

**ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDERS
TO AID PUBLIC COMMENT**
In the Matter of Whole Foods Market, Inc., Docket No. 9324

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 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.

¹Wild 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).

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.

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

²Following 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.

adjudication. The withdrawal was subsequently 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 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

³Immediately 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.

⁴Of 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.

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 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.

⁵Pursuant 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.

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 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.