UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

EKATERINI KOTTARAS, Individually On Behalf Of Herself And On Behalf Of All Others Similarly Situated,	)	
Plaintiff	)	Civil Action No.__________
1541 Garden Street Glendale, CA 91201 County: Los Angeles	)	CLASS ACTION COMPLAINT
v.	)	**JURY TRIAL DEMANDED**
WHOLE FOODS MARKET, INC.	)	
Defendant. 550 Bowie Street Austin, Texas 78703 County: Travis	)	

NATURE OF THE ACTION

1. Plaintiff Ekaterini Kottaras ("plaintiff" or "Kottaras") hereby files this antitrust class action complaint pursuant to Sections 7 and 3 of the Clayton Act and Sections 1 and 2 of the Sherman Act, on behalf of herself and on behalf of all other similarly situated consumers, who since August 28, 2007 until the date this action is resolved by the entry and upholding of a final judgment of this Court ("the Class Period") purchased produce directly from defendant the Whole Foods Market, Inc. ("defendant" or "Whole Foods") within the United States. Defendant operates a chain of grocery supermarkets that specialize in selling premium, natural, and organic produce, and is the leading grocery supermarket store in this specialty market within the

United States. Until the events that give rise to this lawsuit occurred, defendant's foremost competitor in this premium, organic, and natural food market was Wild Markets, Inc., who similarly operated a rival chain of grocery supermarkets, known by their trade name, Wild Oats, that also specialized in selling premium, natural, and organic produce. The existing market rivalry between these competing grocery chain stores served to ensure that market competition constrained any of the two from charging supra-competitive prices, and assured the consumer the benefits of a market characterized by competitive forces that were free of manipulation. All that changed, however, when on February 2007, Whole Foods announced that it would be acquiring and merging with its main rival, Wild Oats. The merger was eventually consummated on August 28, 2007. As a result of that merger, competition in the premium, natural, and organic produce market has been unlawfully thwarted, and defendant Whole Foods has been able to and has acquired an unlawful monopoly in this market, and has charged consumers like plaintiff and the members of the class she seeks to represent supra-competitive prices for their premium, natural, and organic produce purchases.

2. Plaintiff now brings this Class Action Complaint to seek monetary, equitable, and injunctive relief for defendant's violations of the federal antitrust laws, including Sections 7 and 3 of the Clayton Act and Sections 1 and 2 of the Sherman Act. This relief is to serve as redress for the thwarting of competition experienced by

consumers like plaintiff and the members of the putative class, as well as to compensate plaintiff and the putative class members for the supra-competitive prices that they have been forced to pay defendant as a direct and foreseeable consequence of defendant's antitrust violations. In addition, although the merger has been consummated, plaintiff's plea for injunctive relief is not mooted, as plaintiff's injunctive relief plea seeks to impose judicially enforceable conditions on defendant's continued implementation of the merger. The object of these conditions is to ensure that defendant's antitrust violations do not continue to cause antitrust injury to consumers like plaintiff and the members of the putative class. Although the precise contours of this injunctive relief will be best addressed after meaningful discovery has taken place, by way of illustration, such judicially enforceable conditions that could form part of the injunctive relief sought may include, without limitation, a requirement for price controls for a certain post-merger period as well as a requirement that defendant divest certain of its stores, or otherwise provide licenses or agreements to competing entities.

3. Plaintiff does not bring this class action on a clean slate. Rather, on June 5, 2007, the Federal Trade Commission ("FTC") filed a Complaint before this Court, charging defendant and the then separate entity, Wild Markets, Inc., with violations of the federal antitrust and Federal Trade Commission Acts based on the underlying merger between the two entities. As part of its Complaint, the FTC sought preliminary injunctive relief to enjoin the merger. Although this Court initially denied the FTC's plea for preliminary injunctive relief, on appeal and by an order dated July 29, 2008, the United States Court of Appeals for the District of Columbia Circuit reversed this Court's denial of the preliminary injunctive relief, after the D.C. Circuit found, *inter alia*, that this Court "committed legal error in assuming market definition

must depend on marginal consumers; consequently, it underestimated the FTC's likelihood of success on the merits." After reversing this Court's order denying the FTC's plea for a preliminary injunction, the D.C. Circuit remanded the FTC's case back to this Court so that this Court could conduct an analysis of the balancing of the equities in order to determine whether a preliminary injunction should issue. The FTC's case against Whole Foods is, therefore, continuing in nature.

4. While the FTC's complaint against defendant sought to represent the government's interest in enforcing the federal antitrust laws and the Federal Trade Commission Act, the FTC's complaint did not purport to directly represent any consumer purchasers as plaintiffs, nor did the FTC complaint against Whole Foods ever seek to obtain any monetary relief for such consumers. Unlike the FTC's action, therefore, the instant class action seeks to directly represent, as plaintiffs, consumer purchasers of Whole Foods during the Class Period, and seeks to obtain monetary redress for these putative class members—something that the FTC Complaint does not seek nor could accomplish.

PARTIES

5. Plaintiff Ekaterini Kottaras is a resident of Glendale, California in Los Angeles County. During the Class Period, plaintiff repeatedly purchased premium, organic, and/or natural produce directly from at least one of defendant's Whole Foods grocery stores. As a result of defendant's antitrust violations detailed herein, plaintiff was denied the benefits of free market competition, and was forced to and did pay defendant supra-competitive prices for her purchases made at Whole Foods.

6. Defendant Whole Foods is a corporation organized, existing, and doing business under and by virtue of the laws of Texas, with its office and principal place of

business at 550 Bowie Street, Austin, Texas 78703. Established in 1980, prior to its merger with Wild Markets, Inc., Whole Foods operated approximately 190 premium natural and organic supermarkets in more than 30 states and the District of Columbia. It is the largest operator of premium natural and organic supermarkets in the United States.

7. Prior to its merger with Whole Foods, Wild Markets, Inc. was a corporation 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. Prior to the merger with Whole Foods, Wild Markets, Inc., through its Wild Oats branded premium grocery stores, was the second largest operator of premium natural and organic supermarkets in the United States, operating numerous premium natural and organic supermarkets throughout the United States.

8. Founded in 1987, Wild Oats stores, prior to their merger with defendant Whole Foods, provided a broad selection of natural, organic, and gourmet foods, environmentally friendly products, and natural vitamins, remedies, and body care products. The Wild Market, Inc. 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' then-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." Prior to the merger between Whole Foods and Wild Oats, Wild Oats was the primary, and in many instances, the sole competitor whose presence provided effective price-constraining competition to the operation of Whole Foods.

9. Consumers spent a combined total of $6.5 billion in fiscal 2006 at Whole Foods and Wild Oats, a significant portion of which was spent on produce, meat, seafood, baked

goods, and prepared foods. As these figures evidence, the facts giving rise to this lawsuit and defendant's challenged activities substantially affect interstate commerce.

JURISDICTION AND VENUE

10. Defendant transacts business within this judicial district through, inter alia, its operation of Whole Foods stores in the District of Columbia. This Court, therefore, has personal jurisdiction over defendant. In addition because defendant transacts business and is found within this judicial district, venue is proper in this district pursuant to 15 U.S.C. § 22. Further, because the FTC's parallel complaint against defendant is already pending before this Court, venue in this district is the most convenient for the efficient administration of justice.

11. Count I of this Complaint asserts a claim under Section 7 of the Clayton Act, 15 U.S.C. § 18, to challenge and seek redress for the allegedly unlawful merger between Whole Foods and Wild Oats. This Court, therefore, has subject matter jurisdiction over this count pursuant to 28 U.S.C. § 1331 and Section 4 of the Clayton Act, 15 U.S.C. § 15. This Court has jurisdiction, pursuant to 15 U.S.C. §26, to enter injunctive relief for any actual or threatened violation of the antitrust laws.

12. Count II of this Complaint asserts a claim under Section 2 of the Sherman Act, 15 U.S.C. § 2 to seek redress for defendant's allegedly unlawful acquisition and/or maintenance of monopoly market power. This Court, therefore, has subject matter jurisdiction over this count pursuant to 28 U.S.C. § 1331 and Section 4 of the Clayton Act, 15 U.S.C. § 15. This Court has jurisdiction, pursuant to 15 U.S.C. §26, to enter injunctive relief for any actual or threatened violation of the antitrust laws.

13. Count III of this Complaint asserts a claim under Section 1 of the Sherman Act, 15 U.S.C. § 1 to seek redress for the allegedly unlawful agreement in restraint of trade that was

entered into between then-competitors Whole Foods and Wild Markets, Inc. to merge their operations and cease competing. This Court, therefore, has subject matter jurisdiction over this count pursuant to 28 U.S.C. § 1331 and Section 4 of the Clayton Act, 15 U.S.C. § 15. This Court has jurisdiction, pursuant to 15 U.S.C. §26, to enter injunctive relief for any actual or threatened violation of the antitrust laws.

14. Count IV of this Complaint asserts a claim under Section 3 of the Clayton Act, 15 U.S.C. § 14 to seek redress for the allegedly unlawful agreement in restraint of trade involving a commodity that was entered into between then-competitors Whole Foods and Wild Markets, Inc. to merge their operations and cease competing. This Court, therefore, has subject matter jurisdiction over this count pursuant to 28 U.S.C. § 1331 and Section 4 of the Clayton Act, 15 U.S.C. § 15. This Court has jurisdiction, pursuant to 15 U.S.C. §26, to enter injunctive relief for any actual or threatened violation of the antitrust laws.

THE WHOLE FOODS—WILD OATS ACQUISITION AND MERGER

15. 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 announced purchase would be effected through tender offer for all shares of Wild Oats common stock. The total cost of the acquisition was expected to be approximately $671 million in cash and assumed debt.

16. The closing of the transaction was subject to clearance under the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a.

17. As part of the announced acquisition, defendant Whole Foods intended to and did merge Wild Oats into Whole Foods; to close Wild Oats stores; and to operate

the remainder as Whole Foods stores. Thus, upon implementation of the merger, two chain stores that formerly competed vigorously against one another would cease their competition.

18. On June 5, 2007, following a three-month investigation, the Commission determined 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 may substantially lessen competition and/or tend to create a monopoly in the operation of premium natural and organic supermarkets across the United States.

19. On that same day, the FTC determined that the injunctive relief would be in the public interest and authorized its staff to seek a temporary restraining order ("TRO") and preliminary injunction ("PI") in federal district court under Section 13(b) of the FTC Act. The purpose of the TRO and PI was to prevent the acquisition during the pendency of an administrative proceeding to be initiated by the Commission under Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), challenging the legality of the proposed Acquisition under Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

20. On August 16, 2007, this Court entered an Order denying the FTC's request for preliminary injunction, after it found, *inter alia*, that the evidence presented to it, as analyzed by this Court, "all lead to the conclusion that the relevant product market in this case is not premium natural and organic supermarkets ("PNOS") as argued by the FTC but, as Dr. Scheffman has said, at least all supermarkets." Having observed in its Opinion and Order that, "the definition of the relevant product market in this case is crucial. In fact, to a great extent, this case hinges on the proper definition of the relevant product market," and having found against the FTC's

asserted relevant market definition, this Court denied the requested injunctive relief.

21. The FTC appealed this Court denial of the requested injunction to the United States Court of Appeals for the District of Columbia Circuit. By Order dated July 29, 2008, the D.C. Circuit reversed this Court's denial of the FTC's request for preliminary injunction. It did so after finding that this Court erred in its analysis of the correctness of the FTC's asserted relevant market definition, and noted that this Court "committed legal error in assuming market definition must depend on marginal consumers; consequently, it underestimated the FTC's likelihood of success on the merits." Although by the time the D.C. Circuit's reversal was entered, the Whole Foods-Wild Oats had been consummated (based on this Court's now reversed August 16, 2007 Order denying the FTC's motion for preliminary injunction), the D.C. Circuit found that seeking injunctive relief to address the alleged anticompetitive harm posed by the merger was not rendered moot.

22. Since the consummation of the merger, Whole Foods and Wild Oats have, in fact, ceased competing against one another. Whole Foods has closed Wild Oats that prior to the merger competed against Whole Foods stores, either by being present in a geographical region where a Whole Foods store also existed, or by being present at a location where, though no Whole Foods store existed yet, the mere presence of a Wild Oats store posed a competitive constraint on Whole Foods ability to expand its presence into that region. Some Wild Oats stores that were closed by Whole Foods after the consummation of the merger were simply re-opened as Whole Foods stores. Others were permanently closed by Whole Foods after the consummation of the merger. In any event, the net effect of the merger is that Wild Oats, the former main competitor to Whole Foods, no longer exists as a price-constraining competitor to Whole Foods.

23. In fact, from the outset, Whole Foods overriding strategy and vision for the announced merger with Wild Oats was not to enhance efficiency and competition, but rather to thwart and suppress competition and insulate Whole Foods from the price-constraining competition posed by the presence of Wild Oats. This much was evidenced by the testimony of Whole Foods CEO, John Mackey, who at his Investigational Hearing testified that:

> [I]t [the merger] will self-evidently lessen competition in those markets that we are competing with Wild Oats in when we are going to intend to close stores. Again, isn't that true in any of the acquisitions that any of these guys do ? One of the motivations is to eliminate a competitor. I will not deny that. That is one of the reasons why we are doing this deal. That is one of the reasons we are willing to pay $18.50 for a company that has lost $60 million in the last six years. If we can't eliminate those stores then Wild Oats, frankly, isn't worth buying.

24. In Los Angeles County where plaintiff made her purchases, for example, Whole Foods and Wild Oats stores co-existed and vigorously competed against one another prior to the merger. Following the merger, however, Whole Foods eliminated competition from Wild Oats. Now, Whole Foods stores in Los Angeles County are free to and do exact monopoly pricing.

<u>PREMIUM NATURAL AND ORGANIC FOODS INDUSTRY</u>

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

26. " 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.

27. Pursuant to the United States Department of Agriculture' s ("USDA's") 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.

28. 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").

29. Premium natural and organic supermarkets are not simply outlets for natural and organic foods. 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."

30. 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’ Mr. Mackey has also emphasized the importance of high quality perishable foods to Whole Foods’ business model.

31. 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.

32. 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.

33. 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 and, when so-labeled, organic, that the store' s suppliers practice humane animal husbandry and provide humane working environments for employees, and that the store's actions are ecologically sound) and qualitative superiority to other retailers.

34. 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.

35. One of Wild Oats' recent 10K documents 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.

36. Premium natural and organic supermarkets are also very different from mass-merchandisers, such as Wal-Mart and Target.

37. 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.

38. 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.

RELEVANT MARKETS

39. For purposes of this Class Action Complaint, the relevant antitrust product market is the market for premium, natural, and organic supermarkets. The relevant geographic antitrust market is nationwide. Similarly, the operation of premium, natural, and organic supermarkets is a distinct " line of commerce" within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18.

40. Consumers and industry players alike recognize premium, natural, and organic supermarkets as a discrete and distinct separate relevant market with its own supply, demand, and pricing characteristics. Other purveyors of groceries, such as conventional supermarkets (i.e. Safeway) or mass merchandisers (i.e. Wal-Mart) are not seen by at least a core group of consumers as reasonable substitutes to premium, natural, and organics supermarkets, such as the ones operated by Whole Foods (and formerly operated by Wild Oats).

41. This much was recognized by Whole Foods CEO, John Mackey, who in his 2007 first quarter report to his Board, announced that:

> Safeway is continuing to roll out their "Lifestyle Stores." I don't believe these stores have had much real impact on us, though they've increased Safeway's comps a couple hundred basis points (not that much when you consider the immense amount of capital invested).

42. Likewise, as to mass merchandisers, Mr. Mackey, similarly proclaimed that:

> [D]espite the hoopla in the media, hasn't had much impact in the organic market. I doubt they will because their core customers don't want to pay the higher prices and their non-core customers

don't want to shop there for various reasons.

Similarly, as one Wild Oats spokesman has noted:

Mr. Mackey has also explained that:

> Right now, I don't see much of a consumer overlap between Whole Foods and [the mass marketer]. . . . Whole Foods doesn't operate in the same markets as [the mass marketer] and it caters to a higher income shopper. I don't see [the mass marketer] as a great threat to Whole Foods right now. . . . The disparity of their customer base is too great. There is very little overlap between our shoppers and [theirs]. . . . We're a specialty retailer and our customers don't focus on price first.

43. The premium, natural, and organic supermarkets comprising the relevant product market definition are also not subject to price-constraining competition from so-called upscale supermarkets that, unlike Whole Foods, do not focus exclusively on premium, natural, and organic chain store sales. This much was also recognized by Mr. Mackey [Whole Foods' CEO], who in his September 13, 2006 report to the Board stated:

> Trade Joe's continues to rapidly expand, but our new large store format has created a large comparative gap with them. TJ's is now a "fill-in" store for Whole Foods, but lacks a wide enough product selection to be considered a complete alternative to our stores.

COMPETITION BETWEEN WHOLE FOODS AND WILD OATS AND DEFENDANT'S MARKET POWER

44. Prior to the consummation of their merger, Whole Foods and Wild Oats, respectively, were the largest and second largest operators of premium, natural, and organic supermarkets in the United States. Combined, they operated 301 such stores nationwide, with Whole Foods operating 191 stores to the 110

stores operated by Wild Oats. Prior to the consummation of their merger, Whole Foods and Wild Oats were the only two nationwide competitors in the relevant market. While other fringe supermarkets offering exclusively premium, natural and organic produce existed, these were primarily small outfits, whose operations were confined to either a single locale, or to a discrete geographic area, without any foreseeable plans or prospects for expansion.

45. By contrast, prior to their merger, Whole Foods and Wild Oats competed vigorously against one another on price, selection, and service. In at least 19 locales, the stores competed head-to-head. Even in regions that lacked the presence of both stores, it was the announced strategy of each to expand to compete into the territory of the other. The realistic possibility that either outfit may and could readily expand to a region where only the other was present, or to a region where neither store operated, served to pose price-constraining competition on the other.

46. Upon information and belief, prior to the Whole Foods- Wild Oats merger, the two entities possessed in excess of a 90 percent share of the relevant market for premium, natural, and organic supermarkets. Upon information and belief, Whole Foods market share alone, was approximately 55-60 percent immediately prior to the merger, and Wild Oats' market share was approximately 30-35 percent during this same time period.

47. As a result of, *inter alia*, the established presence of each, and their respective market shares, neither Whole Foods nor Wild Oats possessed monopoly market power prior to the consummation of their merger.

48. By contrast, upon consummation of the Whole Foods-Wild Oats merger, Whole Foods acquired a nearly 100 percent share of the relevant nationwide market for premium,

natural, and organic supermarkets. That inordinately high market share, resulting solely as a result of the merger with Wild Oats, along with the existence of the high barriers to entry into this market (which are reference below), means that, as a direct, foreseeable, and natural result of the consummation of the merger, Whole Foods acquired and has been able to maintain an unlawful monopoly in the relevant market alleged herein. This monopoly market power resulted not from Whole Foods' superior business acumen, skill, or enterprise, but strictly from its unlawful agreement to cease competing and merge with its then-primary competitor, Wild Oats.

49. There exist high barriers to entry into the alleged relevant market for premium, natural, and organic supermarkets. First, Whole Foods sheer size and high market share act as an entry barrier to any new would-be entrant into this relevant market. To be able to effectively compete against the likes of a Whole Foods, it would be insufficient for a prospective new entrant to merely open a single or even a few stores, but rather, it would be required to make entry on a scale and size that would be significant enough to challenge Whole Foods' customer base to a sufficient degree so as to pose price-constraining competition to Whole Foods. The sheer size of investment and logistical complexity of making such a large-scale entry from scratch presents an almost insurmountable barrier to entry. This is borne out by the history within this relevant market. For example, in approximately June 2005, Earth Fare, a relatively small competitor in the premium, natural, and organic supermarket relevant market attempted to enter and compete directly against Whole Foods. The attempt was unsuccessful and short-lived. Due to its sheer size, Whole Foods was able to effectively run Earth Fare out of competition. By 2007, Earth Fare closed its store that competed against Whole Foods. Not surprisingly, the other prominent small competitor in the premium, natural, and organic supermarket relevant market, New Season, has openly declared in statements by its founder that it has no plans or desires to

expand beyond its single locale in Portland, Oregon so as to compete against Whole Foods.

50. Conventional and other supermarkets as well as mass-market stores also face significant and likely insurmountable barriers to entry were they to attempt to expand so as to enter the relevant market alleged herein. Given the entirely distinct product offerings between such supermarkets or mass-market stores and the products offered at premium, natural, and organic supermarkets, attempted entry by conventional sellers like Safeway or Wal-Mart would require a complete overhaul of their long-established business operations.

51. The net result is that Whole Foods' inordinately high market share along with the high barriers to entry characterizing this relevant market serve to ensure that Whole Foods has and continues to have monopoly market power; that is, the power to restrict output and exclude competition.

ANTICOMPETITIVE EFFECTS, AND ANTITRUST INJURY SUSTAINED AND LIKELY TO BE SUSTAINED BY THE CONSUMER CLASS

52. The merger between Whole Foods and Wild Oats has caused and continues to cause antitrust injury to plaintiff and the members of the class she seeks to represent. Prior to the merger, Wild Oats and Whole Foods competed against one another and posed price-constraining competition on one another. The merger has eliminated these constraints, and has handed Whole Foods an unlawful monopoly in the relevant market. Whole Foods has exploited this unlawful monopoly by charging plaintiff and the members of the class she seeks to represent supra-competitive prices for their Whole Foods' purchases of premium, natural, and organic produce.

53. Thus, as a direct, proximate, and foreseeable result of defendant's antitrust violations detailed herein, plaintiff and the members of the class she seeks to represent have paid and continue to pay supra-competitive prices for their purchases made from Whole Foods.

54. Unless enjoined by this Court, Whole Foods is likely to continue imparting such injury to plaintiff and members of the putative class. Further, plaintiff is a repeat shopper in the premium, natural, and organic supermarket relevant market where Whole Foods now holds an unlawful monopoly. Thus, unless Whole Foods is restrained or enjoined by this Court, plaintiff (as well as members of the putative class) is likely to continue to sustain the antitrust injury detailed herein.

CLASS ACTION ALLEGATIONS

55. Pursuant to Federal Rules of Civil Procedure 23(b)(2) and 23(b)(3), plaintiff brings this action on behalf of herself and on behalf of all other similarly situated persons who purchased premium, natural, and organic goods from Whole Foods in the United States during the Class Period.

56. Although the precise number of the members of the putative class is not presently known to plaintiff, it is self-evident from defendant's sales figures that the number of members of the putative class is so numerous so as to make joinder impracticable.

57. Plaintiff's claims are typical of the claims raised on behalf of the members of the putative class. Specifically, plaintiff like the rest of the members of the putative class allege that, as a result of defendant's antitrust violations alleged herein, they were injured in their business or property by being forced to pay supra-competitive prices for their purchases from Whole Foods during the Class Period.

58. Plaintiff and her counsel are adequate representatives of the interests of the putative class. Plaintiff is a member of the class she seeks to represent, as she made purchases from Whole Foods during the Class Period and continues to do so. Plaintiff's interests,

therefore, are fully aligned with those of the putative class members. Plaintiff has also retained counsel experienced in complex and class action litigation, including numerous consumer antitrust class actions. Counsel retained by plaintiff, therefore, will adequately and zealously represent the interests of the absent putative class members.

59. This action raises common issue of fact and/or law, and such common issues predominate over any issues that may affect only individual putative class members. Among the common questions of fact and/or law that are present and predominate in this case are:

a. the definition of the applicable relevant antitrust market;

b. defendant's market power within this antitrust relevant market;

c. the legality of defendant's merger with Wild Oats;

d. the extent, if any, of the anticompetitive effects proximately caused by defendant's actions;

e. the existence of any injury to business or property of the class members directly and proximately caused by defendant's actions;

f. the proper means of redress or remedy.

60. A class action presents a superior form of conducting this litigation over the litigation of individual claims separately. The amount of damages sustained by each individual putative class member is likely to be so small individually when compared to the cost of litigating this matter, that separate individual litigation of each class member's case would prove unfeasible. In addition, the sheer number of class members means that if each class member were required to litigate his or her case separately, vast judicial inefficiency would result, and a significant toll would be imposed on the courts and the parties.

61. Litigating this case as a class action is manageable. This case is not atypical from

other consumer antitrust cases that have been previously certified and successfully managed as class actions in courts across the country.

62. Class certification is also independently appropriate because defendant has acted and continues to act in a manner that is common to the class, thereby making injunctive and/or equitable relief the appropriate remedy, so as to prevent inconsistent rulings and obligations that may come about if this matter were litigated on an individual basis by separate class members individually.

COUNT I

(VIOLATION OF SECTION 7 OF THE CLAYTON ACT, 15 U.S.C. §18)

63. Plaintiff incorporates by reference all of the allegations of this Complaint with the same force and effect as if they had been fully restated herein.

64. During the Class Period, plaintiff made purchases of premium, natural, and organic produce at a Whole Foods store within the United States, and paid Whole Foods money directly for those purchases.

65. For purposes of this Class Action Complaint, the relevant antitrust product market is the market for premium, natural, and organic supermarkets. The relevant geographic antitrust market is nationwide. Similarly, the operation of premium, natural, and organic supermarkets is a distinct " line of commerce" within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18.

66. The activities carried on by Whole Foods and formerly by Wild Oats in the operation of premium, natural, and organic supermarkets affects interstate commerce.

67. The consummation of the merger between Whole Foods and Wild Oats amounts to an acquisition within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18.

68. The acquisition and merger between Whole Foods and Wild Oats has had and continues to have the direct, proximate, and foreseeable result of substantially lessening competition and of tending to create and actually creating a monopoly. The acquisition and merger between Whole Foods and Wild Oats, therefore, violates Section 7 of the Clayton Act, 15 U.S.C. §18.

69. As a direct, proximate, and foreseeable result of the acquisition and merger between Whole Foods and Wild Oats, which violates Section 7 of the Clayton Act, plaintiff and the members of the class she seeks to represent have been injured in their business and/or property by being forced to pay supra-competitive prices for their premium, natural, and organic produce purchases from Whole Foods during the Class Period. Unless defendant is enjoined or otherwise restrained by this Court, plaintiff is likely to continue sustaining such antitrust injury.

70. As a direct purchaser who has paid for and continues to purchase products in the relevant market from Whole Foods, plaintiff has standing to and does seek money damages as well as equitable relief for the antitrust injury sustained by her as a direct, proximate, and foreseeable result of Whole Foods' violation of Section 7 of the Clayton Act, 15 U.S.C. §18.

COUNT II

(VIOLATION OF SECTION 2 OF THE SHERMAN ACT, 15 U.S.C. §2)

71. Plaintiff incorporates by reference all of the allegations of this Complaint with the same force and effect as if they had been fully restated herein.

72. During the Class Period, plaintiff made purchases of premium, natural, and organic produce at a Whole Foods store within the United States, and paid Whole Foods money directly for those purchases.

73. For purposes of this Class Action Complaint, the relevant antitrust product market is the market for premium, natural, and organic supermarkets. The relevant geographic antitrust market is nationwide. Similarly, the operation of premium, natural, and organic supermarkets is a distinct " line of commerce" within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18.

74. The activities carried on by Whole Foods and formerly by Wild Oats in the operation of premium, natural, and organic supermarkets affects interstate commerce.

75. The consummation of the acquisition and merger between Whole Foods and Wild Oats amounts to an acquisition within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18.

76. As a direct, proximate, and foreseeable result of the anticompetitive merger between Whole Foods and Wild Oats, which violates Section 7 of the Clayton Act, Whole Foods was able to and did eliminate competition in the relevant market, and secured an unlawful monopoly for itself in the relevant market. The ongoing merger agreement further serves as the means by which Whole Foods is able to forestall any ongoing competition in the relevant market. Thus, Whole Foods' acquisition and maintenance of its monopoly market power within the relevant market was not brought about by superior skill, enterprise, or business acumen, but rather was a direct, proximate, and foreseeable result of its unlawful and anticompetitive merger with Wild Oats.

77. Defendant has exploited and continues to exploit its unlawfully acquired and maintained monopoly market power by charging plaintiff and the members of the putative class supra-competitive prices for their premium, natural, and organic produce purchases from Whole Foods during the Class Period. Defendant, therefore, has injured plaintiff and the members of the putative class in their business and/or property by causing them to overpay for their

purchases, and this injury is precisely the type of injury that the antitrust laws were designed to redress.

78. Defendant's conduct and practice is continuing, and unless enjoined or restrained by this Court, is likely to continue inflicting antitrust injury to plaintiff and members of the putative class.

79. Defendant's unlawful acquisition, maintenance, and exploitation of its monopoly market power violates Section 2 of the Sherman Act, 15 U.S.C. §2.

80. As a direct purchaser who has paid for and continues to purchase products in the relevant market from Whole Foods, plaintiff has standing to and does seek money damages as well as equitable relief for the antitrust injury sustained by her as a direct, proximate, and foreseeable result of Whole Foods' violation of Section 2 of the Sherman Act, 15 U.S.C. §2.

COUNT III

(VIOLATION OF SECTION 1 OF THE SHERMAN ACT, 15 U.S.C. §1)

81. Plaintiff incorporates by reference all of the allegations of this Complaint with the same force and effect as if they had been fully restated herein.

82. During the Class Period, plaintiff made purchases of premium, natural, and organic produce at a Whole Foods store within the United States, and paid Whole Foods money directly for those purchases.

83. For purposes of this Class Action Complaint, the relevant antitrust product market is the market for premium, natural, and organic supermarkets. The relevant geographic antitrust market is nationwide. Similarly, the operation of premium, natural, and organic supermarkets is a distinct " line of commerce" within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18.

84. The activities carried on by Whole Foods and formerly by Wild Oats in the operation of premium, natural, and organic supermarkets affects interstate commerce.

85. The acquisition and merger agreement between Whole Foods and Wild Oats amounts to an agreement in restraint of trade within the meaning of Section 1 of the Sherman Act, 15 U.S.C. §1.

86. The acquisition and merger agreement between Whole Foods and Wild Oats is anticompetitive, and violates Section 1 of the Sherman Act, 15 U.S.C. § 1, because it, inter alia, unduly thwarts and forecloses competition in the relevant market.

87. To the extent that the Whole Foods-Wild Oats acquisition and merger agreement possesses any pro-competitive effects, these effects are outweighed by the anticompetitive harm caused by the agreement. To the extent that the Whole Foods-Wild Oats acquisition and merger agreement possesses any pro-competitive effects, these pro-competitive effects could be achieved through less restrictive means than the merger and acquisition agreement actually executed and consummated between Whole Foods and Wild Oats.

88. As a direct, proximate, and foreseeable result of the anticompetitive agreement in restraint of trade in violation of Section 1 of the Sherman Act, Whole Foods was able to and did thwart and eliminate competition in the relevant market, and secured an unlawful monopoly for itself in the relevant market. The ongoing merger agreement further serves as the means by which Whole Foods is able to forestall any ongoing competition in the relevant market. Thus, Whole Foods' acquisition and maintenance of its monopoly market power within the relevant market was not brought about by superior skill, enterprise, or business acumen, but rather was a direct, proximate, and foreseeable result of its unlawful and anticompetitive merger with Wild Oats.

89. Defendant has exploited and continues to exploit its unlawfully acquired and maintained monopoly market power by charging plaintiff and the members of the putative class supra-competitive prices for their premium, natural, and organic produce purchases from Whole Foods during the Class Period. Defendant, therefore, has injured plaintiff and the members of the putative class in their business and/or property by causing them to overpay for their purchases, and this injury is precisely the type of injury that the antitrust laws were designed to redress.

90. Defendant's conduct and practice is continuing, and unless enjoined or restrained by this Court, is likely to continue inflicting antitrust injury to plaintiff and members of the putative class.

91. Defendant's unlawful acquisition, maintenance, and exploitation of its monopoly market power violates Section 1 of the Sherman Act, 15 U.S.C. §1.

92. As a direct purchaser who has paid for and continues to purchase products in the relevant market from Whole Foods, plaintiff has standing to and does seek money damages as well as equitable relief for the antitrust injury sustained by her as a direct, proximate, and foreseeable result of Whole Foods' violation of Section 1 of the Sherman Act, 15 U.S.C. §1.

COUNT IV

(VIOLATION OF SECTION 3 OF THE CLAYTON ACT, 15 U.S.C. § 14)

93. Plaintiff incorporates by reference all of the allegations of this Complaint with the same force and effect as if they had been fully restated herein.

94. During the Class Period, plaintiff made purchases of premium, natural, and organic produce at a Whole Foods store within the United States, and paid Whole Foods money

directly for those purchases.

95. For purposes of this Class Action Complaint, the relevant antitrust product market is the market for premium, natural, and organic supermarkets. The relevant geographic antitrust market is nationwide. Similarly, the operation of premium, natural, and organic supermarkets is a distinct " line of commerce" within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18.

96. The activities carried on by Whole Foods and formerly by Wild Oats in the operation of premium, natural, and organic supermarkets affects interstate commerce.

97. The acquisition and merger agreement between Whole Foods and Wild Oats amounts to an agreement in restraint of trade within the meaning of Section 1 of the Sherman Act, 15 U.S.C. §1 and Section 3 of the Clayton Act, 15 U.S.C. § 14. The sale of premium, natural, and organic produce amounts to sales of a commodity within the meaning of Section 3 of the Clayton Act, 15 U.S.C. § 3.

98. The acquisition and merger agreement between Whole Foods and Wild Oats is anticompetitive, and violates Section 3 of the Clayton Act, 15 U.S.C. § 14, because it, *inter alia*, unduly thwarts and forecloses competition in the relevant market.

99. To the extent that the Whole Foods-Wild Oats acquisition and merger agreement possesses any pro-competitive effects, these effects are outweighed by the anticompetitive harm caused by the agreement. To the extent that the Whole Foods-Wild Oats acquisition and merger agreement possesses any pro-competitive effects, these pro-competitive effects could be achieved through less restrictive means than the merger and acquisition agreement actually executed and consummated between Whole Foods and Wild Oats.

100. As a direct, proximate, and foreseeable result of the anticompetitive agreement in restraint of trade in violation of Section 3 of the Clayton Act, Whole Foods was able to and did

thwart and eliminate competition in the relevant market, and secured an unlawful monopoly for itself in the relevant market. The ongoing merger agreement further serves as the means by which Whole Foods is able to forestall any ongoing competition in the relevant market. Thus, Whole Foods' acquisition and maintenance of its monopoly market power within the relevant market was not brought about by superior skill, enterprise, or business acumen, but rather was a direct, proximate, and foreseeable result of its unlawful and anticompetitive merger with Wild Oats.

101. Defendant has exploited and continues to exploit its unlawfully acquired and maintained monopoly market power by charging plaintiff and the members of the putative class supra-competitive prices for their premium, natural, and organic produce purchases from Whole Foods during the Class Period. Defendant, therefore, has injured plaintiff and the members of the putative class in their business and/or property by causing them to overpay for their purchases, and this injury is precisely the type of injury that the antitrust laws were designed to redress.

102. Defendant's conduct and practice is continuing, and unless enjoined or restrained by this Court, is likely to continue inflicting antitrust injury to plaintiff and members of the putative class.

103. Defendant's unlawful acquisition, maintenance, and exploitation of its monopoly market power violates Section 3 of the Clayton Act, 15 U.S.C. §14.

104. As a direct purchaser who has paid for and continues to purchase products in the relevant market from Whole Foods, plaintiff has standing to and does seek money damages as well as equitable relief for the antitrust injury sustained by her as a direct, proximate, and foreseeable result of Whole Foods' violation of Section 3 of the Clayton Act, 15 U.S.C. §14.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for the following relief from the Court:

a. That the Court enter judgment against defendant and in favor plaintiff and the members of the class on all counts of this Class Action Complaint;

b. That the Court certify this action as a class action, and designate plaintiff and her counsel as class representative and class counsel, respectively;

c. That the Court direct that notice of this class action be disseminated at the expense of defendant to the absent class members;

d. That this Court award plaintiff's counsel's their reasonable attorneys' fees, expenses, and costs of suit, and enter an order and judgment directing defendant to pay such an award;

e. That this Court award plaintiff and the class members money damages, including all available compensatory and statutory damages, including but not limited to treble damages, as well as an award of attorneys' fees and expenses, and that the Court enter an order and judgment directing defendant to pay such damages;

f. That the Court enter an order and/or judgment providing for the appropriate equitable, injunctive, and declaratory relief to, inter alia, restrain continued and future violations by defendant and protecting plaintiff and members of the class from sustaining future harm and antitrust injury;

g. That the Court award any other relief appropriate to redress the violations alleged.

Plaintiff seeks a trial by jury on all counts and issues so triable.

Dated: October 27, 2008

Respectfully submitted,

_/s/ Roy A. Katriel_______________
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