of Respondent that may deter these employees from accepting employment with the Commission-approved Acquirer, including, but not limited to, any non-compete provisions of employment or other contracts with Respondent that would affect the ability or incentive of those individuals to be employed by the Commission-approved Acquirer; *provided, however*, that nothing in this Order shall be construed to require Respondent to terminate the employment of any employee or prevent Respondent from continuing the employment of any employee; *provided further, however*, that nothing in this Order shall be construed to

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prohibit Respondent from providing any notice required by law or contract to any Store Employee who Respondent may transfer to another of Respondent's stores; and

2. provide all Store Employees with reasonable financial incentives to continue in their positions until the Closing Date. Such incentives shall include, but are not limited to, a continuation, until the Closing Date, of all employee benefits, including regularly scheduled raises, bonuses and vesting of pension benefits (as permitted by law and for those Store Employees covered by a pension plan), offered by Respondent.

- G. Prior to the each Closing Date, Respondent shall secure all Third Party Consents.

Provided however, that, if within twelve (12) months of the date the Commission approves the trustee agreement described herein, Respondent certifies to the Commission that a landlord is unreasonably withholding its consent to a transfer or assignment of the lease of a particular store location, then the divestiture period is tolled while the Commission reviews the matter. If Respondent demonstrates to the Commission's satisfaction that a landlord is unreasonably withholding its consent to a transfer or assignment of the lease of a particular store location, then, and only then, Respondent may remove that location from the definition of Assets To Be Divested and may substitute a store location to the definition of Assets To Be Divested from the list contained on Confidential Appendix D. Any substitutions of locations shall be made in the order in which the stores appear in Confidential Appendix D. If a substitution is made pursuant to this Paragraph, then the Divestiture Trustee shall have six (6) months from the date Respondent notifies the Divestiture Trustee of the substitution to accomplish the divestiture of the substituted store location, which shall be subject to the prior approval of

Decision and Order

the Commission. The Divestiture Trustee's period may be extended in the same manner as provided in Paragraph II.C.2.

Provided further, however, that Respondent may seek substitution for store locations only up to the number of stores contained in Confidential Appendix D;

Provided further, however, that Respondent may not seek further substitution for any store that has been added to the Assets To Be Divested from Confidential Appendix D;

Provided further, however, that Respondent shall notify the Divestiture Trustee of any substitution within three (3) days of Respondent's receipt from the Commission of the Commission's acceptance of such substitution;

Provided further, however, that all of Respondent's obligations as to the Assets To Be Divested, including its obligations under Paragraph II.C.4., shall apply to the substitute store as of the date Respondent notifies the Divestiture Trustee of the substitution.

- H. Respondent shall make all commercially reasonable efforts to remove as soon as practicable any of Respondent's trademarks, trade dress, service marks, trade names, inventory, and all other proprietary information from the store locations listed in Appendix A of this Order after the Closing Date for each such location, during which time the location will not be open for business, pursuant to the following terms:
1. For a period of not more than ten (10) days after the Closing Date, Respondent shall have exclusive access to the store, during which period Respondent shall use all commercially reasonable efforts to remove as soon as practicable all confidential business information, including all information technology and operating

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systems, all human resources, payroll and benefits records, all accounting and financial records, all company policies and directives, and all purchasing information. This exclusive access period shall end when Respondent has removed all confidential business information from the store. *Provided, however*, that Respondent shall also use commercially reasonable efforts to remove as soon as practicable any of Respondent's trademarks, trade dress, service marks, trade names, inventory, and all other proprietary information from the store during such exclusive access period.

2. For a period of not more than twenty (20) days after Respondent has removed the confidential business information from the store, Respondent shall have non-exclusive access to the store, during which period Respondent shall use all commercially reasonable efforts to remove as soon as practicable any remaining trademarks, trade dress, service marks, trade names, inventory, and all other proprietary information from the store. Respondent shall cooperate fully with the Commission-approved Acquirer to coordinate its removal efforts with the Commission-approved Acquirer's efforts to prepare the location for reopening.

Provided, however, that Respondent shall be responsible for all lease and utility costs associated with such store until it has completely removed its assets from such store.

Provided further, however, that Respondent shall not remove any of the Wild Oats Associated Intellectual Property identified in Paragraph I.G.1. of this order.

- I. The purpose of the divestiture of the Assets To Be Divested is to ensure the viable and competitive operation of the Assets To Be Divested in the same business and in the same manner in which the Assets To Be Divested were engaged at

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the time of the announcement of the proposed acquisition of Wild Oats by Whole Foods and to remedy the lessening of competition alleged in the Commission's complaint.

III.

IT IS FURTHER ORDERED that:

- A. Within thirty (30) days after the date this Order becomes final, and every thirty (30) Days thereafter until Respondent has fully complied with Paragraphs II.A., through II.H, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondent shall submit at the same time a copy of its report concerning compliance with this Order to the Interim Monitor, if any Interim Monitor has been appointed and to the Divestiture Trustee. Respondent shall include in its reports, among other things that are required from time to time, a full description of the efforts being made to comply with the relevant Paragraphs of this Order.

IV.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed (1) dissolution of the Respondent, (2) acquisition, merger or consolidation of Respondent, or (3) any other change in the Respondent that may affect compliance obligations arising out of this Order, including, but not limited to, assignment, the creation or dissolution of subsidiaries, or any other change in Respondent.

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V.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondent, Respondent shall, without restraint or interference, permit any duly authorized representative(s) of the Commission:

- A. access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of the Respondent related to compliance with this Order, which copying services shall be provided by the Respondent at its expense; and
- B. to interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.

VI.

IT IS FURTHER ORDERED that this Order shall terminate on May 28, 2019.

By the Commission.

Decision and Order

APPENDIX A**APPENDIX A
OPERATING LOCATIONS**

Wild Oats Market
2584 Baseline Rd.
Boulder, CO 80305

Alfalfa's
1651 Broadway St.
Boulder, CO 80302

Whole Foods Market
3180 New Center Point
Colorado Springs, CO 80922

Wild Oats Market
4301 Main St.
Kansas City, MO 64111

Whole Foods Market
7250 W. Lake Mead Blvd.
Las Vegas, NV 89128

Wild Oats Market
5910 S. University Blvd.
Littleton, CO 80121

Whole Foods Market
6930 S. Highland Dr.
Cotton Wood Heights, UT 84121

Wild Oats Market
1090 St. Francis Dr.
Santa Fe, NM 87505

Whole Foods Market
8688 East Raintree Drive
Scottsdale, AZ 85260

Whole Foods Market
19440 NW Cornell Rd.
Hillsboro, OR 97124

Whole Foods Market
7133 N. Oracle Rd.
Tucson, AZ 85704

Whole Foods Market
340 N. Main St.
West Hartford, CT 06117

Whole Foods Market
9229 N. Sheridan Blvd.
Westminster, CO 80031

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APPENDIX B**APPENDIX B
CLOSED LOCATIONS**

200 W. Foothills Pkwy. Fort Collins, CO 80525	13823 N. Tatum Blvd. Phoenix, AZ 85032
1422 N. Cooper Road Gilbert, AZ 85233	87 Marginal Way Portland, ME 04101
874 E. Warner Road Gilbert, AZ 85296	2077 NE Burnside St. Gresham, OR 97030
5350 W. Bell Road Glendale, AZ 85308	5695 S. Virginia Street Reno, NV 89502
517 N. Stephanie St. Henderson, NV 89014	4979 S. Virginia Street Reno, NV 89502
17711 Jean Way Lake Oswego, OR 97035	4600 Shelbyville Road St. Matthews, KY 40207
8194 S. Kipling Parkway Littleton, CO 80127	15569 W. Bell Road Surprise, AZ 85374
6424 Naples Blvd. Naples, FL 34109	3736 W. Center Park Drive West Jordan, UT 84084
7831 Dodge St. Omaha, NE 68114	8819-8833 Ladue Rd. St. Louis, MO 63124
9028 W. Union Hills Peoria, AZ 85382	

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APPENDIX C**APPENDIX C****INFORMATION TO BE PROVIDED TO THE DIVESTITURE TRUSTEE**For each store listed in Appendix A and Appendix B:

Store number, banner, name, address, city, state, zip code and county

Total square footage and selling space square footage

Date store opened and closed (if applicable)

Indication whether store is freestanding or in a shopping center

Indication whether store has equipment (yes or no answer within ten (10) days of approval of trustee agreement, full list of fixtures and equipment to be provided later upon the request of the Divestiture Trustee

Total gross sales for the (1) 2008 fiscal year, (2) first quarter 2009 fiscal year, and (3) first quarter 2008 fiscal year

Occupancy expenses (segmented by minimum annual rent, percentage rent, common area maintenance expenses, insurance, taxes and utilities) during the last full fiscal year

Lease and lease abstract indicating lease commencement date, base lease expiration, remaining renewal options, minimum annual rent, percentage rent and threshold, rent adjustments, recapture rights/operating covenants, and use restrictions

Any required contractual obligations to be assumed related to occupancy

Fixture (basic floor plan layout) and site plans (e.g., ingress and egress into shopping center, etc.) to the extent they exist

Aerial, exterior and interior photographs to the extent they exist

Maps of the customer draw area and customer spotting surveys and supporting data, to the extent they exist, to be provided on the Closing Date for the particular store

For the Wild Oats Associated Intellectual Property:

A detailed list of all assets that constitute the Wild Oats Associated Intellectual Property

All registrations for all trademarks, trade dress, service marks and trade names

Decision and Order

CONFIDENTIAL APPENDIX D

CONFIDENTIAL APPENDIX D

[Redacted From the Public Record Version, But Incorporated By Reference]

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDERS TO AID PUBLIC COMMENT**I. INTRODUCTION**

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from Whole Foods Market, Inc. (“Whole Foods”). The purpose of the proposed Consent Agreement is to remedy the competitive harm resulting from Whole Foods’ acquisition of Wild Oats Markets, Inc. (“Wild Oats”), completed on or about August 28, 2007. Under the terms of the proposed Consent Agreement, Whole Foods is required to maintain and subsequently divest a significant portion of the Wild Oats assets at issue in this matter.

The proposed Consent Agreement has been placed on the public record for thirty days to solicit comments from interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission again will review the proposed Consent Agreement and the comments received, and decide whether it should withdraw the Consent Agreement or make it final.

The sole purpose of this analysis is to facilitate public comment on the Consent Agreement; it is not intended to constitute an official interpretation of the Consent Agreement or modify its terms in any way.

II. BACKGROUND

On February 21, 2007, Whole Foods and Wild Oats publicly announced that they had executed a merger agreement pursuant to which Whole Foods would acquire Wild Oats in a transaction valued at about \$700 million. At the time of the merger announcement, Whole Foods (headquartered in Austin, Texas) and Wild Oats (headquartered in Boulder, Colorado) were the only national operators of premium natural and organic supermarkets (“PNOS”) in

Analysis to Aid Public Comment

the United States. Whole Foods operated 194 stores in more than 37 states and the District of Columbia as well as the United Kingdom, and Wild Oats maintained 74 PNOS stores in 24 states.¹

Wild Oats and Whole Foods offered a unique selection of natural and organic products, amenities, and high levels of customer service that differentiated them from conventional supermarkets, mass merchants, and other categories of food retailers. The combination of Whole Foods and Wild Oats would provide Whole Foods with market power post-acquisition in the PNOS market, leading to significant anticompetitive effects. Staff's investigation confirmed that repositioning by existing competitors or new entry would be inadequate to deter or counteract this harm to competition.

Having reason to believe the proposed transaction would result in competitive harm, the Commission authorized staff to seek a temporary restraining order ("TRO") and preliminary injunctive relief in federal district court and to commence an administrative trial under Part 3 of the Commission's Rules of Practice. Both the district court and administrative complaints alleged that the combined company would increase prices, and decrease the quality and number of offered services, if the merger were permitted to close.

III. LITIGATION HISTORY

On June 6, 2007, the Commission filed an action in the U.S. District Court for the District of Columbia to seek a TRO and a preliminary injunction against the acquisition. The court granted the TRO on June 7, 2007. On June 28, 2007, the Commission issued an administrative complaint pursuant to Part 3 of its Rules. Given the proceedings in the collateral federal district court case, the Commission, as a matter of discretion, stayed the Part 3 action in an order issued on August 7, 2007.

¹ Wild Oats also operated stores under the Henry's Farmers Market banner (in Southern California), the Sun Harvest banner (in Texas), and the Capers Community Market banner (in British Columbia, Canada).

Analysis to Aid Public Comment

After a two-day hearing on July 31 and August 1, 2007, the district court denied the Commission's motion for a preliminary injunction on August 16, 2007. On August 17, 2007, the Commission filed with the U.S. Court of Appeals for the D.C. Circuit a notice of appeal and an emergency motion for an injunction pending appeal. Although the D.C. Circuit initially denied the Commission's emergency motion for an injunction pending appeal, on July 29, 2008, the court of appeals reversed the district court's opinion and found that the Commission had demonstrated the requisite likelihood of success in the preliminary injunction proceeding, and remanded the matter to the district court to address the equities and, if necessary, fashion appropriate relief.² Approximately one week later, on August 8, 2008, the Commission lifted the stay of the Part 3 proceedings, and the Commission issued an amended administrative complaint on September 8, 2008. The amended complaint alleged anticompetitive effects in 22 overlap markets (in which Whole Foods and Wild Oats competed head-to-head) and seven potential competition markets (in which Whole Foods had planned to enter but for the merger).

On January 8, 2009, the district court issued a written order and opinion holding that the issue of likelihood of success had been fully resolved in the Commission's favor by the court of appeals, and confirming that all that remained was to weigh the equities and impose relief, if necessary.

On January 26, 2009, Whole Foods filed a motion to withdraw the matter from administrative litigation, together with a settlement agreement. The Commission granted Whole Foods' motion on January 29, 2009, and temporarily withdrew the matter from administrative adjudication. The withdrawal was subsequently

² Following Whole Foods' August 26, 2008 petition for rehearing *en banc* in the court of appeals, the D.C. Circuit denied the petition and reissued the court's judgment on November 21, 2008. The two judges of the panel majority reissued opinions that reiterated their respective rationales for concluding that the Commission had carried its burden of showing a likelihood of success on the merits and that the district court should conduct an equities analysis to determine whether an injunction should issue.

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extended until March 6, 2009, as Whole Foods and Commission staff negotiated a remedy in settlement of the ongoing litigation.

IV. POST-ACQUISITION INTEGRATION

The acquired Wild Oats assets included stores operating under the Wild Oats banner as well as a number of leases for Wild Oats stores that were closed prior to the acquisition.³ After the district court's August 16, 2007 decision denying the Commission's request for a preliminary injunction, Whole Foods consummated its acquisition of Wild Oats and began integrating certain of the acquired Wild Oats assets, rebranding Wild Oats stores, closing other Wild Oats locations, and terminating certain leases.

In the 18 months since the close of the transaction, Whole Foods has closed a number of Wild Oats stores. Whole Foods has maintained leases and physical assets relating to some, but not all, of the closed Wild Oats locations. Within the 29 geographic markets alleged in the complaint, Whole Foods is currently operating 31 former Wild Oats stores and is maintaining control of 19 formerly operating Wild Oats stores.

V. THE PROPOSED CONSENT AGREEMENT

In order to remedy, to a significant degree, the anticompetitive effects of the transaction, the Commission has entered into the attached Consent Agreement with Whole Foods, which requires the divestiture of 32 stores, along with associated Wild Oats intellectual property and related assets, leases, properties, and government permits.⁴ The Order to Maintain Assets will require Whole Foods to maintain the operating status of the open stores, and maintain all

³ Immediately following the closing, on September, 30, 2007, Whole Foods sold the Henry's and Sun Harvest stores that Wild Oats had been operating to Smart & Final Inc., a Los Angeles-based food retailer.

⁴ Of the 32 stores, 13 are live stores and 19 are "dark" stores. Dark stores are former Wild Oats stores that are not presently operating, but are under the control of Whole Foods.

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leases (open and dark stores) until divestiture is complete. *See* Appendix A.

The inclusion of the Wild Oats intellectual property is an important component of the package. The intellectual property includes the use, without restriction, of the Wild Oats name. Even months after the acquisition, the Wild Oats brand name retains significant brand equity that has been developed over the past 20 years.

As shown in Appendices A & B of the Decision and Order, Whole Foods is required to divest a significant portion of the acquired and currently operating stores, and all of the formerly operating stores for which leases still exist. These planned divestitures will offer relief in 17 of the 29 geographic markets alleged in the amended administrative complaint, eliminating Whole Foods' monopoly position in these markets, and permitting consumers to once again enjoy the benefits of competition between PNOS operators. These stores also could provide a springboard from which the acquirer(s) can expand into additional geographic markets.

The proposed order provides that the responsibility for the marketing and sale of the assets to be divested will immediately be put in the hands of the divestiture trustee.⁵ The trustee will have six months within which to divest the stores and related assets to a buyer or buyers approved by the Commission. If the trustee has received good faith offers from potential acquirers for certain stores within the initial six-month divestiture period, the Commission may extend the divestiture period for those stores for up to an additional six months. The requirement that any potential acquirer be approved by the Commission is designed to ensure that the potential acquirer(s) intends to put the divested assets, including the stores

⁵ Pursuant to the proposed Consent Agreement, although the divestiture of the stores may be made to one or more Commission-approved buyers, the Wild Oats-associated intellectual property may be divested to only a single buyer.

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and the Wild Oats brand, to use in the relevant product market in competition with Whole Foods.

VI. OTHER PROVISIONS OF THE CONSENT AGREEMENT

The Consent Agreement contains several additional provisions designed to ensure that competition is, in fact, replicated in the targeted geographic markets. As referenced above, the Consent Agreement requires appointment of a divestiture trustee to oversee the process for divesting the Wild Oats assets. The Food Partners (“TFP”) has been appointed to fill this role. TFP is one of the leading investment banking firms in the food retailing industry, with particular expertise in mergers, acquisition, and divestiture services. TFP has advised on a number of supermarket sales and acquisitions, including divesting packages of geographically dispersed national chain supermarkets. For these reasons, TFP is well-suited to serve as divestiture trustee in this matter.

The Consent Agreement also includes an Order to Maintain Assets (“OMA”), which requires Whole Foods to continue to operate the Wild Oats stores until a buyer is identified and approved by the Commission and final closing of the purchase occurs. Because of concerns about possible deterioration of the stores during the divestiture period, the OMA further provides for the appointment of an interim monitor to ensure that Whole Foods maintains the viability, marketability, and competitiveness of the assets and does not terminate the operation of any store included in the divestiture package.

VII. POST-CONSUMMATION RELIEF

The absence of pre-consummation relief from the district court, and Whole Foods’ subsequent integration activities, have made it more difficult for the Commission to obtain complete relief in this matter. However, the proposed Consent Agreement will provide substantial relief to consumers in 17 geographic markets across the United States. Moreover, acceptance of the proposed Consent Agreement will bring immediate, certain relief and avoid the

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expense and uncertainty inherent in continued litigation. Reestablishing a PNOS competitor in these markets under the Wild Oats banner will reintroduce direct price, quality, and service competition in these areas, restoring to a substantial degree the competition that was eliminated by the acquisition, providing important benefits to consumers, and perhaps creating a springboard for broader competition nationwide.

Complaint

IN THE MATTER OF

**REED ELSEVIER NV,
REED ELSEVIER PLC,
REED ELSEVIER GROUP PLC,
REED ELSEVIER INC.,
CHOICEPOINT INC.,
CHOICEPOINT SERVICES INC.,
AND
CHOICEPOINT GOVERNMENT SERVICES LLC**

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE
COMMISSION ACT

*Docket No. C-4257; File No. 081 0133
Complaint, June 1, 2009 – Decision, June 1, 2009*

This consent order addresses the \$4.1 billion acquisition by Reed Elsevier of ChoicePoint. The complaint alleges that the acquisition would eliminate substantial competition between the only two significant suppliers of electronic public record services sold to law enforcement customers in the United States and enable LexisNexis to unilaterally raise the prices of electronic public records services. The complaint also alleges that this market is highly concentrated. The order requires the divestiture of assets related to ChoicePoint's AutoTrackXP and CLEAR electronic public records services to Thomson Reuters Legal Inc. The order also requires Reed Elsevier to provide various transitional services and allows the Commission to appoint an interim monitor.

Participants

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and Catherine M. Sanchez.*

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LLP; and Damian Didden, Wachtell, Lipton, Rosen & Katz.*