

Malcolm L. Catt, Esq.
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, D.C. 20580

re: **Public Comment re FTC v. Whole Foods lawsuit**

Dear Mr. Catt:

I submit this letter for the purpose of providing public comment about the proposed settlement in the above matter. I am also filing appearances and objections, and requests for leave to file motions to intervene, in the federal court lawsuit and FTC proceeding.

I was a customer of Wild Oats Markets, Inc. (“Wild Oats”), before defendant Whole Foods Market, Inc. (“Whole Foods”) purchased Wild Oats and closed the Wild Oats store in Pasadena, California. As a result of such closure, the public and I have been deprived of the opportunity to shop at Wild Oats, and have been injured by Whole Foods’ anticompetitive activities and unfair competition. As detailed in my objections, Whole Foods purchased Wild Oats for the express purpose of avoiding “price wars” and other competition, and to prevent the possibility of the “launch [of] a national natural/organic food chain to rival” Whole Foods, in Whole Foods’ president’s own words. The Wild Oats acquisition is part of a continuing pattern of illegal conduct by Whole Foods in its plan to acquire and then shut down competitors, including the Bread & Circus and Fresh Fields chains back in the 1990’s.

Whole Foods’ conduct in acquiring and then shutting down Wild Oats stores is illegal on its face, including by violating Section 7 of the Clayton Act. *See generally FTC v. Universal Health, Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991). As the *Narnia* author C.S. Lewis explained, “the greatest evil is not done in those sordid dens of evil Dickens loved to paint, but in clear, carpeted, warmed, well-lighted offices, by quiet men with white collars and cut fingernails and smooth-shaven cheeks who do not need to raise their voices.”

Despite Whole Foods’ illegal and anticompetitive conduct in acquiring and then shutting down the Pasadena and other Wild Oats stores, the proposed settlement agreement allows Whole Foods to get away with its illegal plan. The settlement would not require Whole Foods to divest the stores in the markets where it has already shut down Wild Oats stores – *i.e.*, the markets where Whole Foods wanted to shut down competition – and instead, it would merely require Whole Foods to divest the Wild Oats stores which it has not already shut down or absorbed – which are presumably in markets that Whole Foods doesn’t care about. This is especially problematic in that the relevant markets are extremely local, so divesting Wild Oats stores in some other state does not preserve or restore competition in California or any other distant location.

Nor would it be unfair to make Whole Foods restore the competition which it destroyed – it bought Wild Oats for the express and acknowledged purposes of avoiding “price wars” and other competition, and to prevent the possibility of the “launch [of] a national natural/organic food chain to rival” Whole Foods, and the only way to restore the status quo ante is to require the divestment of the original Wild Oats chain in its entirety. If that is impossible, so that Whole Foods is allowed to be successful in its scheme to shut down the competition, then at least this lawsuit should continue to that a damages award can be obtained which would impose such significant burden upon Whole Foods as to prevent it from continuing to buy up and destroy the competition.

I understand the FTC may be tired and reluctant to pursue these claims and thereby protect the public, and I have therefore requested that the Court step in and prevent this unfair settlement from going forward. This situation is analogous to a class action settlement, in which case the Court acts as “a guardian for class members.” *Weinberger v. Kendrick*, 698 F.2d 61, 69 n.10 (2d Cir. 1982). Just as individual class members cannot protect themselves and so the Court must act as their guardian or fiduciary, the individual members of the public cannot protect themselves against Whole Foods’ rapacious conduct and therefore require the protection of the Court.

Thus, my objections request that the Court reject the proposed settlement, since it would allow Whole Foods to succeed in its illegal and anticompetitive scheme to buy up and then close down the competition.

Very truly yours,

James B. Hicks
for Hicks | Park LLP