UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **William E. Kovacic, Chairman**
Pamela Jones Harbour
Jon Leibowitz
J. Thomas Rosch

In the Matter of	)	
	)	**Docket No. 9324**
WHOLE FOODS MARKET, INC.,	)	
a corporation.	)	**PUBLIC**

AMENDED COMPLAINT

I. INTRODUCTION

Whole Foods Market, Inc.'s ("Whole Foods") acquisition of Wild Oats Markets, Inc. ("Wild Oats"), is likely to have substantially lessened competition and continues to substantially lessen competition, thereby causing significant harm to consumers. This merger, involving the two leading operators of premium natural and organic supermarkets, may 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 Wild Oats entered into an agreement pursuant to which Whole Foods acquired 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 violates 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 in the public interest, hereby issues its Amended Complaint, stating its charges as follows:

II. THE PARTIES AND JURISDICTION

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 260 premium natural and organic supermarkets in more than 37 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.

III. THE ACQUISITION

6. On February 21, 2007, Whole Foods and Wild Oats executed an agreement whereby Whole Foods proposed 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 was effected through a tender offer for all shares of Wild Oats common stock. The total cost of the Acquisition was approximately $671 million in cash and assumed debt.

7. Respondent Whole Foods is in the process of merging Wild Oats into Whole Foods; closing numerous Wild Oats stores; selling several Wild Oats stores; and operating the remainder as Whole Foods stores.

8. 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).

9. In authorizing the commencement of this action, the Commission determined that a temporary restraining order and a preliminary injunction were in the public interest and that it had 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 likely would substantially lessen competition in the relevant markets alleged in the complaint.

10. On June 7, 2007, United States District Court Judge Paul L. Friedman of the United States District Court for the District of Columbia issued an Order granting the Commission's motion for temporary restraining order. On August 16, 2007, Judge Friedman denied the Commission's request for a preliminary injunction and, on August 23, 2007, the United States Court of Appeals for the District of Columbia Circuit denied the Commission's emergency motion for an injunction pending appeal. As a result, Whole Foods' acquisition of Wild Oats was consummated on August 28, 2007. On July 29, 2008, the United States Court of Appeals for the District of Columbia Circuit reversed the district court's conclusion that the Commission failed to show a likelihood of success in this proceeding and remanded the matter back to the district court to address the equities.

IV. NATURE OF COMPETITION

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

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

13. 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.

14. 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").

15. 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. . . ."

16. 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."

17. Relative to conventional supermarkets and most other Retailers, premium natural and organic supermarkets target shoppers who are, in the words of the Respondent or Wild Oats, "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.

18. 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.

19. 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 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.

20. 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.

21. 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."

22. 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."

23. Wild Oats' 2006 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 variety of natural and organic products, and emphasis on service and consumer education that our stores offer."

24. 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 . . . ."

25. 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."

26. 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.

27. Prior to the Acquisition, Whole Foods and Wild Oats, respectively, were the largest and second largest operators of premium natural and organic supermarkets in the United States.

28. Prior to the Acquisition, Whole Foods and Wild Oats were the only two nationwide operators of premium and natural organic supermarkets in the United States.

29. Consumers spent a combined total of $6.5 billion in fiscal 2006 at Whole Foods and Wild Oats. Approximately 70% of that total was spent on perishable products, such as produce, meat, seafood, baked goods, and prepared foods.

30. Prior to the Acquisition, Whole Foods and Wild Oats were one another's closest competitors in 22 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 competed head to head are: Albuquerque, NM; Boston, MA; Boulder, CO; Hinsdale, IL (suburban Chicago); Evanston, IL (suburban Chicago); Cleveland, OH; Colorado Springs, CO; Columbus, OH; Denver, CO; West Hartford, CT; Henderson, NV; 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; Santa Fe, NM; and St. Louis, MO.

31. Over the last five years prior to the Acquisition, Whole Foods 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.

32. Prior to the Acquisition, there were other geographic markets in which only one or the other is present. In many of these markets, Wild Oats or Whole Foods planned, but for the Acquisition, to enter and offer direct and unique competition to the other. Each developed expansion plans that targeted 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.

33. 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, has engaged 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 geographic markets of other retailers. In addition, when Whole Foods or Wild Oats expected the other to enter one of its markets, it planned 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." Prior to the Acquisition, neither company responded in the same way to competition from conventional supermarkets or other Retailers.

34. Prior to the Acquisition, consumers benefitted directly from the price and quality competition between Whole Foods and Wild Oats. These benefits will be lost in the markets where the two competed before the Acquisition and they will not occur in those markets where each had planned to expand.

V. RELEVANT MARKETS

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

36. A relevant geographic market in which to analyze the effects of the 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

37. 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 Acquisition.

VII. ANTICOMPETITIVE EFFECTS

38. The relevant markets are highly concentrated and are significantly more concentrated after the 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.

39. The Acquisition is likely to have substantially lessened competition and continues to substantially lessen competition in the following ways, among others:

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

b. the Acquisition has already eliminated 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 Acquisition has already eliminated 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 Acquisition has already eliminated 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 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 Acquisition has already eliminated 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 Acquisition has already resulted in the closing of numerous Wild Oats stores, reducing or eliminating consumer choice in premium natural and organic supermarkets, and will result in the closing of additional Wild Oats stores and further disposition of assets;

g. the Acquisition has already enabled the combined Whole Foods/Wild Oats to exercise market power unilaterally; and

h. the Acquisition has already eliminated potential competition in numerous parts of the United States.

VIII. VIOLATIONS CHARGED

COUNT I – ILLEGAL ACQUISITION

40. The allegations contained in paragraphs 1-39 are repeated and realleged as though fully set forth here.

41. Whole Foods' acquisition of Wild Oats is likely to have substantially lessened competition and continues to substantially lessen 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.

COUNT II – ILLEGAL ACQUISITION AGREEMENT

42. The allegations contained in paragraphs 1-41 are repeated and realleged as though fully set forth here.

43. Whole Foods, through the Agreement with Wild Oats as described in paragraph 6, has 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 Respondent that the sixteenth day of February 2009, at 10 a.m. 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 Amended 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 Amended 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 until September 26, 2008, 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 Amended 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 Amended Complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the Amended 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 Amended 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 Amended Complaint and, together with the Amended 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 Amended 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 Amended Complaint and to enter an initial decision containing such findings, appropriate conclusions, and order.

Unless otherwise directed, further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Ave., N.W. Room 532, Washington, D.C. 20580. The final prehearing conference shall be held at that location, at 10:00 a.m. on a date to be determined. The parties shall meet and confer prior to the final prehearing conference regarding trial logistics, any designated deposition testimony, and proposed stipulations of law, facts, and authenticity.

NOTICE OF CONTEMPLATED RELIEF

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

1. An order preventing Whole Foods from consolidating any Wild Oats stores into the Whole Foods system, to the extent such consolidation has not occurred at the time of the Commission's decision;

2. An order preventing Whole Foods from selling or disposing of any owned or leased property that had been used as a Wild Oats store in any geographic market, or a Whole Foods store in any relevant geographic market;

3. An order preventing Whole Foods from discontinuing the use of the Wild Oats name at any store being operated as Wild Oats at the time of the Commission's decision;

4. Re-establishment of Wild Oats stores, with Whole Foods stores added as necessary, along with any associated or necessary assets in a manner that creates a group or system of stores that may be available for divestiture, including, but not limited to, re-opening closed Wild Oats stores, re-naming Wild Oats stores that had been changed to the Whole Foods name, reversing any consolidation of Wild Oats stores into the Whole Foods system and re-establishing the Wild Oats system, and re-establishing Wild Oats' distribution arrangements, private label products and supplier relationships;

5. The divestiture of Wild Oats stores, and Whole Foods stores, and any other associated or necessary assets, including the Wild Oats name, distribution systems or assets, and supplier relationships, 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 had offered prior to its acquisition by Whole Foods;

6. Maintenance of the Wild Oats stores pending divestiture, including operating the stores in the ordinary course and maintaining the inventory of the stores, the hours of operation of the stores and of each department in the stores;

7. Appointment of a monitor, or a divestiture trustee, to assure that the Wild Oats, Whole Foods, and related assets are re-established and divested within the time set forth in the Commission's decision;

8. 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;

9. A requirement for Whole Foods to file periodic compliance reports with the Commission; and

10. 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 markets.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this Amended Complaint to be signed by the Secretary and its official seal to be affixed hereto, at Washington, D.C., this eighth day of September, 2008.

By the Commission.

Donald S. Clark
Secretary