

WILD OATS MARKETS INC

Form PREM14A

June 15, 2007

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**UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549  
(RULE 14a-101)  
SCHEDULE 14A**

Proxy Statement Pursuant to Section 14(a) of the Securities  
Exchange Act of 1934 (Amendment No. )

Filed by the Registrant ☐

Filed by a Party other than the Registrant ☐

Check the appropriate box:

☐ Preliminary Proxy Statement

☐ **Confidential, for Use of the Commission Only (as permitted by Rule 14a-6(e)(2))**

☐ Definitive Proxy Statement

☐ Definitive Additional Materials

☐ Soliciting Material Pursuant to §240.14a-12

**Wild Oats Markets, Inc.**

(Name of Registrant as Specified In Its Charter)

(Name of Person(s) Filing Proxy Statement, if other than the Registrant)

Payment of Filing Fee (Check the appropriate box):

☐ No fee required.

☐ Fee computed on table below per Exchange Act Rules 14a-6(i)(4) and 0-11.

(1) Title of each class of securities to which transaction applies:

Wild Oats Markets, Inc. common stock, par value \$.001 per share

(2) Aggregate number of securities to which transaction applies: 31,334,034

The aggregate of 31,334,034 shares of common stock, par value \$0.001 per share, of Wild Oats Markets, Inc. outstanding consists of: (a) 29,900,167 shares of common stock issued and outstanding, (b) 1,274,380 shares of common stock issuable pursuant to existing stock options with an exercise price below \$18.50 per share, and (c) 159,487 shares of restricted common stock and restricted common stock units

(3) Per unit price or other underlying value of transaction computed pursuant to Exchange Act Rule 0-11 (set forth the amount on which the filing fee is calculated and state how it was determined):

**Calculated solely for the purpose of determining the filing fee.** The value of the transaction is determined based upon the product of (1) the aggregate of 31,334,034 shares of common stock, par value \$0.001 per share, of Wild Oats Markets, Inc. outstanding consisting of: (a) 29,900,167 shares of common stock issued and outstanding, (b) 1,274,380 shares of common stock issuable pursuant to existing stock options with an exercise price below \$18.50 per share, and (c) 159,487 shares of restricted common stock and restricted common stock units, and (2) the \$18.50 per share merger consideration. The filing fee, calculated in accordance with Rule 0-11 of the Securities Exchange Act of 1934, is calculated by multiplying the value of the transaction by 0.0000307.

(4) Proposed maximum aggregate value of transaction:

\$579,679,629

(5) Total fee paid:

\$17,796.17

- Fee paid previously with preliminary materials.
- Check box if any part of the fee is offset as provided by Exchange Act Rule 0-11(a)(2) and identify the filing for which the offsetting fee was paid previously. Identify the previous filing by registration statement number, or the Form or Schedule and the date of its filing.

(1) Amount Previously Paid:

(2) Form, Schedule or Registration Statement No.:

(3) Filing Party:

(4) Date Filed:

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**The information in this document is not complete and can be changed.  
PRELIMINARY DRAFT, DATED JUNE 15, 2007**

Dear Stockholder:

You are cordially invited to attend a special meeting of stockholders of Wild Oats Markets, Inc. (the Company) to be held on \_\_\_\_\_, 2007 at :00 MDT at \_\_\_\_\_, Boulder, Colorado.

At the special meeting, you will be asked to approve and adopt an agreement and plan of merger that the Company entered into on February 21, 2007, providing for the merger of an affiliate of Whole Foods Market, Inc. ( WFMI ) with and into the Company with the Company surviving as a wholly-owned subsidiary of WFMI. WFMI is one of the leading retailers of natural and organic foods. WFMI operates 195 stores in the United States, Canada and United Kingdom.

If the merger is consummated, the Company's stockholders will be entitled to receive \$18.50 in cash for each share of Company common stock they own. The \$18.50 per share being paid pursuant to the merger represents a 17% premium over the closing price of the Company's common stock on February 20, 2007, the last trading day before the merger was announced, and a 23% premium over the average closing price of the Company's common stock for the one month prior to announcement.

On February 20, 2007, our board of directors, after carefully considered a number of factors which are described in the accompanying proxy, unanimously determined that the merger agreement and the merger are fair to and in the best interests of the Company and its stockholders, and unanimously approved the form, terms and provisions of the merger agreement. **The Company's board of directors unanimously recommends that the Company's stockholders vote FOR the proposal to approve and adopt the merger agreement.**

The Company cannot consummate the merger unless the Company's stockholders approve and adopt the merger agreement. Such approval and adoption requires the affirmative vote of the holders of at least a majority of the shares of Company common stock outstanding on the record date.

The attached notice of special meeting and proxy statement explain the proposed merger and provide specific information concerning the special meeting. Please read these materials (including the annexes) carefully.

**Your vote is important. Whether or not you plan to attend the special meeting, you should read the proxy statement and follow the instructions on your proxy card to submit a proxy by mail, telephone or Internet to ensure that your shares will be represented at the special meeting.** If you decide to attend the special meeting and vote in person, your vote at the special meeting will revoke any previously submitted proxy.

Sincerely,

Greg Mays  
Chairman and CEO

**This transaction has not been approved or disapproved by the Securities and Exchange Commission, nor has the Securities and Exchange Commission passed upon the fairness or merits of this transaction or the accuracy or adequacy of the information contained in this proxy statement. Any representation to the contrary is unlawful.**

This proxy statement is dated \_\_\_\_\_, 2007, and is first being mailed to stockholders of the Company on or about \_\_\_\_\_, 2007.

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**The information in this document is not complete and can be changed.  
PRELIMINARY DRAFT, DATED JUNE 15, 2007**

*1821 30th Street  
Boulder, CO 80301  
303-440-5220*

**NOTICE OF SPECIAL MEETING OF STOCKHOLDERS  
TO BE HELD ON \_\_\_\_\_, 2007**

TO OUR STOCKHOLDERS:

**Notice Is Hereby Given** that a special meeting of Stockholders of Wild Oats Markets, Inc. (the "Company") will be held on \_\_\_\_\_, 2007 at \_\_\_\_\_:00 MDT at \_\_\_\_\_, Boulder, Colorado. All holders of record of shares of Company common stock at the close of business on \_\_\_\_\_, 2007 are entitled to vote at this special meeting and at any adjournment or postponement thereof. At the special meeting, the Company's stockholders will be asked to:

1. consider and vote upon a proposal to approve and adopt the Agreement and Plan of Merger, dated as of February 21, 2007 (the "Merger Agreement"), by and among the Company, Whole Foods Market, Inc. ("WFMI") and WFMI Merger Co., a wholly-owned subsidiary of WFMI ("Merger Sub"), pursuant to which, upon the merger becoming effective, each outstanding share of the Company's common stock, par value \$.001 (together with associated preferred stock purchase rights, the "Shares") will be converted into the right to receive \$18.50 per share in cash, without interest;
2. approve any motion to adjourn the special meeting to a later date, if necessary or appropriate, and to solicit additional proxies if there are insufficient votes at the time of the special meeting to approve the foregoing proposal; and
3. transact such other business as may properly come before the special meeting or any adjournment or postponement thereof.

The foregoing items of business are more fully described in the proxy statement accompanying this notice.

All holders of record of Shares at the close of business on \_\_\_\_\_, 2007 are entitled to vote at this special meeting and at any adjournment or postponement thereof. **The Company's board of directors has determined that the Merger Agreement and the Merger are fair to and in the best interests of the Company and its stockholders, and has unanimously approved the Merger Agreement and related transactions. The Company's board of directors unanimously recommends that the Company's stockholders vote FOR the proposal to approve and adopt the Merger Agreement.**

When you consider the recommendation of our board of directors to approve the Merger Agreement, you should be aware that some of our directors and executive officers have interests in the Merger that may be different from, or in addition to, the interests of our stockholders generally.

Company stockholders who do not vote in favor of approval and adoption of the Merger Agreement will have the right to seek appraisal of the fair value of their shares if the Merger is consummated, but only if they perfect their appraisal rights by complying with all of the required procedures under Delaware law. See "Special Factors" Appraisal

Rights beginning on page 22 of the accompanying proxy statement and Annex F to the proxy statement.

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You are cordially invited to attend the special meeting in person. **Whether or not you expect to attend the special meeting, please vote by phone, Internet or complete, date, sign and return the enclosed proxy as promptly as possible in order to ensure your representation at the special meeting.** The approval and adoption of the merger agreement require the affirmative vote of a majority of the outstanding shares of common stock entitled to vote thereon. It is important that your shares are represented at this special meeting. A return envelope (which is postage prepaid if mailed in the United States) is enclosed for that purpose. You may also vote by phone or Internet, following the instructions on your ballot. Even if you have given your proxy, you may still vote in person if you attend the special meeting

By Order of the Board of Directors

Freya R. Brier  
Senior Vice President and Corporate Secretary

Boulder, Colorado  
, 2007

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**SUMMARY TERM SHEET OF MERGER TERMS AND CONDITIONS**

*This summary term sheet highlights material information contained in this proxy statement, but does not contain all of the information in this proxy statement that is important to your voting decision. To understand the Merger Agreement fully and for a more complete description of the terms of the Merger, you should carefully read this entire proxy statement, including the attached annexes. In addition, the Company encourages you to read the Merger Agreement and the information incorporated by reference into this proxy statement, which includes important business and financial information about the Company that has been filed with the Securities and Exchange Commission. See*

*Where Can You Find More Information. Page references below relate to a more complete description of terms and conditions in this proxy statement.*

**Important Defined Terms**

<b>Company:</b>	Wild Oats Markets, Inc., a Delaware corporation
<b>Company Board</b>	Board of Directors of Wild Oats Markets, Inc.
<b>DGCL:</b>	Delaware General Corporations Law
<b>Effective Time:</b>	The time of the filing of the Certificate of Merger with the Secretary of State of the State of Delaware effecting the Merger
<b>FTC:</b>	The Federal Trade Commission
<b>HSR Act:</b>	Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended
<b>Merger:</b>	The merger of Merger Sub with and into the Company, with the Company as the survivor
<b>Merger Agreement:</b>	Agreement and Plan of Merger, dated as of February 21, 2007, by and among WFMI, Merger Sub and the Company, a copy of which is attached as Annex A to this proxy statement
<b>Merger Sub:</b>	WFMI Merger Co., a wholly owned subsidiary of Whole Foods Market, Inc.
<b>Per Share Merger Consideration:</b>	\$18.50 per Share in cash, without interest
<b>SEC:</b>	Securities and Exchange Commission
<b>Shares:</b>	Wild Oats Markets, Inc. common stock, \$.001 par value, including associated preferred stock purchase rights
<b>WFMI:</b>	Whole Foods Market, Inc., a Texas corporation

**The Parties (page 10)**

The Company is a nationwide chain of natural and organic foods markets currently operating 110 natural food stores in 24 U.S. states and British Columbia, Canada under the Wild Oats Marketplace, Henry's Farmers Market, Sun Harvest and Capers Community Markets banners. The Company's corporate headquarters are located at 1821 30th Street, Boulder, Colorado, 80301, and its principal phone number is 303-440-5220.

WFMI is one of the leading retailers of natural and organic foods currently operating 195 stores in the United States, Canada and the United Kingdom. WFMI's principal offices are located at 550 Bowie Street, Austin, Texas 78703, and its phone number is (512) 477-4455.

Merger Sub is a Delaware corporation and, to date, has engaged in no activities other than those incident to its formation and to the tender offer and the Merger. Merger Sub's principal executive offices are located at 550 Bowie Street, Austin, Texas 78703, and Merger Sub's telephone number at such principal executive offices is (512) 477-4455.

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**Recommendation of the Company's Board of Directors (page 14)**

The Company Board has determined that the Merger Agreement and the Merger are fair to and in the best interests of the Company and its stockholders, and has unanimously approved the Merger Agreement and related transactions.

**The Company Board unanimously recommends that the Company's stockholders vote FOR the proposal to approve and adopt the Merger Agreement.**

**Principal Reasons for the Merger (page 14)**

The principal reasons for the Merger include, among others, the risks and uncertainties of executing the Company's business and financial plans as a stand-alone company and the opportunity for the Company's stockholders to receive a cash payment for their Shares at a significant premium to historical trading prices. See Special Factors Recommendation of the Company's Board of Directors and Its Reasons for the Merger.

**What You Will Receive in the Merger (page 30)**

If the Merger is consummated, each outstanding Share (other than Shares held in the treasury of the Company, owned by Merger Sub, WFMI or any wholly-owned subsidiary of WFMI or the Company, or held by stockholders who properly demand and perfect appraisal rights under Delaware law) will be converted into the right to receive the Per Share Merger Consideration (i.e., \$18.50 in cash). You will receive the Per Share Merger Consideration in respect of your Shares after you remit your stock certificate(s) evidencing your Shares or exchange your book-entry Shares in accordance with the instructions contained in a letter of transmittal to be sent to you as soon as reasonably practicable after consummation of the Merger, together with a properly completed and signed letter of transmittal and any other documentation required to be completed pursuant to the written instructions. If your Shares are held in street name by your bank, broker or other nominee, you will receive instructions from your bank, broker or nominee as to how to surrender your street name Shares and receive cash for those Shares.

**Treatment of Company Stock Options, ESPP and RSUs (page 30)**

The Merger Agreement provides that, no later than the Effective Time, each outstanding and unexercised option to acquire Shares granted under any of the Company's equity incentive plans, whether vested or unvested, will automatically be terminated and will thereafter solely represent the right to receive, in exchange, an amount in cash equal to the product of the number of Shares subject to such option and the excess, if any, of the Per Share Merger Consideration over the exercise price per Share subject to such option. Options having an exercise price per Share equal to or greater than the Per Share Merger Consideration will, at the Effective Time, be cancelled without payment of any consideration. The Company Board has taken actions under the Company's Employee Stock Purchase Plan such that no further offering periods for the purchase of Shares thereunder would commence following the expiration of the offering period that ended December 31, 2006. Immediately prior to the Effective Time, all granted but unvested restricted stock units, or RSUs, will become fully vested. Each Share of restricted stock and each Share represented by an RSU will, at the Effective Time, be cancelled and converted into the right to receive the Per Share Merger Consideration.

**Opinion of Financial Advisor (page 18)**

Citigroup Global Markets Inc. delivered its written opinion to the Company Board that, as of February 20, 2007, and based upon and subject to the factors and assumptions set forth in its written opinion, the \$18.50 per share in cash to be received by the holders of Company Shares pursuant to the Merger Agreement was fair from a financial point of view to such holders. The full text of Citigroup's written opinion is attached to this proxy statement as Annex C.

**Appraisal Rights (page 22)**

Holders of Shares who do not vote in favor of approval and adoption of the Merger Agreement will have the right to seek appraisal of the fair value of their Shares as determined by the Delaware Court of Chancery if the Merger is consummated, but only if they submit a written demand for appraisal to the Company before the vote is taken on the Merger Agreement and they comply with all requirements of Delaware law, which are summarized in

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this proxy statement. This appraisal amount could be more than, the same as or less than the amount a stockholder would be entitled to receive under the terms of the Merger Agreement. Any holder of Shares intending to exercise his appraisal rights, among other things, must submit a written demand for an appraisal to the Company prior to the vote on the approval and adoption of the Merger Agreement and must not vote or otherwise submit a proxy in favor of approval and adoption of the Merger Agreement.

## **Material United States Federal Income Tax Consequences (Page 24).**

The receipt of cash in exchange for Shares pursuant to the Merger will be a taxable sale transaction for United States federal income tax purposes. In general, you will recognize gain or loss in the Merger in an amount equal to the difference, if any, between the cash you receive and your tax basis in Shares surrendered. Payment of the cash consideration with respect to the disposition of Shares pursuant to the Merger may be subject to information reporting and United States federal backup withholding tax at the applicable rate (currently 28%), unless a holder of Shares properly certifies its taxpayer identification number or otherwise establishes an exemption from backup withholding and complies with all other applicable requirements of the backup withholding rules. **Tax matters are very complicated. The tax consequences of the Merger to you will depend upon your particular circumstances. You should consult your tax advisor for a full understanding of the U.S. federal, state, local, non-U.S. and other tax consequences of the Merger to you.**

## **Regulatory Approvals (Page 25)**

The Merger is subject to U.S. antitrust laws. WFMI and the Company separately filed the required notifications under the HSR Act with both the Antitrust Division of the Department of Justice and the FTC. On March 13, 2007, the FTC issues a request for additional documentary material and information, which is commonly referred to as a second request. On June 7, 2007, the FTC filed suit in federal district court challenging the Merger on antitrust grounds and seeking a temporary restraining order and preliminary injunction to block the Merger pending a trial on the merits. WFMI and the Company consented to a temporary restraining order pending the hearing of the preliminary injunction, which has been scheduled for July 31 and August 1, 2007. While WFMI and the Company are optimistic that the FTC's case is without legal or factual merit and have agreed to cooperate to vigorously challenge the FTC in court, there can be no assurance that the parties will be successful in this matter or that the matter will be resolved prior to the Outside Date (defined below under "Termination of the Merger Agreement").

The Merger Agreement provides that, in the event that any administrative or judicial action or proceeding is instituted by a government entity or private party challenging the Merger or any transaction contemplated by the Merger Agreement, each of WFMI, Merger Sub and the Company shall cooperate in all respects with each other and use its respective reasonable best efforts to contest and resist any such action or proceeding and to have vacated, lifted, reversed or overturned any decree, judgment, injunction, or other order whether temporary, preliminary or permanent, that is in effect and that prohibits, prevents or restricts the consummation of the transactions contemplated by the Merger Agreement, and each have further agreed to take all reasonable actions that are necessary, proper or advisable to avoid any obstacle that may be asserted by any governmental authority under applicable antitrust laws to enable the Merger to be completed as soon as possible, and to cause the termination of the applicable HSR waiting periods.

## **Source of Funds (page 26)**

The Merger is not subject to a financing contingency. WFMI intends to fund the Merger with cash on hand and borrowing capacity under its credit facilities.

## **Merger Agreement (page 29)**



A copy of the Merger Agreement is attached to this proxy statement as Annex A and a summary of the Merger Agreement is provided beginning on page A-1 of this proxy statement. You are encouraged to carefully read the Merger Agreement as it is the legal document that contains the terms and conditions of the Merger.

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**The Tender Offer (page 28)**

Pursuant to the Merger Agreement, Merger Sub made a cash tender offer disclosed in a Tender Offer Statement on Schedule TO dated February 27, 2007 filed with the SEC to purchase all outstanding Shares at a price of \$18.50 per share, net to the seller in cash, without interest, upon the terms and subject to the conditions set forth in the Offer to Purchase and related Letter of Transmittal, copies of which are filed as Annexes D and E hereto and are incorporated herein by reference. The current expiration date of the tender offer is June 20, 2007, which may be extended from time to time by WFMI but not beyond the Outside Date without the Company's consent.

**Holders that have tendered their Shares in the tender offer are counted for the purpose of determining whether a quorum exists and are eligible to vote their Shares at the special meeting. We urge you to vote your Shares FOR the proposal to approve and adopt the Merger Agreement.**

**The Merger (page 29)**

Promptly following either (i) the Merger having been approved by stockholders of record owning a majority of our Shares (whether or not the tender offer closes), or (ii) at least 90% of the Shares being tendered to and purchased by Merger Sub in the tender offer, allowing Merger Sub to merge with the Company under Delaware's short form merger statute, Merger Sub will (subject to satisfaction of the other conditions set forth in the Merger Agreement) merge with and into the Company, with the Company surviving the Merger as a wholly-owned subsidiary of WFMI.

**No-Solicitation (page 33)**

The Merger Agreement contains restrictions on the Company's ability to solicit or engage in discussions or negotiations with a third party regarding a competing proposal as described in Merger Agreement No Solicitation of Alternative Acquisition Proposals. Notwithstanding these restrictions, under certain limited circumstances, the Company may furnish non-public information to a third party making a competing proposal (after entering into a confidentiality agreement with such third party) and engage in discussions or negotiations with a third party with respect to a superior proposal, in each case after furnishing prior written notice of such proposal to WFMI and satisfying the other conditions described in the Merger Agreement.

**Conditions to the Merger (page 36)**

The obligations of each party to consummate the Merger are subject to the satisfaction or waiver, where permissible, at or prior to the Effective Time, of the following conditions:

unless the Merger is consummated as a short-form merger under Delaware Law, the Merger Agreement shall have been approved and adopted by the requisite vote of holders of the outstanding Shares of the Company;

the applicable waiting period under the HSR Act shall have expired or been terminated; and

no statute, rule, regulation, judgment, writ, decree, order or injunction or similar action shall have been promulgated, issued or taken by any governmental entity of competent jurisdiction that makes illegal or prohibits consummation of the Merger.

The obligations of the Company to consummate the Merger are subject to the satisfaction or waiver, at or prior to the Effective Time, of the following conditions:

WFMI and Merger Sub having complied in all material respects with their respective agreements contained in the Merger Agreement; and

all material representation and warranties of WFMI and Merger Sub contained in the Merger Agreement being true and correct, except for certain breaches of representations and warranties that do not have a material adverse effect on WFMI's and Merger Sub's ability to consummate the Merger.

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Unless Merger Sub has purchased Shares in the tender offer, the obligations of WFMI and Merger Sub to consummate the Merger are subject to the satisfaction or waiver, at or prior to the Effective Time, of the following conditions:

the Company having complied in all material respects with its agreements contained in the Merger Agreement;

all material representations and warranties of the Company contained in the Merger Agreement being true and correct, except for certain breaches of representations and warranties that are not reasonably expected to have a Material Adverse Effect, which is defined below under Merger Agreement Representations and Warranties;

no change, event or circumstance shall have occurred since the date of the Merger Agreement that has a Material Adverse Effect; and

the parties having received certain third party consents, except where the failure to obtain any such consent is not reasonably expected to have a Material Adverse Effect.

**Termination of the Merger Agreement (page 36)**

The Merger Agreement may be terminated at any time prior to the consummation of the Merger by mutual written consent of the Company Board and the board of directors of WFMI.

The Merger Agreement may be terminated by either party if:

The Merger is not consummated by the Outside Date (defined below) and a breach by the party seeking to terminate the Merger Agreement is not the principal cause of the Merger not being consummated by such date;

A governmental entity takes final action permanently prohibiting the Merger and the party seeking to terminate the Merger Agreement used its reasonable best efforts to avoid such action from occurring;

Stockholder approval of the Merger Agreement, if necessary, is not obtained; or

The non-terminating party has materially breached its representations, warranties, covenants or other agreements set forth in the Merger Agreement.

As used in this proxy statement, Outside Date refers to June 30, 2007, the latest date the Merger can be consummated, unless, as of June 30, 2007, either

all of the conditions to the consummation of the Merger are satisfied, other than (A) the Merger being approved by the Company's stockholders; or (B) the applicable HSR Act waiting periods being expired or terminated; or

any court of competent jurisdiction or other governmental entity has issued an order, decree or ruling or taken any other action restraining, enjoining or otherwise prohibiting the tender offer or the Merger (as applicable) and such order, decree, ruling or other action has not become final and nonappealable,

in which case, the latest date the Merger can be consummated is August 31, 2007.

Subject to certain conditions, including payment of the Termination Fee described below under Termination Fee Payable by the Company and WFMI, the Merger Agreement may be terminated by the Company if, at any time prior to the earlier of (i) the purchase of Shares by Merger Sub in the tender offer and (ii) a meeting of the Company's

stockholders to vote on the Merger, the Company Board determines in good faith after consultation with its legal and financial advisors that

the terms of an alternative acquisition proposal are superior from a financial point of view to the terms of the tender offer and Merger, and

it is necessary to withdraw or modify its recommendation in respect of the tender offer and Merger to comply with its fiduciary duties to stockholders under applicable law.

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**Termination Fee Payable by the Company and WFMI (page 37)**

The Merger Agreement provides that the Company will be obligated to pay WFMI a fee of \$15.2 million, which we refer to in this proxy statement as the Termination Fee, if:

The Company terminates the Merger Agreement under the circumstance described above in the last paragraph under Termination of the Merger Agreement; or

Both of the following occur:

either party properly terminates the Merger Agreement as a result of the Merger not being consummated by the Outside Date or failure of the stockholders to approve the Merger by such date; and

within twelve months after the date of such termination, the Company consummates a transaction with a third party for the acquisition of the Company.

In addition, either party will be obligated to pay the other a \$4.0 million termination fee if the Merger fails to close for certain breaches by the paying party of its representations, warranties, covenants or obligations.

**Tender and Support Agreement with Yucaipa Stockholders (page 38)**

Yucaipa, which holds approximately 18% of the Company's outstanding Shares, has agreed pursuant to a Tender and Support Agreement with the Company, WFMI and Merger Sub to vote its Shares in favor of the Merger at any meeting of stockholders in which the Merger is considered, and at every adjournment or postponement of such meeting.

**Interests of the Company's Directors and Executive Officers in the Merger (page 19)**

When considering the recommendation by the Company Board, you should be aware that a number of the Company's directors and executive officers may have interests in the Merger that are different from, or in addition to, the interests of the Company's other stockholders. The Company Board was aware of these interests and considered them, among other matters, in unanimously approving the Merger Agreement and the related transactions. Each of these additional interests is described in this proxy statement, to the extent material, and, except as described in this proxy statement, such persons have, to the knowledge of the Company, no material interest in the Merger apart from those of the Company's common stockholders generally. See Special Factors Interests of Certain Persons in Matters to be Acted Upon.

**Price Range of Common Stock and Dividend Information (page 39)**

The Shares are listed on Nasdaq and trade under the symbol OATS. The Company does not currently pay dividends on the Shares. See Other Important Information Regarding the Company-Price Range of Common Stock and Dividend Information.

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**QUESTIONS AND ANSWERS ABOUT THE MERGER AND THE SPECIAL MEETING**

*The following are some questions that you may have regarding the proposed Merger and the other matters being considered at the special meeting and brief answers to those questions. The Company urges you to carefully read the remainder of this proxy statement because the information in this section does not provide all the information that might be important to you with respect to the proposed Merger. Additional important information is also contained in the annexes to, and the documents incorporated by reference in, this proxy statement.*

**WHAT AM I BEING ASKED TO VOTE ON?**

The Company is asking for your vote to approve and adopt the Merger Agreement, which will result in Merger Sub being merged with and into the Company with the Company surviving the Merger and continuing its existence as a wholly-owned subsidiary of WFMI.

**WHY AM I RECEIVING THESE MATERIALS?**

In order to consummate the Merger, the Company's stockholders must approve and adopt the Merger Agreement. Under the General Corporation Law of the State of Delaware, or DGCL, in order for the Merger Agreement to be approved and adopted, a majority of the outstanding Shares must be voted in favor of approval and adoption of the Merger Agreement at a meeting of the Company's stockholders. A quorum is necessary to hold the special meeting. A quorum exists if at least a majority of the votes entitled to be cast at the special meeting are present in person or by proxy.

This proxy statement contains important information about the proposed Merger, the Merger Agreement and the special meeting, which you should read carefully. The enclosed voting materials allow you to vote your Shares without attending the special meeting.

For a more complete description of the special meeting, see The Special Meeting of Stockholders.

**Your vote is very important. You are encouraged to vote as soon as possible.**

**IF I TENDER MY SHARES AM I STILL PERMITTED TO VOTE AT THE MEETING?**

**Yes. Holders that have tendered their Shares in the tender offer are counted for the purpose of determining whether a quorum exists and are eligible to vote their Shares at the special meeting. We urge you to vote your Shares FOR the proposal to approve and adopt the Merger Agreement.**

**WHAT WILL I RECEIVE IF THE MERGER IS APPROVED AND CONSUMMATED?**

If the Merger is consummated, at the Effective Time, the Company's stockholders will be entitled to receive \$18.50 per share in cash, without interest, for each Share they own. For example, if you own 100 Shares upon completion of the Merger you will receive \$1,850 in cash.

For a more complete description of what the Company's stockholders will be entitled to receive pursuant to the Merger, see Merger Agreement Merger Consideration.

**WHAT WILL HAPPEN IN THE PROPOSED MERGER TO OPTIONS TO PURCHASE SHARES?**

The Merger Agreement provides that, no later than the Effective Time of the Merger, each outstanding and unexercised option to acquire Shares granted under any of the Company's equity incentive plans, whether vested or unvested, will automatically be terminated in exchange for an amount in cash equal to the product of the number of Shares subject to such option and the excess, if any, of the Per Share Merger Consideration (i.e., \$18.50 in cash) over the exercise price per Share subject to such option. Options having an exercise price per Share equal to or greater than the Per Share Merger Consideration will be cancelled without payment of any consideration.



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**WILL THE MERGER BE TAXABLE TO ME?**

Yes. The exchange of Shares for cash pursuant to the Merger will be a taxable transaction for U.S. federal income tax purposes, and may be a taxable transaction under state and local tax law as well. A U.S. Holder that receives cash for Shares pursuant to the Merger will recognize capital gain or loss equal to the difference between the amount of cash received and the holder's adjusted tax basis in the Shares. Such gain or loss will be long-term if the U.S. Holder's holding period for the Shares is more than one year at the time of sale.

Because individual circumstances may differ, you should consult your own tax advisor to determine the particular tax effects to you of the consummation of the Merger. See Special Factors United States Federal Income Tax Considerations.

**AFTER THE MERGER IS CONSUMMATED, HOW WILL I RECEIVE THE CASH FOR MY SHARES?**

After the Merger is consummated, you will receive written instructions from the exchange agent to be appointed by WFMI on how to exchange your Company common stock certificates or book-entry Shares for the Per Share Merger Consideration. You will receive cash for your Shares from the exchange agent after you comply with these instructions.

If your Shares are held in street name by your bank, broker or other nominee, you will receive instructions from your bank, broker or nominee as to how to surrender your street name Shares and receive cash for those shares.

**SHOULD I SEND IN MY COMPANY STOCK CERTIFICATES NOW?**

No. After the Merger is consummated, you will receive written instructions from the exchange agent on how to exchange your Company common stock certificates for the Per Share Merger Consideration. **Please do not send in your Company common stock certificates with your proxy card.**

**WHAT CONDITIONS ARE REQUIRED TO BE FULFILLED TO CONSUMMATE THE MERGER?**

The Company, WFMI and Merger Sub are not required to consummate the Merger unless specified conditions are satisfied or waived. These conditions include, among others, approval and adoption of the Merger Agreement by the Company's stockholders and the expiration or early termination of the waiting period required under the HSR Act. On June 7, 2007, the FTC filed suit in federal district court challenging the Merger on antitrust grounds and seeking a temporary restraining order and preliminary injunction to block the Merger pending a trial on the merits. WFMI and the Company consented to a temporary restraining order pending the hearing of the preliminary injunction, which has been scheduled for July 31 and August 1, 2007. While WFMI and the Company are optimistic that the FTC's case is without legal or factual merit and have agreed to cooperate to vigorously challenge the FTC in court, there can be no assurance that the parties will be successful in this matter or that the matter will be resolved prior to the Outside Date.

**IS THE MERGER SUBJECT TO WFMI OBTAINING NEW FINANCING?**

No. WFMI intends to finance the Merger using cash on hand and borrowing capacity under its existing credit facilities.

**WHAT VOTE IS REQUIRED TO APPROVE THE MERGER?**

Under the DGCL, in order for the Merger Agreement to be approved and adopted, a majority of the outstanding Shares must be voted in favor of approval and adoption of the Merger Agreement at a meeting of the Company's

stockholders, provided that a quorum is present. Our transfer agent, Wells Fargo Bank, N.A., will act as inspector of election at the special meeting, determining whether or not quorum is present, and separately counting affirmative and negative votes, abstentions and broker non-votes. Broker non-votes are counted towards a quorum, but are not counted for any purpose in determining whether a matter has been approved. Abstentions are not counted as votes cast where approval of a matter is by plurality of votes cast. Where approval of a matter requires the affirmative vote

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of a majority of the total votes cast on a proposal, abstentions count toward the tabulation of votes cast on the proposal and will have the same effect as negative votes.

**HOW MANY VOTES DOES THE COMPANY ALREADY KNOW WILL BE VOTED IN FAVOR OF THE MERGER PROPOSAL?**

Pursuant to a Tender and Support Agreement, Yucaipa has agreed to vote its Shares in favor of the Merger, which represent approximately 18% of our outstanding Shares.

**WHEN DO YOU EXPECT THE MERGER TO BE COMPLETED?**

The Company, WFMI and Merger Sub are working to complete the Merger as quickly as possible. However, they cannot predict the exact timing of the consummation of the Merger because it is subject to several conditions, including successful resolution of the action brought by the FTC challenging the Merger. See Special Factors Regulatory Approvals.

**WHAT IF I OBJECT TO THE MERGER?**

Under Delaware law, you have the right to seek appraisal of the fair value of your Shares as may be determined by the Delaware Court of Chancery if the Merger is consummated. However, you must follow the procedures under Delaware law explained in this proxy statement in order to do so. In order to preserve your appraisal rights, Delaware law requires, among other things, that you do not vote in favor of the approval and adoption of the Merger Agreement at the special meeting.

**WHEN AND WHERE WILL THE SPECIAL MEETING BE HELD?**

The special meeting will be held on \_\_\_\_\_, 2007 at :00 MDT at \_\_\_\_\_, Boulder, Colorado.

**HOW DOES THE BOARD OF DIRECTORS OF THE COMPANY RECOMMEND THAT I VOTE ON THE MERGER?**

The Company Board recommends that all stockholders vote FOR the Merger, for the reasons that are described in this proxy.

**WHO CAN VOTE AT THE MEETING?**

Only holders of record of Shares at the close of business on the \_\_\_\_\_, 2007 will be entitled to notice of, and to vote at the special meeting of Stockholders. At the close of business on \_\_\_\_\_, 2007, we had outstanding and entitled to vote \_\_\_\_\_ Shares. Each holder of record of Shares on the record date has one vote for each Share held on all matters to be voted upon at the special meeting.

**WHAT HAPPENS IF I SELL MY SHARES BEFORE THE SPECIAL MEETING?**

The record date for the special meeting is earlier than the date of the special meeting and the date that the Merger is expected to be consummated. If you transfer your Shares after the record date but before the special meeting you will retain your right to vote at the special meeting, but will transfer the right to receive the Per Share Merger Consideration to the person to whom you transfer your Shares, so long as such person owns the Shares when the Merger is consummated.

## HOW DO I VOTE?

There are four different ways that those who are stockholders as of close of business on the record date can cast their vote at the special meeting. You may cast your vote by:

1. Telephone, using the toll-free number listed on each proxy card (if you are a stockholder of record) or vote instruction card (if your shares are held by a bank or broker). Telephonic votes may be cast through *12:00 p.m. (noon) Eastern Time* on \_\_\_\_\_, 2007;

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2. The Internet, at the address provided on each proxy or vote instruction card. Internet votes may be cast through 12:00 p.m. (noon) Eastern Time on \_\_\_\_\_, 2007;

3. Marking, signing, dating and mailing each proxy or vote instruction card and returning it in the envelope provided. If you return your signed proxy or vote instruction card but do not mark the boxes showing how you wish to vote, your shares will be voted FOR all of the proposals; or

4. Attending the special meeting (if your shares are registered directly in your name on the Company's books and not held through a broker, bank or other nominee). Please note, however, that if a broker, bank or other nominee is the record holder of your shares (i.e. the shares are held in \_\_\_\_\_ street name) and you wish to vote at the meeting, you must obtain from the record holder a proxy issued in your name.

You can revoke a previously given proxy at any time before it is voted. You may revoke your proxy by filing a written notice of revocation of proxy with the Corporate Secretary of the Company at our executive offices at 1821 30th Street, Boulder, Colorado 80301. You can also revoke your proxy by casting a vote by mail, telephone or via the Internet received at a later date than the original proxy. Attending the special meeting and voting in person may also revoke the proxy, but attendance at the meeting will not, by itself, revoke a proxy. The latest-dated, properly completed proxy that you submit whether by mail, telephone or Internet will count as your vote.

## **WHAT SHOULD I DO IF I RECEIVE MORE THAN ONE SET OF VOTING MATERIALS FOR THE SPECIAL MEETING?**

You may receive more than one set of voting materials for the special meeting, including multiple copies of this proxy statement and multiple proxy cards or voting instruction cards. For example, if you hold your Shares in more than one brokerage account, you will receive a separate voting instruction card for each brokerage account in which you hold Shares. If you are a holder of record and your Shares are registered in more than one name, you will receive more than one proxy card. Please mark, sign, date and return each proxy card and voting instruction card that you receive.

## **HOW WILL I KNOW THE MERGER HAS OCCURRED?**

If the Merger occurs, the Company and/or WFMI will promptly make a public announcement of this fact.

## **WHO CAN HELP ANSWER MY QUESTIONS?**

If you have any questions about the Merger or how to submit your proxy, or if you need additional copies of this proxy statement, the enclosed proxy card or voting instructions, please contact Investor Relations at Wild Oats Markets, Inc., at the following telephone number: (303) 396-6984.

## **THE PARTIES**

### **The Company**

The Company is the subject company of the proposed Merger. The Company is a nationwide chain of natural and organic foods markets in the U.S. and Canada. With more than \$1.2 billion in annual sales, the Company currently operates 110 natural food stores in 24 states and British Columbia, Canada. The Company's markets include: Wild Oats Marketplace, Henry's Farmers Market, Sun Harvest and Capers Community Markets.

The Company is dedicated to providing a broad selection of natural, organic and gourmet foods, environmentally friendly household products and natural vitamins, supplements, herbal and homeopathic remedies and body care

products at competitive prices, in an inviting and educational store environment that emphasizes customer service. The Company's broad selection of natural and organic products appeals to health-conscious shoppers while offering virtually every product category found in a conventional supermarket, including dry grocery, produce, meat, poultry, seafood, dairy, frozen, prepared foods, bakery, vitamins and supplements, health and body care, and household items. The Company believes that industry data stating the natural products industry

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currently comprises less than 5% of the total grocery industry suggests significant potential to continue to expand its customer base.

## **WFMI**

WFMI is a public company whose common stock is traded on the Nasdaq Global Select Market under the symbol

WFMI. WFMI is one of the leading retailers of natural and organic products. WFMI's mission is to promote the vitality and well-being of all individuals by supplying the highest quality, most wholesome foods available. WFMI's core mission is devoted to the promotion of organically grown foods, food safety concern, and the sustainability of the entire ecosystem. Through WFMI's growth, it has had a large and positive impact on the natural and organic foods movement throughout the United States, helping lead it to nationwide acceptance over the last 26 years.

WFMI opened its first store in Austin, Texas in 1980 and completed its initial public offering in January 1992. WFMI operates 195 stores in the United States, Canada and the United Kingdom. WFMI's stores are supported by regional distribution centers, bakehouse facilities, commissary kitchens, seafood-processing facilities, produce procurement centers, a national meat purchasing office and a specialty coffee procurement and roasting operation.

## **Merger Sub**

Merger Sub is a Delaware corporation and, to date, has engaged in no activities other than those incident to its formation and to the tender offer and the Merger. Merger Sub is wholly-owned subsidiary of WFMI.

## **SPECIAL FACTORS**

### **Background of the Merger**

From time to time the Company has explored a variety of strategic alternatives with a view of enhancing stockholder value, including the possible sale of the Company. During 2004 and 2005, management of the Company, together with its financial advisor, contacted several companies in the grocery industry regarding a possible acquisition of the Company as well as several potential financial buyers. These discussions led to a preliminary proposal from a potential financial buyer for an acquisition of all of the shares of the Company that was not acceptable to the Company at the time. The process of seeking out potential strategic and financial buyers of the Company was terminated in late summer 2005. The current transaction recommended by the Company Board provides consideration substantially in excess of the previous proposal and any other proposal discussed in 2004 and 2005.

On October 19, 2006, the Company's existing Chief Executive Officer resigned and was replaced on an interim basis by Gregory Mays, the Chairman of the Company Board. Also at such time the Company Board appointed an Executive Committee consisting of Company Board members Brian K. Devine and John Shields to interact with Mr. Mays on interim management of the Company.

On December 20, 2006, the Company's existing Chief Financial Officer announced he was resigning effective December 31, 2006. The Company Board appointed Mr. Mays to act as interim Chief Financial Officer.

On January 4, 2007, John P. Mackey, the Chief Executive Officer and Chairman of the Board of Directors of WFMI contacted Mr. Mays and suggested that Mr. Mays meet with him to discuss a potential acquisition transaction of the Company by WFMI. Mr. Mackey proposed discussing a transaction where WFMI would commence a cash tender offer for all of the Company outstanding shares at a price per share substantially above the market value of the Company's common stock to be followed by a cash merger. Mr. Mackey further stated that he believed that the stock of the Company was already trading at a premium to market as a result of Yucaipa's investment in the Company.

Mr. Mackey further stated that WFMI would only be interested in pursuing such a transaction if WFMI and the Company could enter into a definitive acquisition agreement no later than February 21, 2007, the scheduled date for WFMI's earnings release for the first quarter of fiscal year 2007. Mr. Mays agreed to discuss with the Company Board scheduling a face to face meeting with Mr. Mackey to discuss a potential transaction with the Company.



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Later on January 4, 2007 and through January 5, 2007, Mr. Mays contacted the members of the Company Board to schedule a meeting of the Company Board on January 6, 2007.

On January 6, 2007, the Company Board met telephonically to discuss the potential transaction, and representatives of the Company's outside legal counsel advised the Board of its fiduciary duties with respect to a possible transaction. After discussing the potential transaction proposed by WFMI, the Company Board authorized Mr. Mays to enter into preliminary discussions with WFMI regarding the terms of a potential transaction with WFMI and to schedule a meeting with Mr. Mackey. The Board also suggested that Mr. Shields attend such meeting.

Following the January 6, 2007 meeting, Mr. Mays contacted Mr. Mackey and scheduled a meeting for January 10, 2007 in Dallas, Texas.

From January 6, 2007 to January 8, 2007, the Company and WFMI and their respective outside counsel prepared and negotiated the terms of a confidentiality agreement, including a standstill agreement from WFMI, which was signed on January 8, 2007.

On January 10, 2007, Mr. Mays and Mr. Shields met in person in Dallas, Texas with Mr. Mackey and James P. Sud, WFMI's Executive Vice President of Growth and Business Development, to discuss the nature and terms of WFMI's proposal. Mr. Mays provided Mr. Mackey and Mr. Sud with publicly available information about the Company's general business prospects and financial outlook. Mr. Mackey, on behalf of WFMI, again proposed a transaction to acquire the Company involving a cash tender offer for all of the Company's outstanding stock followed by a cash merger. Based upon the diligence materials he had been provided at the time, Mr. Mackey proposed a price range of \$16.00-\$18.00 per share. Mr. Mays proposed, and Mr. Mackey agreed, that the tender offer and the Merger would not have a financing condition or diligence condition, that the termination fee payable by the Company would be no more than 2.5% of the equity value of the Company, that the Merger Agreement would contain other provisions to assure certainty of closing the transaction, and that WFMI would require only limited confirmatory diligence, in addition to WFMI's review of the publicly available financial and operating information. Mr. Mackey again stated that WFMI was scheduled to release its earnings and hold its analyst call on February 21, 2007 and that this date was WFMI's deadline to sign a definitive agreement to acquire the Company. Mr. Mays also indicated that he did not believe that a price in the price range proposed by Mr. Mackey would be acceptable to the Company Board.

Following the January 10, 2007 meeting, Mr. Mays and Mr. Sud spoke regularly over the telephone regarding WFMI's proposal and the respective businesses of the Company and WFMI generally. In these conversations, Mr. Mays strongly emphasized to Mr. Sud that in order to accomplish a transaction in the indicated time, WFMI would have to propose its best price for the acquisition of the Company and he again strongly indicated that a price in the proposed range would not be acceptable to the Company Board.

On January 11, 2007, the Company Board met telephonically to discuss the January 10, 2007 meeting in Dallas, Texas and the status of the potential transaction with WFMI. The Company Board discussed the status of the negotiations with WFMI, including WFMI's proposed purchase price range. At the conclusion of the meeting the Company Board authorized Mr. Mays to continue to negotiate the terms of the proposed transaction with WFMI and to hire a financial advisor on behalf of the Company.

On January 12, 2007, WFMI delivered a diligence request which the Company responded to. WFMI then followed up with a second diligence request on January 15, 2007, which the Company also responded to.

On January 20, 2007, Mr. Mackey telephoned Mr. Mays and, on behalf of WFMI, submitted to the Company a verbal, non-binding, all-cash proposal to buy the Company for \$17.50 per share pursuant to a tender offer followed by a merger as previously discussed. Mr. Mays indicated to Mr. Mackey that the proposed price per share would not be

acceptable to the Company Board and expressed his view that WFMI was undervaluing certain assets of the Company.

During the week of January 22, 2007, the Company engaged Citigroup Global Markets Inc., which we refer to in this proxy as Citigroup, as its financial advisor in connection with the Company's potential transaction with WFMI.

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During the period of January 22, 2007 to February 6, 2007, WFMI continued its diligence activities and representatives of Citigroup and the Company engaged in discussions concerning the terms of any proposed transaction, including continuing negotiations for a higher price. Through Citigroup, the Company also contacted the third party which had expressed the most interest in the Company during prior exploration of strategic alternatives to determine their current level of interest and was advised that, while that party might be interested in purchasing selected store sites, it did not have an interest in acquiring the entire equity interest in the Company.

On February 7, 2007, Mr. Sud telephoned Mr. Mays and, on behalf of WFMI, proposed that WFMI acquire the Company for \$18.50 per share pursuant to the cash tender offer and cash merger transaction structure previously discussed. Mr. Sud stated that this valuation represented WFMI's best and final offer. Mr. Sud also discussed with Mr. Mays the requirement that Yucaipa execute a tender and support agreement. The oral proposal was followed shortly thereafter by a non-binding written proposal that included a request for additional diligence materials.

On February 8, 2007, the Company Board met to discuss WFMI's proposal. Representatives of Citigroup gave a presentation to the Company Board regarding the financial aspects of WFMI's proposal and representatives of Skadden, Arps, Slate, Meagher & Flom LLP, which we refer to in this proxy as Skadden, the Company's special counsel, described for the Company Board its fiduciary duties in connection with the potential transaction with WFMI. At the conclusion of the meeting, the Company Board authorized Mr. Mays to continue to negotiate the terms of the proposed transaction with WFMI and instructed Mr. Mays and Citigroup to contact WFMI and WFMI's financial advisor to determine if the per share price offered by WFMI was its best and final offer.

Following the February 8, 2007 meeting, Mr. Mays had discussions with representatives of WFMI and Citigroup had discussions with representatives of WFMI's financial advisor and following these discussions both Mr. Mays and Citigroup concluded that the price per share offered by WFMI was WFMI's best and final offer. Also following this meeting the parties continued to discuss diligence information concerning the Company and certain requested revisions to the Merger Agreement in order to assure the Company Board that any transaction once announced, might have a high degree of certainty of being consummated.

On February 9, 2007, WFMI sent Skadden a proposed draft of the Merger Agreement.

On February 10, 2007, the Company Board met telephonically to discuss the status of the discussions, WFMI's proposed purchase price and other aspects of the proposed transaction, including the structure and timing of the transaction as well as the conditions to closing. Representatives of Skadden reviewed for the Company Board certain issues raised in the draft Merger Agreement, including the circumstances under which the Merger Agreement could be terminated. At such meeting, Mr. Mays and Citigroup advised the Company Board that, in their view, based upon their negotiations with WFMI, WFMI's proposed price of \$18.50 per share represented its best and final offer. Following such meeting, and having concluded that it had obtained WFMI's best and final offer, the Company Board authorized the Company's Compensation Committee to adopt such arrangements as it deemed advisable to secure the services of the workforce necessary to run the business during the sale and transition period by adopting a transition bonus plan for the general workforce and modifying the compensation arrangements for Mr. Mays as interim Chief Executive Officer.

From February 10, 2007 to February 21, 2007, representatives from the Company, WFMI and their respective outside financial and legal advisors, had frequent discussions and negotiations regarding the Merger Agreement.

On February 15, 2007, the Company's Compensation Committee met telephonically to discuss 2006 bonuses and compensation issues relating to WFMI's proposal. At such meeting the Compensation Committee authorized certain matters in connection with the tender offer and Merger subject to full Company Board approval, including: (i) upon the earlier of consummation of the tender offer or the Merger (x) the termination of the Company's employee stock

purchase plan and (y) the acceleration of outstanding Company stock options, (ii) upon the Effective Time, the cancellation of each Company stock option in exchange for the right to receive the difference between the \$18.50 offer price and the exercise price of such option, (iii) adoption of the Company's 2007 Transition Bonus Plan, and (iv) modification of the compensation arrangements for Mr. Mays.

During the week of February 12, 2007, representatives of the Company had discussions with representatives of Yucaipa regarding the Tender and Support Agreement and drafts of such agreement were circulated and negotiated among WFMI, the Company and Yucaipa.

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On February 17, 2007, the Company Board met telephonically to discuss the status of the proposed transaction with WFMI. Representatives of Skadden updated the Company Board on the status of the Merger Agreement, diligence matters and the issues that were under discussion among the parties. At the conclusion of the meeting the Company Board scheduled a meeting for February 20, 2007 to consider the approval of the Merger Agreement and the transactions contemplated thereby.

From February 17, 2007 to February 21, 2007, representatives from the Company, WFMI and their respective financial and legal advisors, had frequent discussions regarding finalizing the Merger Agreement and the related documents. Also during this period, representatives of Yucaipa, the Company and WFMI finalized the Tender and Support Agreement.

On February 20, 2007, the Company Board met telephonically. Mr. Mays described for the Company Board discussions he had with representatives of WFMI since the Company Board meeting on February 17, 2007. Representatives of Citigroup gave a presentation to the Company Board regarding the financial aspects of WFMI's proposal. Citigroup delivered an oral fairness opinion, with a written copy to be delivered by Citigroup subsequently. Representatives of Skadden updated the Company Board on discussions with representatives of WFMI and reviewed with the Company Board in detail the terms of the tender offer and the Merger Agreement. Representatives from Skadden, Citigroup and management addressed questions from the Company Board. After a general discussion involving all of the members of the Company Board, the Company Board by a unanimous vote determined that the proposed tender offer and Merger are fair to and in the best interests of the Company and its stockholders, and approved the form, terms and provisions of the Merger Agreement and authorized the officers of the Company to execute the Merger Agreement and related documents following the approval of the Board of Directors of WFMI. The Company Board also approved the actions taken by the Compensation Committee.

On February 21, 2007, the Board of Directors of WFMI approved the Merger Agreement and the tender offer. Following such meeting, WFMI, Merger Sub and the Company executed and delivered the Merger Agreement and related documents and publicly announced the proposed transaction.

On February 27, 2007, Merger Sub commenced its tender offer for Shares of the Company at \$18.50 per Share. On March 21, 2007, WFMI extended the expiration date to April 24, 2007. On April 24, 2007, WFMI further extended the expiration date for its tender offer to May 22, 2007 and on May 22, 2007, WFMI further extended the expiration date for its tender offer to its current expiration date of June 20, 2007.

## **Recommendation of the Company's Board of Directors and Its Reasons for the Merger**

### ***Recommendation of the Board of Directors***

The Company Board has determined that the Merger Agreement and the Merger are fair to and in the best interests of the Company and its stockholders, and has unanimously approved the Merger Agreement and related transactions. The Company Board unanimously recommends that the Company's stockholders vote **FOR** the proposal to approve and adopt the Merger Agreement.

### ***Reasons for the Merger***

In evaluating the Merger Agreement and the transactions contemplated thereby, including the tender offer and the Merger, and recommending that the Company stockholders tender all of their Shares of Common Stock pursuant to the tender offer and vote their Shares in favor of the Merger, the tender offer and adoption of the Merger Agreement and the other transactions contemplated thereby, in accordance with the applicable provisions of Delaware law, the Company Board consulted with the Company's senior management, legal counsel and financial advisor and considered

a number of factors, including the following:

*Financial Condition and Prospects of the Company.* The Company Board considered the current and historical financial condition, results of operations, business and prospects of the Company as well as the Company's financial plan and prospects if it were to remain an independent company, including the substantial capital expenditures required to advance the Company's business plan and the accompanying risks associated with financing such capital expenditures. The Company Board discussed the Company's current financial plan, including the risks associated with achieving and executing upon the Company's

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business plan including the need to identify and hire a permanent CEO and a CFO for the Company. The Company Board considered that the holders of Common Stock would continue to be subject to the risks and uncertainties of the Company's financial plan and prospects unless the Common Stock was acquired for cash.

*Transaction Financial Terms; Premium to Market Price.* The Company Board considered the \$18.50 per share price to be paid in cash for each share of the Company's common stock, which represents a 17% premium over the closing price of the Company's common stock on February 20, 2007, the last trading day before the tender offer and the Merger were announced, and a 23% premium over the average closing price of the Company's common stock for the one month prior to announcement.

*Historical Trading Prices.* The Company Board considered the relationship of the \$18.50 offer price to the historical trading prices of the Shares.

*Cash Tender Offer; Certainty of Value.* The Company Board considered the form of consideration to be paid to holders of Shares in the tender offer and the Merger and the certainty of value of such cash consideration. The Company Board also considered that, while the consummation of the tender offer gives the stockholders the opportunity to realize a premium over the prices at which the Shares were traded prior to the public announcement of the Merger and tender offer, tendering in the tender offer would eliminate the opportunity for stockholders to participate in the future growth and profits of the Company.

*Timing of Completion.* The Company Board considered the anticipated timing of the consummation of the transactions contemplated by the Merger Agreement, and the structure of the transaction as a tender offer for all Shares, which should allow stockholders to receive the transaction consideration in a relatively short time frame, followed by the Merger in which stockholders will receive the same consideration as received by stockholders who tender their Shares in the tender offer. The Company Board also considered the business reputation of WFMI and its management and the substantial financial resources of WFMI and, by extension, Merger Sub, which the Company Board believed supported the conclusion that an acquisition transaction with WFMI and Merger Sub could be completed relatively quickly and in an orderly manner.

*Citigroup Fairness Opinion.* The Company Board considered the presentation of Citigroup as to various financial matters and the Citigroup Opinion (as defined below), dated February 20, 2007, to the effect that, as of the date of the opinion, the cash consideration to be received by holders of Shares pursuant to the tender offer and the Merger is fair from a financial point of view to such stockholders. The full text of the Citigroup Opinion which sets forth the procedures followed, the factors considered, the limitations on the review undertaken and the assumptions made by Citigroup in arriving at its opinion is attached hereto as Annex B and is incorporated herein by reference. The Citigroup Opinion is not intended to constitute, and does not constitute, a recommendation as to whether any stockholder should tender his Shares in the tender offer or as to any other actions to be taken by any stockholder in connection with the tender offer or the Merger.

**Stockholders are urged to read the opinion of Citigroup carefully and in its entirety.**

*Solicitation of Other Parties.* The Company Board also considered (i) the fact that the Company did not solicit alternative proposals from third parties other than from the one financial party mentioned above, (ii) the risks of the proposed transaction with WFMI, including the risk of not reaching an agreement with WFMI prior to the WFMI's February 21, 2007 deadline, and the risks to the Company's business that may have resulted from initiating an auction process, (iii) whether parties other than WFMI would be willing or capable of entering into a transaction with the Company that would provide value to the Company's stockholders superior to the cash price to be paid pursuant to the tender offer and the Merger and (iv) the fact that the Company Board could terminate the Merger Agreement to accept a Superior Proposal (as defined in the Merger Agreement), subject to payment of a termination fee prior to the earlier of the purchase of Shares in the tender offer and the

time of stockholder approval of the Merger.

*Terms of the Merger Agreement.* The Company Board believed that the provisions of the Merger Agreement, including the respective representations, warranties and covenants and termination rights of



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the parties and termination fees payable by the Company were favorable to the Company's stockholders. In particular:

*No Financing Condition.* The Company Board considered the representation of WFMI that it has available sufficient cash and committed financing sources to satisfy its obligations to cause Merger Sub to purchase and pay for Shares pursuant to the tender offer and to cause the Surviving Corporation, to pay the aggregate Merger Consideration and the fact that the tender offer is not subject to a financing condition.

*Ability to Respond to Certain Unsolicited Takeover Proposals.* The Company Board considered the fact that the Merger Agreement, while prohibiting the Company and its subsidiaries from, directly or indirectly, (a) soliciting or initiating any inquiries with respect to the submission of any Acquisition Proposal (as that term is defined in the Merger Agreement), (b) participating in any discussions or negotiations regarding, or furnishing to any person any information with respect to, or otherwise cooperating in any way with, or knowingly assisting or participating in, facilitating or encouraging, any effort or attempt by any person to make an inquiry in respect of or make any proposal or offer that constitutes, or may reasonably be expected to lead to, any Acquisition Proposal or (c) entering into any agreement or agreement in principle providing for or relating to an Acquisition Proposal, does not prohibit the Company, prior to the purchase of the Shares pursuant to the tender offer, in response to an unsolicited bona fide written proposal received on or after the date of the Merger Agreement (and not withdrawn), with respect to an Acquisition Proposal from a third party, which did not result from a breach of the forgoing prohibitions, to furnish information to, and negotiate, explore or otherwise engage in substantive discussions with such third party if, and only to the extent that (i) the Company Board, after consultation with and taking into account the advice of its financial advisors and outside legal counsel, determines in good faith that the Company Board would reasonably be likely to breach its fiduciary duties to stockholders under applicable law without taking such action, (ii) prior to taking such action, the Company receives from such person an executed confidentiality agreement having terms no more favorable than the Confidentiality Agreement, (iii) the Company promptly provides to WFMI any non-public information that is provided to the person making such Acquisition Proposal or its representatives which was not previously provided to WFMI or Merger Sub, (iv) the Company Board, after consultation with and taking into account the advice of its financial advisors and legal counsel, determines in good faith that such proposal would, if accepted, be reasonably likely to be consummated, taking into account all legal, financial and regulatory aspects of the proposal and the Person making the proposal, and (v) the proposal would, if consummated, result in a transaction that is more favorable to Company's stockholders, from a financial point of view, than the transactions contemplated by the Merger Agreement. In addition, the Company Board considered the fact that the Company Board could terminate the Merger Agreement to accept a Superior Proposal, subject to payment of a termination fee prior to the earlier of the purchase of Shares in the tender offer and the time of stockholder approval of the Merger.

*Conditions to the Consummation of the Tender Offer and the Merger; Likelihood of Closing.* The Company Board considered the reasonable likelihood of the consummation of the transactions contemplated by the Merger Agreement in light of the conditions in the Merger Agreement to the obligations of WFMI to accept for payment and pay for the Shares tendered pursuant to the tender offer and to consummate the Merger.

*Change in Recommendation/Termination Right to Accept Superior Proposals.* The Company Board considered the provisions in the Merger Agreement that provide for the ability of the Company Board under certain circumstances to withdraw, modify or change in a manner adverse to WFMI and Merger Sub, the Company Board Recommendation (as defined in the Merger Agreement) if certain conditions are satisfied. In particular, the Company Board considered the fact that the Merger Agreement provides that the Company Board may withdraw or modify the Company Board Recommendation, if, prior to the earlier of the time at which WFMI consummates the purchase of tendered Shares pursuant to the tender offer, which we refer to

in this proxy as the Purchase Time, or the meeting of the Company's stockholder to consider the Merger Agreement, if any, (i) the Company Board determines in good faith that an Acquisition Proposal is a Superior Proposal for which financing, to the extent required, is then represented by a bona fide commitment letter, and that the failure to so withdraw or modify the Company Board's

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recommendation would constitute a breach of its fiduciary duties to the Company's stockholders under applicable law, (ii) the Company Board shall have given at least five business days prior written notice to WFMI and Merger Sub of the Company Board's intent to take such action and provided WFMI and Merger Sub with a reasonable opportunity to respond to any such Superior Proposal, (iii) the Company shall have fully considered any response by WFMI and Merger Sub and concluded that, notwithstanding such response, such Acquisition Proposal continues to be a Superior Proposal in relation to the transactions contemplated by the Merger Agreement, as the terms thereof may be proposed to be revised by such response, and (iv) any such termination of the Merger Agreement shall be accompanied by payment of the Termination Fee.

*Extension of Offer Period.* The Company Board considered the fact that the Merger Agreement provides that, under certain circumstances, Merger Sub would be required to extend the tender offer beyond the initial expiration date of the tender offer if certain conditions to the consummation of the tender offer are not satisfied as of the initial expiration date of the tender offer or, if applicable, certain subsequent expiration dates and to complete the Merger, subject to stockholder approval at a meeting of stockholders, even if Shares are not acquired in the tender offer as a result of the failure of Company stockholders to tender a majority of the outstanding shares of Common Stock or otherwise.

*Termination Fee.* The Company Board considered the termination fee of \$15.2 million, approximately 2.2% of the enterprise value of the Company, that could become payable pursuant to the Merger Agreement under certain circumstances, including in the event that the Company Board terminates the Merger Agreement to accept a Superior Proposal, as well as the view of Citigroup that the Termination Fee would not be a significant deterrent to competing offers.

*Appraisal Rights.* The Company Board considered the availability of appraisal rights with respect to the Merger for Company stockholders who properly exercise their rights under Delaware law, which would give these stockholders the ability to seek and be paid a judicially determined appraisal of the fair value of their shares of Common Stock at the completion of the Merger.

*Pre-Closing Covenants.* The Company Board considered that, under the terms of the Merger Agreement, the Company has agreed that it will carry on its business in the ordinary course of business consistent with past practice and, subject to specified exceptions, that the Company will not take a number of actions related to the conduct of its business without the prior written consent of WFMI. The Company Board further considered that these terms may limit the ability of the Company to pursue business opportunities that it would otherwise pursue.

*Strategic Alternatives.* The Company Board considered the recent evaluations by the Company Board of the Company's strategic alternatives and the consolidations occurring in the Company's business. The Company Board also considered the risks inherent with remaining independent and the prospects of the Company going forward as an independent entity.

*Management.* The Company Board also considered the ongoing search for a permanent Chief Executive Officer and a permanent Chief Financial Officer and the risks in finding qualified new management who would develop and implement a new strategic plan for the Company.

*Failure to Close.* The Company Board considered the possibility that the transactions contemplated by the Merger Agreement may not be consummated, and the effect of public announcement of the Merger Agreement, including effects on the Company's sales, operating results and stock price, and the Company's ability to attract and retain key management and sales and marketing personnel.

*Tax Treatment.* The Company Board considered that the consideration to be received by the holders of Shares in the tender offer and the Merger would be taxable to such holders for federal income tax purposes.

*Regulatory Approval and Third Party Consents.* The Company Board considered the regulatory approvals and third party consents that may be required to consummate the tender offer and Merger and the prospects for receiving any such approvals and consents, if necessary.

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In making its recommendation the Company Board was aware of and took into consideration the interests of certain Company executives, including the Interim Chief Executive Officer, who is a member of the Company Board, in the tender offer and the Merger as a result of the agreements referred to **Interests of Certain Persons in Matters to be Acted Upon** of this proxy statement and their holding of Shares and options to purchase Shares.

The Company Board did not assign relative weights to the foregoing factors or determine that any factor was of particular importance. Rather, the Company Board viewed their position and recommendations as being based on the totality of the information presented to and considered by them. Individual members of the Company Board may have given different weight to different factors.

## **Effects of the Merger Not Being Consummated**

If the Merger is not consummated for any reason, the Company's stockholders and holders of stock options, restricted stock and RSUs will not receive the Per Share Merger Consideration. Instead, the Company will remain a public company and the Shares will continue to be listed on the Nasdaq. If the Merger is not consummated, the Company expects to continue to conduct its business in a manner similar to the manner in which it is presently conducted. In such event, the value of your Shares would continue to be subject to risks and opportunities described in the Company's past filings with the SEC, the risk factors set forth in this proxy statement, and prevailing economic and market conditions. If the Merger is not consummated, adverse market reaction may cause Shares to trade below the levels at which it traded prior to WFMI's announcement that it would seek to sell its non-strategic assets. If the Merger is not consummated, there can be no assurance that any other transaction similar to the Merger would be available to the Company. Even if such a transaction were available, there can be no assurance that such transaction would be acceptable to the Company Board and would offer the Company's stockholders the opportunity to receive at least the same price as is payable pursuant to the Merger.

## **Opinion of Financial Advisor**

The Company has retained Citigroup as its financial advisor in connection with the tender offer and the Merger. The Company has also engaged Citigroup to provide a financial opinion letter in connection with the Merger Agreement, the tender offer and the Merger. The full text of the financial opinion letter of Citigroup, which sets forth assumptions made, procedures followed, matters considered and limitations on the review undertaken in connection with the opinion letter, is attached to this proxy statement as Annex B and is incorporated herein by reference.

Citigroup provided its opinion for the information and assistance of the Company Board in connection with its consideration of the transactions contemplated by the Merger Agreement. The Citigroup financial opinion letter does not constitute a recommendation as to how any holder of Shares should vote with respect to the proposal to approve and adopt the Merger Agreement.

Citigroup was chosen based on its extensive experience in evaluating financial transactions of the nature of the tender offer and Merger and its proposed fee to provide the opinion letter. Citigroup was chosen after interviews were conducted by the interim Chief Executive Officer of the Company with three investment banking firms.

No material relationship, except as described herein, has existed during the past two years between Citigroup and the Company.

Pursuant to the Engagement Letter between Citigroup and the Company, dated January 26, 2007, which we refer to in this proxy as the Engagement Letter, the Company has agreed to pay Citigroup (i) \$1,500,000 upon delivery by Citigroup of an opinion as to the fairness, from a financial point of view, to the Company or the holders of the

common stock of the Company, of the consideration to be received in the tender offer and the Merger; (ii) 4.5% of the equity consideration received in excess of the Transaction Value (as defined in the Engagement Letter) implied by \$17.50 per share, and (iii) 20%, net of direct out-of-pocket expenses incurred by the Company, of any termination, break-up, topping or similar fees or payments or any profits arising from any shares (or option to acquire shares or assets) of any prospective purchaser or its affiliates received by the Company in connection with the termination of any Transaction (as defined in the Engagement Letter). The Engagement Letter

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specifies however that no such fee shall exceed 50% of the fee that the Company would have paid Citigroup had the Transaction been consummated.

The Company has also agreed in the Engagement Letter to reimburse Citigroup for all reasonable travel and third party expenses (not to exceed \$25,000 without the prior approval of the Company) and to indemnify Citigroup and certain related persons from and against any losses, expenses, claims or proceedings relating to or arising out of its engagement. The Company further agreed in the Engagement Letter to reimburse Citigroup for its outside legal counsel expense incurred in connection with the Fairness Opinion up to \$25,000 in the aggregate without the Company's prior written consent, not to be unreasonably withheld.

In reviewing the fairness of the tender offer and the Merger, Citigroup reviewed a draft Merger Agreement, dated February 20, 2007, and held discussions with certain senior officers, directors and other representatives and advisors of the Company and certain senior officers and other representatives and advisors of WFMI regarding the business, prospects and operations of the Company. They also reviewed both publicly available and nonpublic business and financial information related to the Company. Citigroup reviewed the financial terms of the tender offer and the Merger in relation to, among other things: current and historical market prices and trading volumes of common stock of the Company; the historical and projected 2007 earnings and other operating data of the Company; and the capitalization and financial condition of the Company. They considered publicly available financial terms of other transactions, which Citigroup considered relevant in evaluating the tender offer and the Merger, and analyzed certain financial, stock market and other publicly available information relating to other companies, whose operations Citigroup considered relevant, in evaluating those of the Company. In addition to the foregoing, Citigroup conducted such other analyses and examinations and considered such other information and financial, economic and market criteria as they deemed appropriate in arriving at its opinion. Citigroup concluded that the offer price of \$18.50 per share, net to the stockholders, in the tender offer and the Merger is fair from a financial point of view to the holders of the Shares.

Except as set forth above, neither the Company nor any person acting on its behalf has employed, retained or agreed to compensate any person to make solicitations or recommendations to stockholders of the Company concerning the tender offer or the Merger.

## **Interests of Certain Persons In Matters To Be Acted Upon**

Certain members of management and the Company Board may be deemed to have interests in the transactions contemplated by the Merger Agreement that are different from or in addition to their interests as Company stockholders generally. The Company Board was aware of these interests and considered them, among other matters, in approving the Merger Agreement and the transactions contemplated thereby. As described below, consummation of the tender offer and/or the Merger will constitute a change in control of the Company for the purposes of determining the entitlements due to the executive officers and directors of the Company to certain severance and other benefits.

### ***Equity Interests of Directors and Officers***

As of the Effective Time, all granted but unvested stock options and restricted stock units, or RSUs, will become fully vested. Each Share issuable pursuant to an option will be converted to the right to receive the excess of the Per Share Merger Consideration over the exercise price of such option, and each share of restricted stock and each share represented by an RSU will be converted to the right to receive the Per Share Merger Consideration. The following table sets forth the number and cash value, assuming the Merger is consummated, using the Per Share Merger Consideration, and the weighted average exercise price by optionee for all stock options, held by those





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individuals who were, during fiscal 2006 and as of the date of this schedule, directors and executive officers of the Company:

	RSU	Total	Option(2)	Weighted	Total	Restricted	Total	
	Awards(1)	Value of	Awards	Average	Value of	Stock	Value of	
	(#	RSUs (\$)	(#	Option	Awards	Awards	Restricted	
ame	Shares)		Shares)	Exercise	(\$)	Shares)(4)	Stock	Total (\$)
				Price(3)				
acey J. Bell	19,400	358,900.00	40,413	9.11	379,478.07			738,378.0
an K. Devine	19,125	353,812.50	103,056	11.39	732,728.16			1,086,540.6
l Brice	7,570	140,045.00	20,000	17.58	18,400.00			158,445.0
n Shields	17,522	324,157.00	209,226	10.08	1,761,682.90			2,085,839.9
vid J. Gallitano	23,781	439,948.50	41,742	9.24	386,530.92			826,479.4
egory Mays	9,035	167,147.50	20,000	17.58	18,400.00			185,547.5
vid Chamberlain(5)	238	4,403.00						4,403.0
bert Miller(5)	200	3,700.00						3,700.0
rk Retzloff(5)	238	4,403.00						4,403.0
eya R. Brier			154,621	10.31	1,266,345.90	8,334	154,179.00	1,420,524.9
ger Davidson			100,000	18.17	33,000.00			33,000.0
muel Martin			100,000	12.19	631,000.00			631,000.0
ry D. Odak(6)						4,167	77,089.50	77,089.5
bert Dimond(7)						2,083	38,535.50	38,535.5
uce Bowman(8)						2,083	38,535.50	38,535.5
even Kaczynski(9)						2,083	38,535.50	38,535.5
er Williams(10)						2,083	38,535.50	38,535.5

(1) Ownership information is based on the last report on Form 4 filed by the individual.

(2) Reflects outstanding options as of the date of this Schedule. All outstanding options expire 30 to 60 days, based on their terms, after resignation of individual.

(3) Weighted average price is calculated based on the exercise price of all outstanding options held by the individual as of the date of this Schedule.

(4) Ownership information is based on the last report on Form 4 filed by the individual.

(5) Mr. Miller declined to stand for reelection in May 2006.

(6) Mr. Odak resigned in October 2006.

(7) Mr. Dimond resigned in December 2006.

(8) Mr. Bowman retired in June 2006.

(9) Mr. Kaczynski resigned in March 2006.

(10) Mr. Williams resigned in November 2006.

***Executive Officer Severance Agreements***

As part of the Company's executive retention strategy, the Company previously entered into severance agreements applicable in the event of certain terminations following a change in control with each of the following executive officers: Freya Brier, the Company's Senior Vice President, General Counsel and Corporate Secretary, Roger E. Davidson, the Company's Senior Vice President of Merchandising and Marketing, and Sam Martin, the Company's Senior Vice President of Operations and one additional member of Company management. The severance agreements renew from year to year unless terminated, and provide for certain payments in the event the individual's employment with the Company is terminated by the Company other than for cause (as defined in such agreements) or by the individual for good reason (as defined in such agreements), in each case (cause and good reason) within 24 months following a change in control (31% of outstanding stock is transferred, certain mergers or changes in the constitution of the Company Board, or other events defined in the severance agreements) of the Company.

The principal benefits under the severance agreements, which are in lieu of any severance benefit otherwise payable to the recipient, consist of (i) a lump sum severance payment equal to two times the individual's salary and bonus, (ii) a lump sum payment in lieu of Company contributions that would have been made on the individual's

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behalf to the Company's savings plan had the individual's employment continued for two additional years, (iii) accelerated vesting of all options, (iv) a lump sum payment equal to any accrued but unpaid incentive compensation with respect to any completed performance periods plus a pro rata portion of any incentive compensation payable with respect to any incomplete performance period in which the termination occurred, (v) continuation of life, disability, accident and health insurance benefits for a period of two years following such termination of employment and (vi) a payment equal to the amount necessary to reimburse the individual for the full effect of any excise tax levied on excise parachute payments. In the event that the conditions triggering the benefits under the severance agreement are satisfied, the individual is subject to certain restrictive covenants relating to non-competition and solicitation of employees, customers or suppliers of the Company for two years following a termination of employment. The executives covenant that for two years following termination under change-in-control circumstances to certain restrictions on competition, solicitation and disparagement and to maintain the confidentiality of certain information. In the event of breach, the Company may recoup the pro rata portion of any payments and benefits previously provided. Under the individual severance agreements, each person would receive continuation of life, disability, accident and health insurance for two years, as well as a gross-up payment for taxes for the amounts paid out as specified below. Specified below is the approximate value of the payments and benefits (excluding the value of continued life, disability, accident and health insurance, any incentive compensation payable for any completed performance period or incomplete performance period and any tax gross-up payment) that each executive would be entitled to receive if the executive was terminated by the Company other than for cause or by the executive for good reason in connection with the Merger and based on salary and bonus information as of May 2007. Mr. Davidson would receive \$787,500 in severance (two times his annual base salary of \$350,000 plus two times his guaranteed 2006 bonus of \$43,750), plus \$33,000 for acceleration of his outstanding unvested stock options and \$17,500 for the Company contributions to the deferred compensation plan; Mr. Martin would receive \$995,000 in severance (two times his annual base salary of \$350,000 plus two times his 2006 bonus, payable in 2007, of \$147,500), plus \$631,000 for acceleration of his outstanding unvested stock options and \$17,500 for the Company contributions to the deferred compensation plan; and Ms. Brier would receive \$988,000.00 in severance (two times her annual base salary of \$315,000 plus two times her 2006 bonus, payable in 2007, of \$179,000) plus \$239,059.50 for acceleration of unvested stock options and unvested restricted stock and \$15,750 for the Company contributions to the deferred compensation plan.

The foregoing summary is qualified in its entirety by reference to the Severance Agreement, dated November 7, 2002, by and between the Company and Freya Brier, the Severance Agreement, dated October 30, 2006, by and between the Company and Roger E. Davidson, and the Severance Agreement, dated January 12, 2006, by and between the Company and Sam Martin, each of which was filed as an exhibit to the Schedule 14D-9, dated February 27, 2007, filed by the Company with the SEC, and are incorporated by reference herein.

***Incentive Bonus Agreement***

On February 21, 2007, the Company entered into an Incentive Bonus Agreement with Gregory Mays. The Incentive Bonus Agreement provides for an increase in Mr. Mays' compensation as interim Chief Executive Officer of the Company from the rate of \$50,000 per month, as reported by the Company on its Current Report on Form 8-K, dated October 26, 2006, to the rate of \$100,000 per month commencing on February 1, 2007, as well as a \$750,000 cash bonus to Mr. Mays, payable upon the consummation of the tender offer, Merger or other sale of the Company. The Incentive Bonus Agreement also confirms the following grant to Mr. Mays of the RSUs included in the initial interim CEO compensation arrangement reported by the Company on its Current Report on Form 8-K, dated October 26, 2006: 20,000 fully vested RSUs, and 10,000 RSUs, which will vest on the earlier to occur of (i) the sale of the Company including the consummation of the tender offer and/or the Merger) or (ii) the appointment of a new CEO of the Company. Finally, in the event that the Merger Agreement is terminated and no other sale of the Company has occurred, the Incentive Bonus Agreement provides for the grant of an additional 15,000 fully vested RSUs, exchangeable for 15,000 shares of the Company's unrestricted common stock on a date selected by Mr. Mays at his

discretion, upon the earlier of the hiring of a new CEO or December 31, 2007. If the Contingent RSUs (as defined in the Incentive Bonus Agreement) have been issued prior to the payment of the bonus, the cash bonus will be decreased by the product of the number of Contingent RSUs multiplied by the price per share on the date of grant. The RSUs will be issued from and subject to the terms of the Company's 2006 Equity Incentive Plan.

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The foregoing summary is qualified in its entirety by reference to the Incentive Bonus Agreement, dated as of February 21, 2007, by and between the Company and Gregory Mays, a copy of which was filed as an exhibit to the Schedule 14D-9, dated February 27, 2007, filed by the Company with the SEC, and is incorporated by reference herein.

### ***Deferred Compensation Plan***

In 1999, the Company adopted the Wild Oats Markets, Inc. Deferred Compensation Plan, effective November 1, 1999. The Company Board, in accordance with Section 11.1 of the Deferred Compensation Plan, has adopted a resolution terminating the plan effective immediately following the Effective Time. Pursuant to the terms of Section 11.1 of the Merger Agreement, upon termination of the Deferred Compensation Plan, all account balances under the plan will be paid-out in a lump sum to the applicable participants as soon as administratively practicable following such termination. As of February 20, 2007, two individuals had such account balances: Ms. Brier had an account balance of \$324,844 under the Deferred Compensation Plan, and Mr. Martin had an account balance of \$1,173.

The foregoing summary is qualified in its entirety by reference to the Wild Oats Markets, Inc. Deferred Compensation Plan, a copy of which is filed as an exhibit to the Company's Form 10-K for the year ended January 1, 2000, and is incorporated by reference herein.

### ***Service Credit for Employee Benefits***

The Merger Agreement provides that, to the extent permitted by applicable law and the applicable employee benefit plans, each employee of the Company and its subsidiaries shall be given credit for all service with the Company (or service credited by the Company) under all employee benefit plans, programs, policies and arrangements maintained by the Surviving Corporation in which they participate or in which they become participants for purposes of eligibility, vesting and benefit accrual, including for purposes of determining (i) short-term and long-term disability benefits, (ii) severance benefits, (iii) vacation benefits, and (iv) benefits under any retirement plan; provided, that credit need not be given for service to the extent such credit would result in duplication of benefits.

The foregoing summary is qualified in its entirety by reference to the Merger Agreement, a copy of which is attached as Annex A to this proxy statement.

### ***Delisting and Deregistration of Company Common Stock***

If the Merger is consummated, the Company common stock will be delisted from the Nasdaq and will be deregistered under the Exchange Act.

### ***Appraisal Rights***

Under Section 262 of the DGCL, any holder of the Company's common stock who does not wish to accept the merger consideration may elect to exercise appraisal rights. Even if the Merger is approved and adopted by the holders of the requisite number of Shares, you are entitled to exercise appraisal rights and obtain payment of the fair value for your shares as determined by the Delaware Court of Chancery, exclusive of any element of value arising from the expectation or accomplishment of the Merger. The Company's stockholders electing to exercise appraisal rights must comply with the provisions of Section 262 of the DGCL in order to perfect their rights. The Company will require strict compliance with the statutory procedures.

The following is intended as a brief summary of the material provisions of the Delaware statutory procedures required to be followed by a stockholder in order to demand and perfect appraisal rights. This summary, however, is not a complete statement of all applicable requirements and is qualified in its entirety by reference to Section 262 of the DGCL, the full text of which appears in Annex F to this proxy statement.

Under Section 262 of the DGCL, when a merger is submitted for approval at a meeting of stockholders, as in the case of the Merger Agreement, the corporation, not less than 20 days prior to the meeting, must notify each of its stockholders that appraisal rights are available and include in the notice a copy of Section 262 of the DGCL. This

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proxy statement constitutes the notice, and the applicable statutory provisions are attached to this proxy statement as Annex F.

In order to exercise your appraisal rights effectively, you must satisfy each of the following primary requirements:

you must hold shares in the Company as of the date you make your demand for appraisal rights and continue to hold shares in the Company through the Effective Time;

you must deliver to the Company a written notice of your demand of payment of the fair value for your shares prior to the taking of the vote at the special meeting;

you must not have voted in favor of approval and adoption of the Merger Agreement as a vote in favor of the approval and adoption of the Merger Agreement, whether by proxy or in person, will constitute a waiver of your appraisal rights in respect of the shares so voted and will nullify any previously filed written demands for appraisal; and

you must file a petition in the Delaware Court of Chancery or the Delaware Court demanding a determination of the fair value of the shares within 120 days after the Effective Time.

If you fail strictly to comply with any of the above conditions or otherwise fail strictly to comply with the requirements of Section 262 of the DGCL, you will have no appraisal rights with respect to your shares. You will receive no further notices from the Company regarding your appraisal rights. Neither voting (in person or by proxy) against, abstaining from voting on or failing to vote on the proposal to approve and adopt the Merger Agreement will constitute a written demand for appraisal within the meaning of Section 262 of the DGCL. The written demand for appraisal must be in addition to and separate from any proxy or vote.

The address for purposes of making an appraisal demand is:

Corporate Secretary  
1821 30th Street, Boulder  
Colorado, 80301

Only a holder of record of Shares, or a person duly authorized and explicitly purporting to act on his or her behalf, is entitled to assert an appraisal right for the Shares registered in his or her name. Beneficial owners who are not record holders and who wish to exercise appraisal rights are advised to consult with the appropriate record holders promptly as to the timely exercise of appraisal rights. A record holder, such as a broker, who holds Shares as a nominee for others, may exercise appraisal rights with respect to Shares held for one or more beneficial owners, while not exercising such rights for other beneficial owners. In such a case, the written demand should set forth the number of Shares as to which the demand is made. Where no Shares are expressly mentioned, the demand will be presumed to cover all shares of the Shares held in the name of such record holder.

A demand for the appraisal of Shares owned of record by two or more joint holders must identify and be signed by all of the holders. A demand for appraisal signed by trustees, executors, administrators, guardians, attorneys-in-fact, officers of corporations or others acting in a fiduciary or representative capacity must so identify the persons signing the demand.

An appraisal demand may be withdrawn by a former stockholder within 60 days after the Effective Time, or thereafter only with the Company's approval. Upon withdrawal of an appraisal demand, the former stockholder will be entitled to receive the merger consideration referred to above, without interest.

If the Company consummates the Merger, it will give written notice of the Effective Time within 10 days after the Effective Time to each of the Company's former stockholders who did not vote in favor of the Merger Agreement and who made a written demand for appraisal in accordance with Section 262 of the DGCL. Within 120 days after the Effective Time, but not later, either the surviving corporation or any dissenting stockholder who has complied with the requirements of Section 262 of the DGCL may file a petition in the Delaware Court demanding a determination of the value of the Shares. Stockholders who desire to have their shares appraised should initiate any petitions necessary for the perfection of their appraisal rights within the time periods and in the manner prescribed in Section 262 of the DGCL.



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Within 120 days after the Effective Time, any stockholder who has complied with the provisions of Section 262 of the DGCL up to that point may receive from the surviving corporation, upon written request, a statement setting forth the aggregate number of shares not voted in favor of the Merger Agreement and with respect to which the Company has received demands for appraisal, and the aggregate number of holders of those shares. The surviving corporation must mail this statement to the stockholder within 10 days of receipt of the request or within 10 days after expiration of the period for delivery of demands for appraisals under Section 262 of the DGCL, whichever is later.

If a hearing on the petition is held, the Delaware Court is empowered to determine which dissenting stockholders are entitled to an appraisal of their shares. The Delaware Court may require dissenting stockholders who hold stock represented by certificates to submit their certificates representing shares for notation thereon of the pendency of the appraisal proceedings, and the Delaware Court is empowered to dismiss the proceedings as to any dissenting stockholder who does not comply with this request. Accordingly, dissenting stockholders are cautioned to retain their share certificates, pending resolution of the appraisal proceedings.

After determination of the dissenting stockholders entitled to an appraisal, the Delaware Court will appraise the Shares held by such dissenting stockholders at their fair value as of the Effective Time. When the value is so determined, the Delaware Court will direct the payment by the surviving corporation of such value, with interest thereon if the Delaware Court so determines, to the dissenting stockholders entitled to receive the same, upon surrender to the surviving corporation by such dissenting stockholders of the certificates representing such Shares.

In determining fair value, the Delaware Court will take into account all relevant factors. The Delaware Supreme Court has stated that proof of value by any techniques or methods which are generally considered acceptable in the financial community and otherwise admissible in court should be considered.

Stockholders should be aware that the fair value of their shares as determined under Section 262 of the DGCL could be greater than, the same as, or less than the Per Share Merger Consideration.

The Delaware courts may also, on application, (1) assess costs among the parties as the Delaware courts deem equitable and (2) order all or a portion of the expenses incurred by any dissenting stockholder in connection with the appraisal proceeding, including, without limitation, reasonable attorney's fees and fees and expenses of experts, to be charged pro rata against the value of all shares entitled to appraisal. Determinations by the Delaware courts are subject to appellate review by the Delaware Supreme Court.

No appraisal proceedings in the Delaware courts shall be dismissed as to any dissenting stockholder without the approval of the Delaware court, and this approval may be conditioned upon terms which the Delaware court deems just.

From and after the Effective Time, former holders of Shares are not entitled to vote their Shares for any purpose and are not entitled to receive payment of dividends or other distributions on the Shares (except dividends or other distributions payable to stockholders of record at a date which is prior to the effective date of the Merger).

A stockholder who wishes to exercise appraisal rights should carefully review the foregoing description and the applicable provisions of Section 262 of the DGCL which is set forth in its entirety in Annex F to this proxy statement and is incorporated herein by reference. Any stockholder considering demanding appraisal is advised to consult legal counsel because the failure strictly to comply with the procedures required by Section 262 of the DGCL could result in the loss of appraisal rights.

## **United States Federal Income Tax Considerations**

The following is a summary of the material United States federal income tax considerations to holders of Shares upon the tender of Shares for cash pursuant to the tender offer and the exchange of Shares for cash pursuant to the Merger by U.S. Holders (as defined below). This summary is based upon existing United States federal income tax law, which is subject to differing interpretations or change, possibly with retroactive effect. This summary is written for U.S. Holders that hold Shares as capital assets for United States federal income tax purposes. This summary does not discuss all aspects of United States federal income taxation that may be important to particular stockholders in light of their individual circumstances, and does not address the tax consequences to

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stockholders subject to special tax rules (for example, financial institutions, insurance companies, broker-dealers, partnerships and their partners, and tax-exempt organizations (including private foundations)), holders who are not U.S. Holders, stockholders that hold Shares as part of a straddle, hedge, conversion, constructive sale, or other integrated transaction for United States federal income tax purposes, stockholders that have a functional currency other than the United States dollar, or persons who acquired their Shares through the exercise of employee stock options or other compensation arrangements, all of whom may be subject to tax rules that differ significantly from those summarized below. In addition, this summary does not discuss any non-United States, state, or local tax considerations. Each stockholder is urged to consult its tax advisor regarding the United States federal, state, local, and non-United States income and other tax considerations of the tender offer and the Merger.

For purposes of this summary, a U.S. Holder is a beneficial owner of Shares that is, for United States federal income tax purposes, (i) an individual who is a citizen or resident of the United States, (ii) a corporation, or other entity taxable as corporation for United States federal income tax purposes, created in, or organized under the law of, the United States or any State or political subdivision thereof, (iii) an estate the income of which is includible in gross income for United States federal income tax purposes regardless of its source, or (iv) a trust (A) the administration of which is subject to the primary supervision of a United States court and which has one or more United States persons who have the authority to control all substantial decisions of the trust or (B) that has otherwise elected to be treated as a United States person under the Code.

If a partnership is a beneficial owner of Shares, the tax treatment of a partner in the partnership will generally depend upon the status of the partner and the activities of the partnership.

## **Regulatory Approvals**

Except as set forth below, the Company is not aware of any filings, approvals or other actions by or with any governmental authority or administrative or regulatory agency that would be required for Merger Sub's and WFMI's acquisition or ownership of the Shares. Should any such approval or other action be required, the Company currently expects that such approval or action, except as described below under State Takeover Laws, would be sought or taken. There can be no assurance that any such approval or action, if needed, would be obtained or, if obtained, that it will be obtained without substantial conditions; and there can be no assurance that, in the event that such approvals were not obtained or such other actions were not taken, adverse consequences might not result to the Company's or WFMI's business or that certain parts of the Company's or WFMI's business might not have to be disposed of or held separate.

## ***Antitrust Compliance***

Under the HSR Act and the related rules and regulations that have been issued by the FTC, certain transactions having a value above specified thresholds (which include the tender offer and Merger) may not be consummated until specified information and documentary material have been furnished to the FTC and the Antitrust Division and certain waiting period requirements have been satisfied. On February 26, 2007, WFMI and the Company each filed a Premerger Notification and Report Form concerning the tender offer with the FTC and the Antitrust Division. On March 13, 2007, the FTC issued a request for additional documentary material and information, which is commonly referred to as a second request.

On June 7, 2007, the FTC filed a complaint in the U.S. District Court for the District of Columbia challenging WFMI's acquisition of the Company and authorized the FTC staff to seek a temporary restraining order and preliminary injunction pending an administrative trial on the merits. The FTC's complaint charges that WFMI's acquisition of the Company, as proposed, would violate Section 5 of the FTC Act and Section 7 of the Clayton Act, as amended. The FTC's challenge to the transactions contemplated by the Merger Agreement is based on its contention that the relevant

antitrust product market is limited to natural and organic food stores and excludes other supermarkets. By acquiring its closest rival, the complaint alleges that WFMI would be in a position to exercise unilateral market power, resulting in higher prices and reduced quality, service and choice for consumers. WFMI and the Company consented to a temporary restraining order pending the hearing of the preliminary injunction, which has been scheduled for July 31 and August 1, 2007.

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While WFMI and the Company are optimistic that the FTC's case is without legal or factual merit and have agreed to cooperate to vigorously challenge the FTC in court, there can be no assurance that the parties will be successful in this matter or that the matter will be resolved prior to the Outside Date.

### ***State Takeover Laws***

A number of states (including Delaware, where the Company is incorporated) have adopted takeover laws and regulations which purport, to varying degrees, to be applicable to attempts to acquire securities of corporations which are incorporated in such states or which have substantial assets, stockholders, principal executive offices or principal places of business therein. To the extent that certain provisions of certain of these state takeover statutes purport to apply to the tender offer or the Merger, WFMI believes that such laws conflict with federal law and constitute an unconstitutional burden on interstate commerce.

### **Source of Funds**

Consummation of the Merger is not subject to a financing contingency. WFMI intends to finance the Merger using cash on hand and borrowing capacity under its credit facilities.

## **THE SPECIAL MEETING OF STOCKHOLDERS**

*The Company is furnishing this proxy statement to holders of Shares as part of the solicitation of proxies by the Company's board of directors for use at the special meeting of stockholders.*

### **Date, Time and Place**

The Company will hold the special meeting on \_\_\_\_\_, 2007 at :00 MDT at \_\_\_\_\_, Boulder, Colorado.

### **Purpose of Special Meeting**

The special meeting will be held for the following purposes:

to consider and vote on the proposal to approve and adopt the Merger Agreement; and

to transact any other business as may properly come before the special meeting or at any adjournment or postponement of the special meeting.

After careful consideration, the Company Board has determined that the Merger Agreement and the Merger are fair to and in the best interests of the Company and its stockholders. Accordingly, the Company Board has unanimously approved the Merger Agreement and related transactions. The Company Board unanimously recommends that you vote **FOR** the proposal to approve and adopt the Merger Agreement.

### **Record Date; Shares Entitled to Vote; Quorum**

Only holders of record of Shares at the close of business on \_\_\_\_\_, 2007, the record date for the special meeting, are entitled to vote at the special meeting. Each record holder will have one vote at the special meeting for each Share as of the close of business on the record date. On the record date, \_\_\_\_\_ Shares were issued and outstanding and held by approximately \_\_\_\_\_ holders of record. A quorum exists if at least a majority of the votes entitled to be cast at the special meeting are present in person or by proxy. **Holders that have tendered their Shares in the tender offer will still be counted for purposes of determining whether a quorum exists.** In the event that a quorum is not present at

the special meeting, it is expected that the special meeting will be adjourned or postponed to solicit additional proxies. Pursuant to the Tender and Support Agreement, Yucaipa has agreed to vote Shares they control in favor of the Merger.

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### **Required Vote**

Under Delaware law, the approval and adoption of the Merger Agreement requires the affirmative vote of holders representing at least a majority of the outstanding Shares as of \_\_\_\_\_, 2007, the record date for the special meeting. The holders of a majority of the outstanding Shares on the record date, represented in person or by proxy, will constitute a quorum for purposes of the special meeting. A quorum is necessary to hold the special meeting. In the event that a quorum is not present at the special meeting, it is expected that the special meeting will be adjourned or postponed to solicit additional proxies. Any Shares held in treasury by the Company or held by any of the Company's subsidiaries are not considered to be outstanding for purposes of determining a quorum. Abstentions and broker non-votes will be counted as Shares present and entitled to vote for the purposes of determining a quorum. Broker non-votes result when brokers are precluded from exercising their voting discretion with respect to the approval of non-routine matters such as the merger proposal, and, thus, absent specific instructions from the beneficial owner of those Shares, brokers are not empowered to vote the shares with respect to the approval of those proposals.

The approval of any proposal to postpone or adjourn the special meeting if there are not sufficient votes to approve and adopt the Merger Agreement requires the affirmative vote of a majority of those Shares represented in person or by proxy at the special meeting. The persons named as proxies may propose and vote for one or more postponements or adjournments of the special meeting, including postponements or adjournments to permit further solicitations of proxies. No proxy voted against approval and adoption of the Merger Agreement will be voted in favor of any postponement or adjournment of the special meeting.

Under Delaware law, holders of shares of the Company's common stock are entitled to appraisal rights in connection with the Merger. In order to exercise appraisal rights, you must comply with all applicable requirements of Delaware law. See Special Factors Appraisal Rights and Annex F for information on the requirements of Delaware law regarding appraisal rights.

### **Voting of Proxies**

There are four different ways that those who are stockholders as of close of business on the record date can cast their vote at the special meeting. You may cast your vote by:

1. Telephone, using the toll-free number listed on each proxy card (if you are a stockholder of record) or vote instruction card (if your shares are held by a bank or broker). Telephonic votes may be cast through *12:00 p.m. (noon) Eastern Time* on \_\_\_\_\_, 2007;
2. The Internet, at the website provided on each proxy or vote instruction card. Internet votes may be cast through *12:00 p.m. (noon) Eastern Time* on \_\_\_\_\_, 2007;
3. Marking, signing, dating and mailing each proxy or vote instruction card and returning it in the envelope provided. If you return your signed proxy or vote instruction card but do not mark the boxes showing how you wish to vote, your shares will be voted **FOR** all of the proposals; or
4. Attending the special meeting (if your shares are registered directly in your name on the Company's books and not held through a broker, bank or other nominee). Please note, however, that if a broker, bank or other nominee is the record holder of your shares (i.e. the shares are held in *street name*) and you wish to vote at the meeting, you must obtain from the record holder a proxy issued in your name.

All shares represented by properly executed proxies received in time for the special meeting will be voted at the special meeting in the manner specified by the holders of such shares. Properly executed proxies that do not contain voting instructions will be voted **FOR** the proposal to approve and adopt the Merger Agreement.

Shares represented at the special meeting but not voted, including broker non-votes, and Shares for which proxies have been received but for which stockholders have abstained, will be treated as present at the special meeting for purposes of determining the presence of a quorum for the transaction of all business.

Only shares affirmatively voted **FOR** the approval and adoption of the Merger Agreement and properly executed proxies that do not contain voting instructions will be counted as favorable votes for the proposal.



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The Company does not expect that any matters other than those described in this proxy statement will come before the special meeting. If any other matters are properly brought before the special meeting for action, however, the Company intends that the persons named as proxies on the enclosed proxy card will vote in accordance with their best judgment. These matters may include an adjournment or postponement of the special meeting from time to time if the Company Board so determines, except that proxies that are voted against the merger proposal may not be voted by the persons named on the enclosed proxy card for an adjournment or postponement of the special meeting. If any adjournment or postponement is made, the Company may solicit additional proxies during the adjournment or postponement period.

**Your vote is important. Please return your signed proxy card or submit your proxy by telephone or Internet so your shares can be represented, even if you plan to attend the special meeting in person.**

## **Revocability of Proxies**

The grant of a proxy on the enclosed proxy card or by telephone or Internet does not preclude a stockholder from voting in person at the special meeting. A stockholder may revoke a proxy at any time prior to its exercise by (1) filing a written notice of revocation with the Corporate Secretary of the Company at our executive offices at 1821 30th Street, Boulder, Colorado 80301, (2) submitting a duly executed proxy, or otherwise casting your vote in the manner set forth above, bearing a later date than the original proxy or (3) voting in person at the special meeting. Attendance at the special meeting will not in and of itself constitute a revocation of the proxy. If you have instructed your broker, bank or other nominee to vote your shares, you must follow the procedures provided by your broker, bank or other nominee to change those instructions.

## **Solicitation of Proxies**

The Company and its proxy solicitation firm, \_\_\_\_\_, may solicit proxies in person or by telephone, fax or other means. The Company will pay \_\_\_\_\_ a fee of \$ \_\_\_\_\_, plus reasonable expenses, for its services. The Company will also pay all other reasonable expenses for solicitation. In addition, proxies may be solicited by officers and directors and other employees of the Company, without additional remuneration, in person or by telephone, fax or other means.

Please mail in your proxy or submit it by telephone or the Internet without delay. If you hold Shares through a broker, bank or other nominee, please follow the instructions on the proxy form supplied by your broker, bank or other nominee, which may provide for voting by telephone or through the Internet. The Company will also reimburse brokers, banks and other nominees for their expenses in sending these materials to you and obtaining your voting instructions.

Please do not send your stock certificate(s) evidencing your Shares with your proxy. As soon as reasonably practicable after the Merger is consummated, you will receive written instructions from the exchange agent to be appointed by WFMI on how to exchange your Share certificates or book-entry Shares for the Per Share Merger Consideration. You will receive cash for your Shares from the exchange agent after you comply with these instructions. If your Shares are held in \_\_\_\_\_ street name \_\_\_\_\_ by your broker, you will receive instructions from your broker as to how to surrender your \_\_\_\_\_ street name \_\_\_\_\_ Shares and receive cash for those Shares.

## **FORWARD-LOOKING AND CAUTIONARY STATEMENTS**

*This proxy statement includes information that could constitute forward-looking statements made pursuant to the safe harbor provision of the Private Securities Litigation Reform Act of 1995, which include words such as anticipate, believe, plan, estimate, expect, intend, and similar and related expressions. Such forward-looking statements involve risks and uncertainties. Although the Company believes that the expectations reflected in such*

*forward-looking statements are based on reasonable assumptions, the Company's actual results could differ materially from those described in the forward-looking statements. The following factors might cause such a difference:*

*The occurrence of any event, change or other circumstances that could give rise to the termination of the Merger Agreement, including failure to close by the Outside Date;*

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*The outcome of any legal proceedings that have been or may be instituted against the Company, WFMI or Merger Sub related to the Merger Agreement, including the action brought by the FTC challenging the Merger;*

*The inability to consummate the Merger due to the failure to obtain stockholder approval or the failure to satisfy other conditions to the consummation of the Merger;*

*Risks that the proposed Merger disrupts current plans and operations;*

*The inability to retain key personnel during any delay in closing the Merger caused by the FTC challenge to the Merger;*

*The amount of the costs, fees, expenses and charges related to the Merger.*

*The inability to enter into leases, material contracts or amendments thereto, pending consummation of the Merger.*

*Additional information regarding these and other risk factors and uncertainties are set forth from time to time in the Company's filings with the SEC, available for viewing on the Company's website at [www.wildoats.com](http://www.wildoats.com). All forward-looking statements are based on information available at the Company on the date of this proxy statement. The Company undertakes no obligation to publicly update or revise any forward-looking statements, whether as a result of new information, future events or otherwise.*

**MERGER AGREEMENT**

*The following is a brief description of the material terms of the Merger Agreement. While the Company believes that the following description covers the material terms of the Merger Agreement, the description may not contain all of the information that is important to you. The Company encourages you to carefully read this entire proxy statement, including the Merger Agreement (which is attached to this proxy statement as Annex A) for a more complete understanding of the Merger and related transactions.*

**The Tender Offer**

Pursuant to the Merger Agreement, Merger Sub made a cash tender offer disclosed in a Tender Offer Statement on Schedule TO dated February 27, 2007 filed with the SEC to purchase all outstanding Shares at a price of \$18.50 per share, net to the seller in cash, without interest, upon the terms and subject to the conditions set forth in the Offer to Purchase and related Letter of Transmittal, copies of which are filed as Annexes D and E hereto and are incorporated herein by reference.

The current expiration date of the tender offer is June 20, 2007, which may be extended from time to time by WFMI but not beyond the Outside Date without the Company's consent.

**Holders that have tendered their Shares in the tender offer are counted for the purpose of determining whether a quorum exists and are eligible to vote their Shares at the special meeting. We urge you to vote your Shares FOR the proposal to approve and adopt the Merger Agreement.**

**The Merger**

Promptly following either of

the Merger having been approved by stockholders of record owning a majority of our Shares (whether or not the tender offer closes), or

at least 90% of the Shares being tendered to and purchased by Merger Sub in the tender offer, allowing Merger Sub to merge with the Company under Delaware's short form merger statute

at the Effective Time, and subject to the other conditions set forth in the Merger Agreement, Merger Sub will be merged with and into the Company, and the Company shall continue as the surviving corporation and a wholly-owned subsidiary of WFMI. At the Effective Time, the certificate of incorporation and bylaws of the Company will be amended and restated in their entirety to read as the certificate of incorporation and bylaws, respectively, of

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Merger Sub in effect immediately prior to the Effective Time (except that the name of the surviving corporation shall be Wild Oats Markets, Inc. ). The directors and officers of WFMI immediately prior to the Effective Time will be the initial directors and officers of the surviving corporation. All surviving corporation directors and officers will hold their positions in accordance with and subject to the certificate of incorporation and bylaws of the surviving corporation. For a description of the conditions to the Merger, see Conditions to Consummation of the Merger.

The Company or WFMI may terminate the Merger Agreement prior to the consummation of the Merger in some circumstances, whether before or after the approval by our stockholders of the Merger Agreement. Additional details on termination of the Merger Agreement are described in Termination of the Merger Agreement.

## **Closing; Effective Time**

Unless otherwise agreed by the parties to the Merger Agreement, the parties are required to close the Merger no later than the first business day after the satisfaction or waiver of the conditions described under Conditions to Consummation of the Merger.

The Merger will be effective in accordance with applicable law after the time the certificate of merger is filed with the Secretary of State of the State of Delaware. We expect to consummate the Merger as promptly as practicable after we obtain the necessary regulatory approvals and our stockholders approve the Merger Agreement. See Special Factors Regulatory Approvals.

## **Merger Consideration**

Each Share issued and outstanding immediately prior to the Merger (other than Shares held in the treasury of the Company, owned by Merger Sub, WFMI or any wholly-owned subsidiary of WFMI or the Company, or held by stockholders who properly demand and perfect appraisal rights under Delaware law) will, by virtue of the Merger and without any action on the part of the holder, be converted at the Effective Time into the right to receive the Per Share Merger Consideration, payable to such holder upon surrender of the certificate formerly representing such Shares, without interest and less any required withholding taxes. At the consummation of the Merger, each Share held in the treasury of the Company and each Share owned by Merger Sub, WFMI or any wholly-owned subsidiary of WFMI or the Company will be canceled, and no payment or distribution will be made with respect to such Shares. At the consummation of the Merger, each share of Merger Sub common stock issued and outstanding immediately prior will, by virtue of the Merger and without any action on the part of the holder thereof, be converted into one share of common stock of the surviving corporation.

After the Merger is effective, each holder of Shares will cease to have any rights with respect to the Shares, except for the right to receive the Per Share Merger Consideration.

## **Treatment of Stock Options, ESPP and RSUs**

### ***Stock Options***

The Merger Agreement provides that, no later than the Effective Time, each outstanding and unexercised option to acquire Shares granted under any of the Company's equity incentive plans, whether vested or unvested, will automatically be terminated and will thereafter solely represent the right to receive, in exchange, an amount in cash equal to the product of the number of Shares subject to such option and the excess, if any, of the Per Share Merger Consideration, without interest, over the exercise price per Share subject to such option, less any required withholding taxes. Options having an exercise price per Share equal to or greater than the Per Share Merger Consideration will, at the Effective Time, be cancelled without payment of any consideration.

***ESPP***

The Company Board has taken actions under the Company's Employee Stock Purchase Plan, or ESPP, such that no further offering periods for the purchase of Shares thereunder would commence following the expiration of the offering period that ended December 31, 2006. All Shares previously purchased pursuant to the ESPP will be treated the same as all other outstanding Shares.

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***Restricted Stock and RSUs***

Immediately prior to the Effective Time, all granted but unvested restricted stock units, or RSUs, will become fully vested. Each Share of restricted stock and each Share represented by an RSU will, at the Effective Time, be cancelled and converted into the right to receive the Per Share Merger Consideration.

**Exchange Agent and Paying Procedures**

Prior to the Effective Time, WFMI will designate a bank or trust company as exchange agent for the payment of the Per Share Merger Consideration. From time to time after the Effective Time, WFMI will deposit with the exchange agent for the benefit of the Company's stockholders, cash in the amount necessary for the payment of the aggregate Per Share Merger Consideration. As soon as reasonably practicable after the Effective Time, the surviving corporation will cause the exchange agent to mail a letter of transmittal to each holder of record of a stock certificate or book-entry Share, which will specify, among other things, instructions for use in effecting the surrender of the certificates or book-entry Shares in exchange for the Per Share Merger Consideration.

Upon surrender of a stock certificate or book-entry Share for cancellation to the exchange agent (or its designee), together with a letter of transmittal duly completed and validly executed in accordance with the instructions provided, and such other documents as may reasonably be required by the exchange agent, the holder of such stock certificate or book-entry Share will be entitled to receive the Per Share Merger Consideration and the certificate so surrendered shall be cancelled.

You should not send your Company common stock certificates to the exchange agent until you have received the transmittal materials from the exchange agent. Do not return your Company common stock certificates with the enclosed proxy, and do not forward your stock certificates to the exchange agent without a letter of transmittal.

**Representations and Warranties**

The representations and warranties contained in the Merger Agreement have been made by each party to the Merger Agreement solely for the benefit of the other parties, and such representations and warranties should not be relied on by any other person. In addition, such representations and warranties:

have been qualified by information set forth in a confidential disclosure schedule exchanged by the parties in connection with signing the Merger Agreement the information contained in this disclosure schedule modifies, qualifies and creates exceptions to the representations and warranties in the Merger Agreement;

will not survive consummation of the Merger and cannot be the basis for any claims under the Merger Agreement by the other party after termination of the Merger Agreement other than claims for willful breach;

may be intended not as statements of fact, but rather as a way of allocating the risk to one of the parties to the Merger Agreement if those statements turn out to be inaccurate; and

were made only as of the date of the Merger Agreement or such other date as is specified in the Merger Agreement.

***By the Company***

In the Merger Agreement, the Company has made customary representations and warranties to WFMI and Merger Sub with respect to, among other matters:

its organization and qualification, capitalization, authority to enter into the Merger and related transactions, and the vote of stockholders required to approve the Merger

governmental consents and approvals required to consummate the Merger

compliance with applicable laws

governmental permits



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forms and financial statements filed with the SEC

absence of changes or events since December 31, 2006 which has had a Material Adverse Effect

undisclosed liabilities, including pending or threatened litigation

employee benefit plans

labor and employment matters

information included in this proxy statement, in the Schedule 14D-9 filed by the Company and in the Offer to Purchase filed by WFMI, and any other ancillary documents related to the tender offer

real property owned or leased by the Company

intellectual property

tax matters

environmental matters

material contracts

affiliate transactions

opinion of Citigroup

no payment of brokers' fees except to Citigroup

inapplicability of state takeover laws

***By WFMI and Merger Sub***

WFMI and Merger Sub have made customary representations and warranties to the Company with respect to, among other matters, organization and qualification, authority, consents and approvals, litigation, information included in the Schedule 14D-9, the tender offer documents and any proxy or information statement to be sent to stockholders in connection with the Merger, brokers' fees, financing and ownership of shares.

***Definition of Material Adverse Effect***

As defined in the Merger Agreement, Material Adverse Effect means any effect, change, fact, event, development, occurrence or circumstance that, individually or together with any other effect, change, fact, event, development, occurrence or circumstance, (a) is materially adverse to the condition (financial or otherwise), properties, business, operations, results of operations, assets or liabilities of the Company and all of its subsidiaries, taken as a whole; or (b) materially and adversely effects the consummation of the transactions contemplated by the Merger Agreement; provided, however, that in no event shall any of the following, either alone or in combination, be deemed to constitute, nor shall any of the following be taken into account in determining whether there has been, a Material Adverse Effect:

any changes resulting from or arising out of general market, economic or political conditions, provided that such changes do not have a substantially disproportionate impact on the Company and its subsidiaries, taken as a whole;

any changes resulting from or arising out of general market, economic or political conditions in the industry in which the Company or any of its subsidiaries conduct business, provided that such changes do not have a substantially disproportionate impact on the Company and its subsidiaries, taken as a whole;

any changes resulting from or arising out of actions taken pursuant to (and required by) the Merger Agreement or at the request of WFMI or Merger Sub or the failure to take any actions due to restrictions set forth in the Merger Agreement;

any changes in the price or trading volume of the Company's stock, in and of itself;

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any failure by the Company to meet published revenue or earnings projections, in and of itself;

any changes or effects arising out of or resulting from any legal claims or other proceedings made by any of the Company's stockholders arising out of or related to the Merger Agreement, the tender offer or the Merger; or

other changes reasonably foreseeable as a result of the announcement of the transactions contemplated by the Merger Agreement.

**Conduct of Business Pending Consummation of Merger**

The Merger Agreement obligates the Company to conduct its business in the ordinary course consistent with past practice during the period, which we refer to in this proxy as the Interim Period, from the date of the Merger Agreement to the earliest of the time when designees of WFMI first constitute at least a majority of the Company Board, the Merger is consummated and the termination of the Merger Agreement. The Merger Agreement also provides that during the Interim Period, the Company will not take certain actions without the prior written consent of WFMI including, among other things and subject to certain exceptions:

amending its certificate of incorporation or bylaws

issuing or selling its securities or granting options, declaring or paying any dividends, or reclassifying or redeeming its securities

making material acquisitions or dispositions

entering into, terminating or amending certain material contracts

opening new stores

authorizing or making any capital expenditures in excess of certain agreed amounts

incurring or guaranteeing indebtedness for borrowed money in excess of certain agreed amounts

making any loans or investments

entering into or amending any employment, severance or similar agreements

increasing compensation or adopting new employee benefit plans, or accelerating the vesting or payment of compensation under any employee benefit plan

changing accounting principles

making material tax elections inconsistent with those made in prior periods or entering into tax settlements

settling litigation or other claims

failing to keep insurance policies in force, or

agreeing to take any of the foregoing actions.

In addition, the Company has agreed not to knowingly take or knowingly omit to take any action that is reasonably likely to result in any failure of its representations and warranties contained in the Merger Agreement to be true and correct.

#### **No Solicitation of Alternative Acquisition Proposals**

Pursuant to the Merger Agreement, the Company has agreed not to, and to cause its officers, directors, employees, representatives and agents not to, directly or indirectly, until the tender offer is completed, initiate, solicit or encourage (including by way of providing information) the submission of any inquiries, proposals or offers that constitute, or may reasonably be expected to lead to, any Acquisition Proposal (as defined below), or to engage in any discussions or negotiations with respect to, or otherwise participate in or facilitate, any proposal by a third party regarding acquisition of the Company or its assets.

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Under the Merger Agreement, **Acquisition Proposal** means any inquiry, proposal, offer or indication of interest from any person (other than by or on behalf of WFMI or Merger Sub) relating to (i) any direct or indirect acquisition or purchase of a business or assets of the Company that constitutes a substantial portion of the net revenues, net income or assets, or 15% or more beneficial ownership of any class of equity securities of the Company or any of its significant subsidiaries, (ii) any tender offer or exchange offer that if consummated would result in any third party beneficially owning 15% or more of any class of equity securities of the Company or (iii) any merger, consolidation, business combination, recapitalization, reorganization, liquidation, dissolution or similar transaction involving the Company, in each case other than the transactions contemplated by the Merger Agreement and any transaction by the Company permitted by Section 5.1 of the Merger Agreement (i.e., covenants regarding Company conduct during the Interim Period).

The Company may, prior to the purchase of Shares pursuant to the tender offer, furnish information to, and negotiate, explore or otherwise engage in substantive discussions with, any person who has made an unsolicited bona fide written proposal that is received on or after the date of the Merger Agreement (and not withdrawn), with respect to an Acquisition Proposal from such person, only if: (i) the Company Board, after consultation with and taking into account the advice of its financial advisors and outside legal counsel, determines in good faith that the Company Board would reasonably be likely to breach its fiduciary duties to stockholders under applicable law without taking such action, (ii) prior to taking such action, the Company receives from such person an executed confidentiality agreement, (iii) the Company promptly provides to WFMI any non-public information that is provided to the person or entity making such acquisition proposal that was not previously provided to WFMI, (iv) the Company Board, after consultation with and taking into account the advice of its financial advisors and legal counsel, determines in good faith that such proposal would, if accepted, be reasonably likely to be consummated, taking into account all legal, financial and regulatory aspects of the proposal and the person making the proposal, and (v) the proposal would, if consummated, result in a transaction that is more favorable to the Company's stockholders, from a financial point of view, than the transactions contemplated by the Merger Agreement.

In addition, the Merger Agreement requires the Company to notify WFMI of any Acquisition Proposal or indication of interest in making an Acquisition Proposal.

Under the Merger Agreement, the Company may not approve, recommend or enter into a written Acquisition Proposal. However, if, at any time prior to the earlier of (i) the purchase of Shares by Merger Sub in the tender offer and (ii) a meeting of the Company's stockholders to vote on the Merger, the Company Board determines in good faith after consultation with its legal counsel and financial advisors that an Acquisition Proposal is a Superior Proposal (as defined in the Merger Agreement), then the Company Board may withdraw or modify its recommendation in respect of the tender offer and Merger in response to such Acquisition Proposal and terminate the Merger Agreement, subject to certain conditions described in the Merger Agreement, including without limitation, (a) the Company Board having determined in good faith (after consultation with and taking into account the advice of its financial advisors and legal counsel) it is necessary to withdraw or modify its recommendation in respect of the tender offer and Merger to comply with its fiduciary duties to stockholders under applicable law and (b) the Company paying WFMI the Termination Fee described below under **Termination Fee** substantially concurrently with such termination.

## **Employee Matters**

The Merger Agreement provides that, to the extent permitted under any applicable law and the benefit plans of WFMI, each employee of the Company will be given credit for all service with the Company (or service credited by the Company) under all employee benefit plans, programs, policies and arrangements maintained by WFMI in which they participate or in which they become participants after the Effective Time for purposes of eligibility, vesting and benefit accrual, including for purposes of determining (i) short-term and long-term disability benefits, (ii) severance benefits, (iii) vacation benefits and (iv) benefits under any retirement plan; provided, that credit is not required to be

given for service to the extent such credit would result in duplication of benefits.

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**Indemnification and Insurance**

Under the Merger Agreement, Merger Sub and WFMI have agreed that the certificate of incorporation and bylaws of the surviving corporation in the Merger will contain provisions no less favorable with respect to indemnification and exculpation from liabilities of the present or former directors, officers, employees and agents of the Company than those in effect as of the date of the Merger Agreement. The Merger Agreement also provides that WFMI and the surviving corporation will indemnify each present and former officer and director of the Company in respect of acts of omissions occurring at or prior to the Effective Time to the fullest extent the Company is permitted to do so under applicable law and its certificate of incorporation or bylaws and shall purchase tail policies to the Company's directors and officers' liability insurance policies as in effect on the date of the Merger Agreement, which are at least as protective to such directors and officers as the coverage provided by the Company's directors' and officers' liability insurance policies as of the date of the Merger Agreement.

**Reasonable Best Efforts; HSR Act**

The Merger Agreement provides that, subject to its terms and conditions, each of the Company, WFMI and Merger Sub will use its reasonable best efforts to take, or cause to be taken, all actions and to do, or cause to be done, all things necessary, proper or advisable under applicable laws and regulations to consummate the tender offer, the Merger and the other transactions contemplated by the Merger Agreement. However, this obligation does not require WFMI or Merger Sub to keep the tender offer open or consummate the Merger beyond the Outside Date. Pursuant to the Merger Agreement, the parties will, to the extent required, make filings under the HSR Act or antitrust or competition laws of jurisdictions other than the United States or investment laws relating to foreign ownership and take other actions necessary to obtain any consents, approvals or clearances required in connection with the transactions contemplated by the Merger Agreement.

In the event that any administrative or judicial action or proceeding is instituted (or threatened to be instituted) by a government entity or private party challenging the Merger or any transaction contemplated by the Merger Agreement, each of WFMI, Merger Sub and the Company is required by the Merger Agreement to cooperate in all respects with each other and use its respective reasonable best efforts to contest and resist any such action or proceeding and to have vacated, lifted, reversed or overturned any decree, judgment, injunction, or other order, whether temporary, preliminary or permanent, that is in effect and that prohibits, prevents or restricts the consummation of the transactions contemplated by the Merger Agreement. Each have further agreed to take all reasonable actions that are necessary, proper or advisable to avoid any obstacle that may be asserted by any governmental authority under applicable antitrust laws to enable the Merger to be completed as soon as possible, and to cause the termination of the applicable HSR waiting periods. WFMI has agreed that its reasonable best efforts will include the divestiture, if required, of certain of the Company's stores, but that in no event will it be required to divest any existing WFMI stores.

**Notification of Certain Matters**

The Company has agreed to give prompt notice to WFMI, and WFMI has agreed to give prompt notice to the Company, upon obtaining knowledge of the occurrence or non-occurrence of any event which is likely to cause any representation or warranty to be untrue or inaccurate in any material respect or that might result in a Material Adverse Effect if made as of any time at or prior to the Outside Date or to result in any material failure of such party to comply with any covenant, condition or agreement to be complied with, including any offer condition. The delivery of any notice will not cure any breach of any representation or warranty requiring disclosure or otherwise affect the remedies available to the party receiving such notice.





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**Conditions to Consummation of the Merger**

***Conditions to All Parties' Obligations***

The obligations of each party to consummate the Merger are subject to the satisfaction or waiver, where permissible, at or prior to the Effective Time, of the following conditions:

unless the Merger is consummated as a short-form merger under Section 253 of the Delaware General Corporation Law, the Merger and the Merger Agreement shall have been approved and adopted by the affirmative vote of holders of at least a majority of the total voting power of the outstanding Shares;

the applicable waiting period under the HSR Act shall have expired or been terminated; and

no statute, rule, regulation, judgment, writ, decree, order or injunction or similar action shall have been promulgated, issued or taken by any governmental entity of competent jurisdiction that makes illegal or prohibits consummation of the Merger.

***Conditions to Company's Obligations***

The obligations of the Company to consummate the Merger are subject to the satisfaction or waiver, where permissible, at or prior to the Effective Time, of the following conditions:

WFMI and Merger Sub having complied in all material respects with their respective agreements contained in the Merger Agreement; and

all material representations and warranties of WFMI or Merger Sub contained in the Merger Agreement being true and correct, except for certain breaches of representations and warranties that do not have a material adverse effect on WFMI's and Merger Sub's ability to consummate the Merger.

***Conditions to WFMI's and Merger Sub's Obligations***

Unless Merger Sub shall have accepted for purchase Shares tendered (and not withdrawn) pursuant to the tender offer, the obligations of WFMI and Merger Sub to consummate the Merger are subject to the satisfaction or waiver, where permissible, at or prior to the Effective Time, of the following conditions:

the Company having complied in all material respects with its agreements contained in the Merger Agreement;

all material representations and warranties of the Company contained in the Merger Agreement being true and correct, except for certain breaches of representations and warranties that are not reasonably expected to have a Material Adverse Effect;

no change, event or circumstance shall have occurred since the date of the Merger Agreement that has a Material Adverse Effect; and

certain third party consents required to transfer certain contracts in the Merger shall have been obtained except where the failure to obtain any such consent is not reasonably expected to have a Material Adverse Effect.

### **Termination of the Merger Agreement**

The Merger Agreement provides that it may be terminated and the Merger may be abandoned (in which case WFMI will also be entitled to terminate the tender offer):

by mutual written consent of WFMI and the Company;

by either party, if (i) any governmental entity issues an order, decree or ruling or takes any other action restraining, enjoining, or otherwise prohibiting the tender offer or the Merger, and such order, decree, ruling or other action has become final and nonappealable, or (ii) the Merger shall not have been consummated by the Outside Date; provided, however, that the right to terminate shall not be available to any party whose failure to fulfill any obligation under the Merger Agreement has been the principal cause of, or resulted in,

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the failure of the Merger to occur on or before the Outside Date, or (iii) the Merger has not been approved by the stockholders of the Company;

by either party if the other breaches or fails to comply in any material respect with any of its obligations, covenants or agreements under the Merger Agreement, or the other party's representations and warranties fail to be true and correct under the relevant materiality standards provided in the Merger Agreement, and the breach or failure to perform or comply is not capable of being cured within 30 days following notice or, if capable of being cured within that period, has not been so cured; but neither party can terminate if it is in material breach of the Merger Agreement; or

by the Company under the circumstances described above in the fourth paragraph of No Solicitations of Alternative Acquisition Proposals.

As used in this proxy statement, Outside Date refers to June 30, 2007, the latest date the Merger can be consummated, unless, as of June 30, 2007, either:

all of the conditions to the consummation of the Merger are satisfied, other than (A) the Merger being approved by the Company's stockholders; or (B) the applicable HSR Act waiting periods being expired or terminated; or

any court of competent jurisdiction or other governmental entity has issued an order, decree or ruling or taken any other action restraining, enjoining or otherwise prohibiting the tender offer or the Merger (as applicable) and such order, decree, ruling or other action has not become final and nonappealable,

in which case, the latest date the Merger can be consummated is August 31, 2007.

**Termination Fee**

In the event that the Merger Agreement is terminated under the circumstances described above in the fourth paragraph of No Solicitations of Alternative Acquisition Proposals, the Company has agreed to pay WFMI a termination fee of \$15,200,000, which we refer to in this proxy statement as the Termination Fee. The Company has also agreed to pay WFMI the Termination Fee if:

the Merger Agreement is terminated under the circumstances described in clause (ii) or (iii) of the second bullet under Termination of the Merger Agreement, and both the following conditions are satisfied:

at any time on or after the date of the Merger Agreement and before such termination, an Acquisition Proposal has been made to the Company's board of directors or to the Company or has been publicly announced and not irrevocably withdrawn, or any person has publicly announced (and not irrevocably withdrawn) an intention to make an Acquisition Proposal; and

within 12 months after the date of such termination, the Company consummates any transaction specified in the definition of Acquisition Proposal (provided that, for this purpose, references in the definition of Acquisition Proposal to 15% will be replaced by 50%); or

the Company shall have withdrawn or modified its recommendation to its stockholders regarding the tender offer and the Merger, and the Merger shall not have been approved by the stockholders of the Company.

In the event that the Merger Agreement is terminated for a breach by either party of its representations, warranties, covenants or obligations under the Merger Agreement, then the breaching party will pay the non-breaching party a

termination fee of \$4,000,000. If WFMI would be entitled to terminate the Merger Agreement and receive a termination fee, then the right to terminate and receive a termination fee will be the exclusive remedy of WFMI and Merger Sub in respect of any breach of the Company's covenants, agreements or representations and warranties under the Merger Agreement.

#### **Other Fees and Expenses**

Except as described above under the Termination Fee, each party will bear its own expenses in connection with the Merger Agreement and the transactions contemplated by the Merger Agreement, including the tender offer.

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WFMI and Merger Sub, on the one hand, and the Company, on the other hand, each will bear one-half of the HSR Act filing fee.

## **Amendments**

The Merger Agreement may be amended by the parties at any time before the Effective Time (subject, in the case of the Company, to certain actions requiring the approval of the Continuing Directors, as such term is defined in the Merger Agreement), whether before or after adoption of the Merger Agreement by the stockholders of the Company, but (a) after WFMI purchases Shares pursuant to the tender offer, no amendment may be made that decreases the Per Share Merger Consideration, and (b) in the event that the Merger Agreement is adopted by the Company's stockholders, no amendment may be made which by law or stock exchange rule requires the further approval of the Company's stockholders without such approval.

## **Waivers**

At any time prior to the Effective Time, any party to the Merger Agreement (subject, in the case of the Company, to certain actions requiring the approval of the Continuing Directors, as such term is defined in the Merger Agreement) may extend the time for performance for any of the acts of the other parties, waive any inaccuracies in the representations and warranties contained in the Merger Agreement, and, subject to the requirements of applicable law, waive compliance by the other parties with any of the agreements or conditions contained in the Merger Agreement, except that the Minimum Tender Condition (as such term is defined in the Merger Agreement) may be waived by WFMI only with the prior written consent of the Company.

## **Specific Performance**

The parties to the Merger Agreement are entitled to seek specific performance of the terms of the Merger Agreement in the event any such terms are breached, this remedy being in addition to any other remedy available under the Merger Agreement, including the termination rights discussed above, or any other remedy available at law or in equity.

## **OTHER AGREEMENTS**

### **Tender and Support Agreement**

The Company, WFMI and Merger Sub entered into a Tender and Support Agreement with Yucaipa American Alliance Fund I, L.P., a Delaware limited partnership, and Yucaipa American Alliance (Parallel) Fund I, L.P., a Delaware limited partnership, which we refer to in this proxy statement as Yucaipa, dated as of the date of the Merger Agreement. Pursuant to the Tender and Support Agreement, Yucaipa has agreed to tender its Shares in the tender offer (together with any Shares that are issued to or otherwise acquired or owned by Yucaipa prior to the termination of the Tender and Support Agreement), which we refer to in this proxy statement as the Subject Shares, within five business days after its receipt of all documents or instruments required to be delivered pursuant to the terms of the tender offer, and not to withdraw such tender unless the tender offer shall have been terminated in accordance with its terms or the Tender and Support Agreement shall have been terminated in accordance with its terms. Additionally, Yucaipa has agreed, at every meeting of the stockholders of the Company, and at every adjournment or postponement of such a meeting, to vote, or cause the holder of record on any applicable record date to vote the Subject Shares (to the extent that any of such Subject Shares are not purchased in the tender offer) (i) in favor of the Merger Agreement and the transactions contemplated under the Merger Agreement, (ii) against (A) any agreement or arrangement related to any Acquisition Proposal (as defined in the Merger Agreement), (B) any liquidation, dissolution, recapitalization, extraordinary dividend or other significant corporate reorganization of the Company or any of its subsidiaries or

(C) any other transaction the consummation of which would reasonably be expected to impede, interfere with, prevent or materially delay the tender offer or the Merger or that would reasonably be expected to dilute materially the benefits to WFMI of the transactions contemplated by the Merger Agreement, and (iii) in favor of any other matter necessary for consummation of the transactions contemplated by the Merger Agreement, which is considered at any such meeting of stockholders, and in connection therewith to

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execute any documents reasonably requested by WFMI that are necessary or appropriate in order to effectuate the foregoing. As of the date of the Tender and Support Agreement, Yucaipa owned 5,375,600 shares of Common Stock representing approximately 18% of the outstanding Shares.

**Confidentiality Agreement**

On January 8, 2007, WFMI and the Company entered into a letter agreement, which we refer to in this proxy statement as the Confidentiality Agreement, that provided, in part, that as a condition to being furnished certain information by the Company, WFMI would (subject to limited exceptions) keep such information confidential for a period of two years from the date of the Confidentiality Agreement, unless otherwise required by law, and not use such information for any purpose other than in connection with evaluating a potential transaction with the Company. WFMI also agreed, among other things, that for a period of one year after the date of the Confidentiality Agreement WFMI will not, directly or indirectly, alone or in concert with others, (i) propose any business combination, acquisition or other extraordinary transaction involving the Company, its successors, securities or any substantial part of its assets, or acquire or propose to acquire any additional Shares, (ii) seek or propose to influence or control, through any solicitation of proxies, the voting securities of the Company, or otherwise, the board of directors, management or policies of the Company, or (iii) make any public disclosure or take any action that could require the Company to make any public disclosure with respect to those actions. WFMI further agreed that, for a period ending on the earliest of the consummation of a definitive agreement for a transaction and the expiration of two years after execution of the Confidentiality Agreement, subject to specified exceptions, it would not offer to hire or hire any person currently or formerly employed by the Company that is senior vice president level or higher, nor to initiate or maintain contact with any officer, director or employee of the Company with respect to the Company's confidential information for purposes of making an acquisition proposal.

**OTHER IMPORTANT INFORMATION REGARDING THE COMPANY****Price Range of Common Stock and Dividend Information**

As of \_\_\_\_\_, 2007, the Company had \_\_\_\_\_ Shares outstanding. The Company's common stock is traded on the Nasdaq National Market under the symbol OATS. If the Merger is consummated, the Company's common stock will be delisted from the Nasdaq and will be deregistered under the Exchange Act. The following table shows the high and low closing prices on the Nasdaq exchange as of the end of each calendar quarter for the past two years:

<b>Quarter</b>	<b>High Price</b>	<b>Low Price</b>
1 <sup>st</sup> Quarter 2005	\$ 10.80	\$ 6.11
2 <sup>nd</sup> Quarter 2005	12.34	9.81
3 <sup>rd</sup> Quarter 2005	13.88	11.57
4 <sup>th</sup> Quarter 2005	12.92	10.91
1 <sup>st</sup> Quarter 2006	20.33	11.75
2 <sup>nd</sup> Quarter 2006	19.49	15.70
3 <sup>rd</sup> Quarter 2006	20.27	15.35
4 <sup>th</sup> Quarter 2006	18.67	14.02
1 <sup>st</sup> Quarter 2007	18.52	13.88

No cash dividends have been declared previously on our common stock, and the Company does not anticipate declaring a cash dividend in the near future. The Company's existing credit facility contains restrictions on its ability to pay cash dividends.





**Table of Contents****Security Ownership of Certain Beneficial Owners and Management and Related Stockholder Matters**

The following table sets forth information regarding the ownership of Shares as of May 1, 2007 by: (i) each director, (ii) the Named Executive Officers, (iii) all executive officers and directors of the Company as a group; and (iv) all those known by us to be beneficial owners of more than five percent of the Company's Shares. All share amounts have been adjusted for 3-for-2 splits of the common stock in January 1998 and December 1999.

<b>Name of Beneficial Owner</b>	<b>Number of Shares Beneficially Owned(1)</b>	<b>Percent Beneficially Owned (%)(2)</b>
Yucaipa Group(3) c/o The Yucaipa Companies LLC, 9130 W. Sunset Boulevard, Los Angeles, California 90069	5,375,600	18.0%
T. Rowe Price Associates, Inc (4) 100 E. Pratt Street, Baltimore, MD 21202	2,438,990	8.2%
Aletheia Research and Management, Inc.(5) 100 Wilshire Boulevard, Suite 1960, Santa Monica, CA 90401	1,995,327	6.8%
The TCW Group, Inc.(6) 865 South Figueroa Street, Los Angeles, CA 90017	1,790,870	6.0%
The Sultan Center for Trading and General contracting W.L.L.(7) P.O. Box 26567, 13126 Safat, Kuwait	1,662,000	5.6%
Greg Mays(8)	44,035	*
Stacey J. Bell(9)	59,715	*
Hal Brice(10)	22,570	*
Brian D. Devine(11)	122,181	*
David J. Gallitano(12)	66,285	*
John A. Shields(13)	268,509	*
Freya R. Brier(14)	159,445	*
Roger Davidson	0	*
Sam Martin(15)	37,499	*
All executive officers and directors as a group (9 persons)(16)	752,821	2.5%

\* Less than one percent.

- (1) Beneficial ownership is determined in accordance with the rules of the Securities and Exchange Commission and generally includes voting or investment power with respect to securities. Beneficial ownership information is based on most recent Form 3, 4 and 5 and 13D and 13G filings with the Securities and Exchange Commission and reports made directly to the Company. Shares subject to options, restricted stock, warrants and convertible notes currently exercisable or convertible, or exercisable or convertible within 60 days of May 1, 2007, are deemed outstanding for computing the percentage of the person or entity holding such securities but are not outstanding for computing the percentage of any other person or entity. Except as indicated by footnote, and subject to community property laws where applicable, the persons named in the table above have sole voting and investment power with respect to all Shares shown as beneficially owned by

them.

- (2) Percentage of ownership is based on 29,883,087 Shares outstanding as of May 1, 2007. Percentage of ownership and Shares outstanding reflect the acquisition of Shares by the Company, as discussed in *Management Indebtedness*.
- (3) The Yucaipa Group consists of the following: (i) Ronald W. Burkle, (ii) Yucaipa American Management, LLC, a Delaware limited liability company ( Yucaipa American ), (iii) Yucaipa American Funds, LLC, a Delaware limited liability company ( Yucaipa American Funds ), (iv) Yucaipa American Alliance Fund I, LLC, a Delaware limited liability company ( YAAF LLC ), (v) Yucaipa American Alliance Fund I, LP, a Delaware limited partnership ( YAAF ) and (vi) Yucaipa American Alliance (Parallel) Fund I, LP ( YAAF

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Parallel ) and, together with Mr. Burkle, Yucaipa American, Yucaipa American Funds, YAAF LLC and YAAF, the Reporting Persons ). Mr. Burkle is the managing member of Yucaipa American, which is the managing member of Yucaipa American Funds, which is the managing member of YAAF LLC, which, in turn, is the general partner of each of YAAF and YAAF Parallel. Mr. Burkle, Yucaipa American, Yucaipa American Funds, and YAAF LLC have shared voting power and shared dispositive power over the full number of Shares. YAAF is the direct beneficial owner of 2,999,564 Shares. YAAF Parallel is the direct beneficial owner of 2,102,636 Shares. Mr. Burkle disclaims any beneficial ownership of the Shares (except to the extent of his pecuniary interest in YAAF and YAAF Parallel. The Yucaipa Group has entered into a Tender Agreement to tender their stock. See Tender and Support Agreement.

- (4) T. Rowe Price Associates, Inc. has sole voting power over 592,800 Shares and sole dispositive power over 2,438,990 Shares, and disclaims that it is the beneficial owner of such securities.
- (5) Consists of 1,995,327 Shares of which Aletheia Research and Management, Inc. has sole voting and dispositive power and it disclaims beneficial ownership as to certain or all Shares being reported as beneficially owned for Section 13(g) filing purposes.
- (6) The TCW Group, Inc., is the parent holding company and is the beneficial owner, along with its relevant subsidiaries: Trust Company of the West, TCW Asset Management Company, TCW Investment Management Company (collectively, the TCW Business Unit ). The TCW Group, Inc. has shared power to vote 909,570 Shares and shared dispositive power over 1,790,870 Shares.
- (7) Consists of 1,662,000 Shares of which The Sultan Center for Trading and General Contracting W.L.L. has sole voting and dispositive power.
- (8) Consists of 44,035 RSUs and Shares subject to stock options that are exercisable within 60 days of May 1, 2007 held by Mr. Mays.
- (9) Consists of 59,715 RSUs and Shares subject to stock options that are exercisable within 60 days of May 1, 2007 held by Dr. Bell.
- (10) Consists of 22,570 RSUs and Shares subject to stock options that are exercisable within 60 days of May 1, 2007 held by Mr. Brice.
- (11) Consists of 122,181 RSUs and Shares subject to stock options that are exercisable within 60 days of May 1, 2007 held by Mr. Devine.
- (12) Consists of 1,000 Shares and 65,285 RSUs and Shares subject to stock options that are exercisable within 60 days of May 1, 2007 held by Mr. Gallitano.
- (13) Consists of 41,761 Shares and 226,748 RSUs and Shares subject to stock options that are exercisable within 60 days of May 1, 2007, held by Mr. Shields.
- (14) Consists of 12,679 Shares and 146,766 Shares subject to stock options exercisable within 60 days of May 1, 2007, held by Ms. Brier.
- (15) Consists of 37,499 Shares subject to stock options exercisable within 60 days of May 1, 2007, held by Mr. Martin.

- (16) Includes Shares directly and indirectly owned, restricted stock units, and options exercisable within 60 days of May 1, 2007, for executive officers and directors as a group.

## **OTHER STOCKHOLDER PROPOSALS**

### **Other Matters For Action at Special Meeting**

The Company does not expect that any matter other than those described in this proxy statement will come before the special meeting. If any other matters are properly brought before the special meeting for action, however, the Company intends that the persons named as proxies on the enclosed proxy card will vote in accordance with their best judgment. These matters may include an adjournment or postponement of the special meeting from time to time if the Company's board of directors so determines, except that proxies that are voted against the merger proposal may not be voted by the persons named on the enclosed proxy card for an adjournment or postponement of

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the special meeting. If any adjournment or postponement is made, the Company may solicit additional proxies during the adjournment or postponement period.

## **Future Stockholder Proposals**

If the Merger is consummated, the Company will not have public stockholders and there will be no public participation in any future meeting of Company stockholders. However, if the Merger is not consummated or if the Company is otherwise required to do so under applicable law, the Company will hold a 2007 annual meeting of stockholders. The Company's Amended and Restated Bylaws provide that stockholders seeking to bring business before an annual meeting of stockholders, or to nominate directors at an annual or special meeting of stockholders, must provide timely notice thereof in writing to the Secretary of the Company. For business to be properly brought before an annual meeting by a stockholder, the stockholder must have given timely notice thereof in writing to the Secretary of the Company. To be timely, a stockholder's notice must be delivered to or mailed and received at the principal executive offices of the Company not less than one hundred twenty (120) calendar days in advance of the date of the Company's proxy statement released to stockholders in connection with the previous year's annual meeting of stockholders; provided, however, that in the event that no annual meeting was held in the previous year or the date of the annual meeting has been changed by more than thirty (30) days from the date contemplated at the time of the previous year's proxy statement, notice by the stockholder to be timely must be so received not earlier than the close of business on the ninetieth (90th) day prior to such annual meeting and not later than the close of business on the sixtieth (60th) day prior to such annual meeting or, in the event public announcement of the date of such annual meeting is first made by the Company fewer than seventy (70) days prior to the date of such annual meeting, the close of business on the tenth (10th) day following the day on which public announcement of the date of such meeting is first made by the Company.

The Company's Amended and Restated Bylaws also specify certain requirements for a stockholder's notice to be in proper written form. If the Company does not receive timely notice of any such proposal, the proposal will not be considered at the annual meeting of stockholders. If the Company does receive timely notice of any such proposed business, the proxy holders may exercise discretionary authority with respect to that proposal, but only to the extent permitted by the regulations of the SEC.

## **WHERE YOU CAN FIND MORE INFORMATION**

The Company files annual, quarterly and current reports, proxy statements and other information with the SEC. You may read and copy any reports, statements or other information that the Company files with the SEC at the SEC's public reference room at 100 F Street, N.E., Washington, D.C. 20549. Please call the SEC at 1-800-SEC-0330 for further information regarding the public reference room. These SEC filings are also available to the public from commercial document retrieval services and at the Internet world wide web site maintained by the SEC at [www.sec.gov](http://www.sec.gov).

The SEC allows the Company to incorporate by reference information into this proxy statement. This means that the Company can disclose important information to you by referring you to another document filed separately with the SEC. The information incorporated by reference is considered to be a part of this proxy statement, except for any information that is superseded by information that is included directly in this proxy statement or incorporated by reference subsequent to the date of this proxy statement. The Company does not incorporate the contents of its website into this proxy statement.

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We incorporate by reference the documents listed below and any future filings made with the SEC under Sections 13(a), 13(c), 14 or 15(d) of the Securities Exchange Act of 1934 after the initial filing date of this proxy statement and before the Special Meeting:

**Company SEC Filings**

**Period and Date Filed**

Schedule 14D-9 and Amendments thereto	Initial Schedule 14D-9 filed on February 27, 2007; Amendments filed on June 6, 2007, May 23, 2007, April 25, 2007, March 22, 2007, March 15, 2007, February 27, 2007
Quarterly Report filed on Form 10-Q	Quarter Ended March 31, 2007 filed on May 9, 2007
Annual Report filed on Form 10-K	Fiscal Year Ended December 30, 2006 filed on March 15, 2007
Current Reports filed on Form 8-K	Filed on June 13, 2007, June 6, 2007, May 3, 2007, March 14, 2007, February 26, 2007, February 22, 2007

In addition, the Company incorporates by reference additional documents that it may file with the SEC pursuant to Sections 13(a), 13(c), 14 or 15(d) of the Exchange Act between the date of this proxy statement and the date of the special meeting. These documents include periodic reports, such as annual reports on Form 10-K, quarterly reports on Form 10-Q and current reports on Form 8-K.

You may obtain the Company's documents filed with the SEC, without charge, by requesting them in writing or by telephone from the Company at the following address:

Wild Oats Markets, Inc.  
1821 30th Street,  
Boulder, Colorado 80301  
Attention: Senior Vice President and Corporate Secretary  
Telephone: 303-440-5220

If you would like to request documents from the Company, please do so by \_\_\_\_\_, 2007 to receive them before the special meeting.

If you are a stockholder of record and have further questions about the exchange of your Shares for the Per Share Merger Consideration, you should contact the Company's proxy solicitor, \_\_\_\_\_. You should not send in your Company stock certificate(s) evidencing your Shares until you receive the transmittal materials from the exchange agent.

The Company Board knows of no other matters that will be presented for consideration at the special meeting. If any other matters are properly brought before the special meeting, it is the intention of the persons named in the accompanying proxy to vote on such matters in accordance with their best judgment.

By Order of the Board of Directors

Freya R. Brier

Senior Vice President and Corporate Secretary

Boulder, Colorado  
, 2007

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**Annex A**

**AGREEMENT AND PLAN OF MERGER  
BY AND AMONG  
WILD OATS MARKETS, INC.,  
WFMI MERGER CO.  
AND  
WHOLE FOODS MARKET, INC.  
DATED AS OF  
FEBRUARY 21, 2007**

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**AGREEMENT AND PLAN OF MERGER**

AGREEMENT AND PLAN OF MERGER, dated as of February 21, 2007 (the Agreement ), by and among Wild Oats Markets, Inc., a Delaware corporation (the Company ), WFMI Merger Co., a Delaware corporation ( Merger Sub ), and Whole Foods Market, Inc., a Texas corporation ( Purchaser ).

WHEREAS, the board of directors of each of Purchaser and the Company has approved the acquisition of the Company by Purchaser on the terms and conditions set forth in this Agreement;

WHEREAS, on the terms and subject to the conditions set forth herein, Merger Sub has agreed to commence a tender offer (the Offer ) to purchase all outstanding shares of common stock, par value \$0.001 per share, of the Company (the Company Common Stock ), including the associated preferred stock purchase rights (the Rights ) issued pursuant to the Rights Agreement, as amended, dated May 22, 1998, by and between the Company and Wells Fargo Bank, N.A., as successor in interest to Norwest Bank Minneapolis, N.A. (the Rights Agreement ) (the shares of Common Stock, together with the Rights, being referred to collectively as the Shares ), at a price of \$18.50 per Share, net to the seller in cash (such price, or any higher price as may be paid in the Offer in accordance with this Agreement, the Offer Price );

WHEREAS, following the consummation, or under certain conditions, the termination of the Offer, on the terms and subject to the conditions set forth herein, Merger Sub shall merge with and into the Company (the Merger ) and each Share that is issued and outstanding immediately prior to the Effective Time (other than Shares held in the treasury of the Company or owned by Merger Sub, Purchaser or any direct or indirect wholly-owned Subsidiary of Merger Sub or the Company immediately prior to the Effective Time, which will be canceled with no consideration issued in exchange therefor, and other than Dissenting Shares) will be canceled and converted into the right to receive cash in an amount equal to the Offer Price, all upon the terms and conditions set forth herein;

WHEREAS, the board of directors of the Company (the Company Board ) has, on the terms and subject to the conditions set forth herein, unanimously (i) determined that the transactions contemplated by this Agreement are fair to, and in the best interests of, the stockholders of the Company, (ii) approved and declared advisable this Agreement and the transactions contemplated hereby, including the Offer and the Merger, in accordance with the Delaware General Corporation Law (the DGCL ), and (iii) determined, as of the date hereof, to recommend that the Company's stockholders accept the Offer and tender their Shares to Purchaser and, to the extent applicable, adopt the agreement of merger (as such term is used in Section 251 of the DGCL) set forth in this Agreement;

WHEREAS, the board of directors of Purchaser has, on the terms and subject to the conditions set forth herein, unanimously approved and declared advisable this Agreement and the transactions contemplated hereby, including the Offer and the Merger, and Purchaser and or a wholly-owned Subsidiary of Purchaser (in each case, in its capacity as the sole stockholder of Merger Sub) has adopted the agreement of merger set forth in this Agreement in each case, in accordance with the DGCL;

WHEREAS, contemporaneously with the execution and delivery of this Agreement, the parties hereto have entered into a Tender and Support Agreement, dated even date herewith, with Yucaipa American Alliance Fund I, L.P. and Yucaipa American Alliance (Parallel) Fund I, L.P. (the Support Agreement ); and

WHEREAS, terms used but not defined herein shall have the meanings set forth in Section 9.4, unless otherwise noted.

NOW, THEREFORE, in consideration of the foregoing premises and the mutual covenants and agreements herein contained, and intending to be legally bound hereby, the parties hereby agree as follows:

ARTICLE I

THE OFFER

Section 1.1. *The Offer.*

(a) (i) Merger Sub shall, and Purchaser shall cause Merger Sub to, promptly (but in no event later than February 27, 2007) commence (within the meaning of Rule 14d-2 under the Securities Exchange Act of 1934, as

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amended (the Exchange Act ) the Offer to purchase all outstanding shares of Company Common Stock, at the Offer Price. The obligations of Merger Sub to, and of Purchaser to cause Merger Sub to, accept for payment and to pay for any shares of Company Common Stock tendered pursuant to the Offer shall be subject to only those conditions set forth in Exhibit A hereto (the Offer Conditions ). The initial expiration date of the Offer shall be the twentieth business day following (and including the day of) the commencement of the Offer. Merger Sub expressly reserves the right (but shall not be obligated) at any time or from time to time in its sole discretion to waive any Offer Condition or modify or amend the terms of the Offer, except that, without the prior written consent of the Company, Merger Sub shall not (A) decrease the Offer Price or change the form of the consideration payable in the Offer, (B) decrease the number of shares of Company Common Stock sought pursuant to the Offer, (C) amend or waive the Minimum Tender Condition (as defined in Exhibit A), (D) add to the conditions set forth on Exhibit A, (E) amend or modify the conditions set forth on Exhibit A in a manner adverse to the holders of shares of Company Common Stock, (F) extend the expiration of the Offer except as required or permitted by Section 1.1(a)(ii) or (iii), or (G) make any other change in the terms or conditions of the Offer which is adverse to the holders of shares of Company Common Stock.

(ii) Subject to the satisfaction or waiver by Merger Sub of the Offer Conditions as of the time of any scheduled expiration of the Offer (including at the expiration of any extension of the Offer as described below), Merger Sub shall, and Purchaser shall cause Merger Sub to, accept for payment and promptly pay for shares of Company Common Stock validly tendered and not withdrawn pursuant to the Offer. Merger Sub may, without the consent of the Company, (A) extend the Offer for one or more periods of time of up to twenty business days per extension if at any scheduled expiration of the Offer any of the Offer Conditions are not satisfied, until such time as such Offer Conditions are satisfied or waived, (B) extend the Offer for any period required by any rule, regulation, interpretation or position of the Securities and Exchange Commission (the SEC ) or the staff thereof or the Nasdaq Global Market ( Nasdaq ) applicable to the Offer, or (C) elect to provide a subsequent offering period for the Offer in accordance with Rule 14d-11 under the Exchange Act, provided that Merger Sub shall not extend the Offer pursuant to clause (A) of this Section beyond the Outside Date without the consent of the Company. The Offer Price may be increased, and the Offer may be extended to the extent required by law in connection with such increase in the Offer Price, in each case without the consent of the Company.

(iii) Subject to the terms and conditions of this Agreement, Merger Sub shall extend the Offer on one or more occasions for periods determined by Merger Sub of up to twenty business days per extension if, at any scheduled expiration of the Offer, any of the Offer Conditions have not been satisfied or waived; provided, that (A) if all Offer Conditions other than the Minimum Tender Condition are satisfied or waived as of any scheduled expiration of the Offer, Merger Sub shall not be obligated to extend the Offer unless required by applicable Law or any applicable rule or regulation of any stock exchange (but shall be entitled to extend the Offer), and (B) if at any scheduled expiration of the Offer (x) the Offer Condition set forth in Paragraph 2(a) of Exhibit A has not been satisfied or waived (other than by reason of a judgment, injunction or order that is not final or remains subject to appeal) or (y) the Offer Condition set forth in Paragraph 2(d) of Exhibit A has not been satisfied or waived by Merger Sub and, in the case of clause (y), the breach or failure to perform or comply that has caused such non-satisfaction is not capable of being cured within 30 days after receipt by the Company of notice of such breach or failure or, if capable of being cured within such period, has not been cured within such period, then Merger Sub shall not be obligated (but shall be entitled) to extend the Offer; provided, further, that Merger Sub shall not, and shall not be required to, extend the Offer (1) beyond the Outside Date or (2) at any time that it is permitted to terminate this Agreement pursuant to Article VII.

(b) On the date of commencement of the Offer, Purchaser and Merger Sub shall (i) file or cause to be filed with the SEC a Tender Offer Statement on Schedule TO (together with all amendments and supplements thereto, the Schedule TO ) with respect to the Offer which shall contain the offer to purchase and related letter of transmittal and summary advertisement and other ancillary documents and instruments required thereby pursuant to which the Offer will be made (collectively with any supplements or amendments thereto, the Offer Documents ) and (ii) cause the

Offer Documents to be disseminated to holders of Company Common Stock. The Company and its counsel shall be given a reasonable opportunity to review and comment on the Offer Documents prior to their filing with the SEC, and the Purchaser and Merger Sub shall give reasonable and good faith consideration to any comments made by Company and their counsel. Purchaser and Merger Sub agree to provide the Company with

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(i) any comments or other communications, whether written or oral that may be received from the SEC or its staff with respect to the Offer Documents promptly after receipt thereof and prior to responding thereto and (ii) a reasonable opportunity to participate in the response of Purchaser and Merger Sub to those comments and to provide comments on that response (to which reasonable and good faith consideration shall be given), including by participating with Purchaser and Merger Sub or their counsel in any discussions or meetings with the SEC. If at any time prior to the Closing, any information relating to the Offer, the Merger, the Company, Purchaser, Merger Sub or any of their respective Affiliates, directors or officers, should be discovered by the Company or Purchaser which should be set forth in an amendment or supplement to the Offer Documents, so that the Offer Documents shall not contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary in order to make the statements therein, in light of the circumstances under which they are made, not misleading, the party which discovers such information shall promptly notify the other party, and an appropriate amendment or supplement describing such information shall be filed with the SEC and disseminated to the stockholders of the Company, as and to the extent required by applicable law or any applicable rule or regulation of any stock exchange.

(c) Purchaser shall provide or cause to be provided to Merger Sub on a timely basis the funds necessary to purchase any shares of Company Common Stock that Merger Sub becomes obligated to purchase pursuant to the Offer and Merger Sub shall maintain such funds exclusively for such purpose.

### *Section 1.2. Company Consent; Schedule 14D-9.*

(a) The Company hereby approves of and consents to the Offer.

(b) On the date the Offer Documents are filed, the Company shall file with the SEC a Solicitation/Recommendation Statement on Schedule 14D-9 (together with all amendments and supplements thereto, the Schedule 14D-9 ) containing, subject to Section 5.3, the recommendations of the Company Board described in Section 4.4(b). Each of Purchaser and Merger Sub shall promptly furnish to the Company in writing all information concerning Purchaser or Merger Sub that may be required by applicable securities laws or reasonably requested by the Company for inclusion in the Schedule 14D-9. The Company hereby consents to the inclusion of the recommendations of the Company Board described in Section 4.4(b) in the Offer Documents (it being understood that such consent shall not be deemed to limit the Company Board's rights under Section 5.3) and to the inclusion of a copy of the Schedule 14D-9 with the Offer Documents mailed or furnished to the Company's stockholders. Purchaser and Merger Sub shall be given a reasonable opportunity to review and comment on the Schedule 14D-9 prior to its filing with the SEC, and the Company shall give reasonable and good faith consideration to any comments made by Purchaser and Merger Sub and their counsel. The Company agrees to provide Purchaser and Merger Sub with (i) any comments or other communications, whether written or oral, that may be received from the SEC or its staff with respect to the Schedule 14D-9 promptly upon receipt thereof and prior to responding thereto and (ii) a reasonable opportunity to participate in the response of the Company to those comments and to provide comments on that response (to which reasonable and good faith consideration shall be given), including by participating with the Company or their counsel in any discussions or meetings with the SEC. If at any time prior to the Closing, any information relating to the Offer, the Merger, the Company, Purchaser, Merger Sub or any of their respective Affiliates, directors or officers, should be discovered by the Company, Purchaser or Merger Sub which should be set forth in an amendment or supplement to the Schedule 14D-9, so that the Schedule 14D-9 shall not contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary in order to make the statements therein, in light of the circumstances under which they are made, not misleading, the party which discovers such information shall promptly notify the other party, and an appropriate amendment or supplement describing such information shall be filed with the SEC and disseminated to the stockholders of the Company, as and to the extent required by applicable law or any applicable rule or regulation of any stock exchange.

Section 1.3. Stockholder Lists. In connection with the Offer, the Company shall cause its transfer agent to, promptly (but in any event on or before February 23, 2007), furnish Purchaser and Merger Sub with mailing labels, security position listings and any available listing or computer file containing the names and addresses of the record holders of the Shares as of the latest practicable date and shall furnish Purchaser and Merger Sub with such information and assistance (including periodic updates of such information) as Purchaser or Merger Sub or their

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agents may reasonably request in communicating the Offer to the record and beneficial holders of the Shares. Subject to the requirements of applicable law, and except for such actions as are reasonably necessary to disseminate the Offer Documents and otherwise to perform its obligations hereunder, Merger Sub shall hold all information and documents provided to it under this Section 1.3 in confidence in accordance with the Confidentiality Agreement, and shall use such information and documents only in connection with the Offer, and if this Agreement shall have been terminated, Purchaser and Merger Sub shall promptly deliver (and use their respective reasonable best efforts to cause their agents to deliver) to the Company all such information and documents (and all copies, extracts or summaries thereof).

Section 1.4. Directors.

(a) Promptly upon the purchase by Merger Sub pursuant to the Offer of such number of Shares as represents at least a majority of the then-outstanding shares of Company Common Stock, and from time to time thereafter, Merger Sub shall be entitled to designate such number of directors, rounded up to the next whole number, on the Company Board as will give Merger Sub representation on the Company Board equal to the product of (x) the total number of directors on the Company Board (after giving effect to any increase in the number of directors pursuant to this Section 1.4) and (y) the percentage that such number of Shares so purchased bears to the total number of shares of Company Common Stock outstanding, and the Company shall, upon request by Merger Sub, promptly increase the size of the Company Board or use its reasonable best efforts to secure the resignations of such number of directors as is necessary to provide Merger Sub with such level of representation and shall cause Merger Sub's designees to be so elected or appointed. The Company shall also use its reasonable best efforts to cause individuals designated by Merger Sub to constitute the same percentage of each committee of the Company Board as the percentage of the entire Company Board represented by individuals designated by Merger Sub. The Company's obligations to appoint designees to the Company Board shall be subject to Section 14(f) of the Exchange Act. At the request of Merger Sub, the Company shall take all actions necessary to effect any such election or appointment of Merger Sub's designees, including mailing to its stockholders the information required by Section 14(f) of the Exchange Act and Rule 14f-1 promulgated thereunder which, unless Merger Sub otherwise elects, shall be so mailed on a date not less than ten (10) days prior to the expiration of the initial Offer. Purchaser and Merger Sub will supply to the Company all information with respect to themselves and their respective officers, directors and Affiliates required by Section 14(f) of the Exchange Act and Rule 14f-1 promulgated thereunder.

(b) Following the election or appointment of Merger Sub's designees pursuant to Section 1.4(a) and prior to the Effective Time, any amendment or termination of this Agreement requiring action by the Company Board, any extension of time for the performance of any of the obligations or other acts of Purchaser or Merger Sub under this Agreement, any waiver of compliance with any of the agreements or conditions under this Agreement that are for the benefit of the Company, any exercise of the Company's rights or remedies under this Agreement, any action to seek to enforce any obligation of Purchaser or Merger Sub under this Agreement (or any other action by the Company Board with respect to this Agreement or the Merger if such other action adversely affects, or could reasonably be expected to adversely affect, any of the holders of shares of Company Common Stock other than Purchaser or Merger Sub) may only be authorized by, and will require the authorization of, a majority of the directors of the Company then in office who were not designated by Merger Sub.

(c) In the event that Purchaser's designees are elected or appointed to the Company Board pursuant to Section 1.4(a), until the Effective Time, (i) the Company Board shall have at least such number of directors as may be required by the Nasdaq rules or the federal securities laws who are considered independent directors within the meaning of such rules and laws ( Independent Directors ) and (ii) each committee of the Company Board that is required (or a majority of which is required) by the Nasdaq rules or the federal securities laws to be composed solely of Independent Directors shall be so composed; provided, however, that in such event, if the number of Independent Directors shall be reduced below the number of directors as may be required by such rules or laws for any reason whatsoever, the remaining Independent Director(s) shall be entitled to designate persons to fill such vacancies who shall be deemed to be



Independent Directors for purposes of this Agreement or, if no other Independent Director then remains, the other directors shall designate such number of directors as may be required by the Nasdaq rules and the federal securities laws, to fill such vacancies who shall not be stockholders or Affiliates of Purchaser or Merger Sub, and such Persons shall be deemed to be Independent Directors for purposes of this Agreement.

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### Section 1.5. Top-Up Option.

(a) The Company hereby irrevocably grants to Merger Sub an option (the Top-Up Option ), exercisable only after the acceptance by Merger Sub of, and payment for, Shares tendered in the Offer, to purchase that number (but not less than that number) of Shares (the Top-Up Shares ) as is equal to the lowest number of Shares that, when added to the number of Shares owned by Purchaser, Merger Sub and any Subsidiaries or Affiliates of Purchaser or Merger Sub, taken as a whole, at the time of such exercise, shall constitute one share more than 90% of the total shares of Company Common Stock then outstanding (assuming the issuance of the Top-Up Shares) at a price per share equal to the Offer Price; provided, however, that (i) in no event shall the Top-Up Option be exercisable (x) for a number of shares of Company Common Stock in excess of the Company's then authorized and unissued shares of Common Stock (including as authorized and unissued shares of Common Stock, for purposes of this Section 1.5, any shares of Company Common Stock held in the treasury of the Company), or (y) if the issuance of shares of Company Common Stock by the Company in connection with the exercise of the Top-Up Option by Merger Sub would violate applicable Nasdaq rules, (ii) Merger Sub shall, concurrently with the exercise of the Top-Up Option, give written notice to the Company that as promptly as practicable following such exercise, Merger Sub shall (and Purchaser shall cause Merger Sub to) consummate the Merger in accordance with Section 253 of the Delaware GCL as contemplated by this Agreement, and (iii) the Top-Up Option may not be exercised if any provision of applicable law or any judgment, injunction, order or decree of any federal, state, provincial, local and foreign government, governmental, quasi-governmental, supranational, regulatory or administrative authority, agency, commission or any court, tribunal, or judicial or arbitral body (each, a Governmental Entity ) shall prohibit, or require any action, consent, approval, authorization or permit of, action by, or filing with or notification to, any Governmental Entity or the Company's stockholders in connection with the exercise of the Top-Up Option or the delivery of the Top-Up Shares in respect of such exercise, which action, consent, approval, authorization or permit, action, filing or notification has not theretofore been obtained or made, as applicable.

(b) Any certificates evidencing Top-Up Shares may include any legends required by applicable securities laws.

(c) Purchaser and Merger Sub understand that the shares of Company Common Stock that Merger Sub may acquire upon exercise of the Top-Up Option will not be registered under the Securities Act of 1933, as amended (the Securities Act ), and will be issued in reliance upon an exemption thereunder for transactions not involving a public offering. Purchaser and Merger Sub represent and warrant to the Company that Merger Sub is, and will be upon exercise of the Top-Up Option, an accredited investor (as defined in Rule 501 of Regulation D promulgated under the Securities Act). Merger Sub agrees that the Top-Up Option and the Top-Up Shares to be acquired upon exercise thereof are being and will be acquired for the purpose of investment and not with a view to or for resale in connection with any distribution thereof within the meaning of the Securities Act.

## ARTICLE II

### THE MERGER

Section 2.1. The Merger. At the Effective Time and subject to and upon the terms and conditions of this Agreement and the DGCL, Merger Sub shall be merged with and into the Company, the separate corporate existence of Merger Sub shall cease, and the Company shall continue as the surviving corporation. The Company as the surviving corporation after the Merger hereinafter sometimes is referred to as the Surviving Corporation.

Section 2.2. Effective Time. As promptly as practicable, and in any event within one business day after the satisfaction or waiver of the conditions set forth in Article VI, the parties hereto shall cause the Merger to be consummated by filing the Certificate of Merger with the Secretary of State of the State of Delaware, in such form as required by, and executed in accordance with the relevant provisions of, the DGCL (the time of such filing being the

Effective Time ).

Section 2.3. *Effect of the Merger.* At the Effective Time, the effect of the Merger shall be as provided in this Agreement, the Certificate of Merger and the applicable provisions of the DGCL (including Section 259 of the DGCL). Without limiting the generality of the foregoing, and subject thereto, at the Effective Time all the property, rights, privileges, powers and franchises of the Company and Merger Sub shall vest in the Surviving Corporation,

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and all debts, liabilities and duties of the Company and Merger Sub shall become the debts, liabilities and duties of the Surviving Corporation.

Section 2.4. Subsequent Actions. If, at any time after the Effective Time, the Surviving Corporation shall consider or be advised that any deeds, bills of sale, assignments, assurances or any other actions or things are necessary or desirable to vest, perfect or confirm of record or otherwise in the Surviving Corporation its right, title or interest in, to or under any of the rights, properties or assets of either of the Company or Merger Sub acquired or to be acquired by the Surviving Corporation as a result of, or in connection with, the Merger or otherwise to carry out this Agreement, the officers and directors of the Surviving Corporation shall be authorized to execute and deliver, in the name and on behalf of either the Company or Merger Sub, all such deeds, bills of sale, assignments and assurances and to take and do, in the name and on behalf of each of such corporations or otherwise, all such other actions and things as may be necessary or desirable to vest, perfect or confirm any and all right, title and interest in, to and under such rights, properties or assets in the Surviving Corporation or otherwise to carry out this Agreement.

Section 2.5. Certificate of Incorporation; By-Laws; Directors and Officers.

(a) At and after the Effective Time, the Certificate of Incorporation of Merger Sub, as in effect immediately prior to the Effective Time, shall be the Certificate of Incorporation of the Surviving Corporation until thereafter amended in accordance with the provisions thereof and the DGCL, except that such Certificate of Incorporation shall be amended to provide that the name of the Surviving Corporation shall be that of the Company.

(b) At and after the Effective Time, the By-Laws of Merger Sub, as in effect immediately before the Effective Time, shall be the By-Laws of the Surviving Corporation until thereafter altered, amended or repealed as provided therein or in the Certificate of Incorporation of the Surviving Corporation and the DGCL, except that such By-Laws shall be amended to change the name of the Surviving Corporation to the Company's name.

(c) The directors of Merger Sub immediately before the Effective Time will be the initial directors of the Surviving Corporation, and the officers of the Company immediately before the Effective Time will be the initial officers of the Surviving Corporation, in each case until their successors are duly elected or appointed and qualified in the manner provided in the Surviving Corporation's Certificate of Incorporation and By-Laws, or as otherwise provided by applicable law.

Section 2.6. Conversion of Securities. At the Effective Time, by virtue of the Merger and without any action on the part of Merger Sub, the Company, the holder of any shares of Company Common Stock, or the holder of any shares of common stock, par value \$0.01 per share, of Merger Sub (the Merger Sub Common Stock):

(a) Company Common Stock. Each share of Company Common Stock that is issued and outstanding immediately prior to the Effective Time (other than shares to be cancelled in accordance with Section 2.6(c) and Dissenting Shares) or issuable pursuant to any outstanding equity awards granted under the Option Plans or otherwise shall be converted automatically into the right to receive an amount in cash equal to the Offer Price (the Merger Consideration). As of the Effective Time, all shares of Company Common Stock upon which the Merger Consideration is payable pursuant to this Section 2.6(a) shall no longer be outstanding and shall automatically be cancelled and retired and shall cease to exist, and each holder of a certificate representing any such shares of Company Common Stock shall cease to have any rights with respect thereto, except the right to receive the Merger Consideration in respect of such holder's shares. Notwithstanding the foregoing, the Merger Consideration shall be appropriately adjusted to reflect fully the effect of any stock split, reverse split, reclassification, stock dividend, reorganization, recapitalization, consolidation, exchange or other like change with respect to the Company Common Stock occurring (or having a record date) after the date of this Agreement and prior to the Effective Time.

(b) Merger Sub Common Stock. Each share of Merger Sub Common Stock that is issued and outstanding immediately prior to the Effective Time shall be converted into and become one fully paid and nonassessable share of common stock, \$0.01 par value per share, of the Surviving Corporation, and the Surviving Corporation shall be a wholly-owned subsidiary of Purchaser.

(c) Cancellation of Treasury Stock and Purchaser- and Merger Sub-Owned Company Common Stock. All shares of Company Common Stock that are owned by the Company or any direct or indirect Subsidiary of

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the Company and any shares of Company Common Stock owned by Purchaser, Merger Sub or any subsidiary of Purchaser or Merger Sub or held in the treasury of the Company shall, by virtue of the Merger and without any action on the part of the holder thereof, be cancelled and retired and shall cease to exist, and no cash, Company Common Stock or other consideration shall be delivered or deliverable in exchange therefor.

(d) Dissenting Shares. Notwithstanding anything in this Agreement to the contrary, shares of Company Common Stock that are issued and outstanding immediately prior to the Effective Time and that are held by a holder who shall not have voted in favor of the Merger or consented thereto in writing and who shall have demanded properly in writing an appraisal of the fair value of such Company Common Stock in accordance with Section 262 of the DGCL (collectively, the Dissenting Shares ) shall be cancelled and terminated and shall cease to have any rights with respect to Dissenting Shares other than such rights as are granted pursuant to Section 262 of the DGCL, except that all Dissenting Shares held by holders of Company Common Stock who shall have failed to perfect or who effectively shall have withdrawn or lost their rights for an appraisal of such shares under the DGCL shall thereupon be deemed to have been cancelled and terminated, as of the Effective Time, and shall represent solely the right to receive the Offer Price in accordance with Section 2.6(a) upon surrender in the manner provided in Section 2.6(f) of the certificate or certificates that formerly evidenced such shares of Company Common Stock. Any payments made in respect of Dissenting Shares shall be made in accordance with the DGCL solely by the Surviving Corporation out of its own funds. The Company shall give prompt notice to Purchaser and Merger Sub of any demands received by the Company for appraisal of shares of Company Common Stock and of attempted withdrawals of such notice and any other instruments served pursuant to the DGCL and received by the Company relating to stockholder rights of appraisal, and Purchaser and Merger Sub shall have the right to participate in and direct all negotiations and proceedings with respect to such demands. The Company shall not, except with the prior written consent of Purchaser and Merger Sub, make any payment with respect to, or settle or offer to settle, any such demands or approve any withdrawal of any such demands.

(e) Exchange Agent. From time to time after the Effective Time, the Purchaser shall, and shall cause the Surviving Corporation to, when and as required, deposit with a bank or trust company designated by Purchaser (the Exchange Agent ), for the benefit of the holders of shares of Company Common Stock, for exchange in accordance with this Article II through the Exchange Agent, an amount equal to the aggregate Merger Consideration (such consideration being hereinafter referred to as the Exchange Fund ). The Exchange Agent shall, pursuant to irrevocable instructions of the Surviving Corporation, make payments of the Merger Consideration out of the Exchange Fund. The Exchange Fund shall not be used for any other purpose.

(f) Exchange Procedure for Certificates. As soon as reasonably practicable after the Effective Time, the Surviving Corporation shall, and Purchaser shall cause the Surviving Corporation to, cause the Exchange Agent to mail to each holder of record of a certificate or certificates which immediately prior to the Effective Time represented outstanding shares of Company Common Stock (the Certificates ) whose shares of Company Common Stock were converted into the right to receive the Merger Consideration pursuant to Section 2.6(a): (x) a letter of transmittal (which shall specify that delivery shall be effected, and risk of loss and title to the Certificates shall pass, only upon delivery of the Certificates to the Exchange Agent and shall be in such form and have such other customary provisions as the Surviving Corporation may reasonably specify); and (y) instructions for use in effecting the surrender of the Certificates in exchange for the Merger Consideration. Upon surrender of a Certificate for cancellation to the Exchange Agent or to such other agent or agents as may be appointed by the Surviving Corporation, together with such letter of transmittal, duly executed, and such other documents as may reasonably be required by the Exchange Agent, the holder of such Certificate shall be entitled to receive in exchange therefor the Merger Consideration into which the shares of Company Common Stock theretofore represented by such Certificate shall have been converted pursuant to Section 2.6(a), and the Certificate so surrendered shall forthwith be cancelled. The Exchange Agent shall accept such Certificates upon compliance with such reasonable terms and conditions as the Exchange Agent may impose to effect an orderly exchange thereof in accordance with normal exchange practices. In the event of a transfer

of ownership of such Company Common Stock that is not registered in the transfer records of the Company, payment may be made to a Person other than the Person in whose name the Certificate so surrendered is registered, if such Certificate shall be properly endorsed or otherwise be in proper form for

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transfer and the Person requesting such payment shall pay any transfer or other Taxes required by reason of the payment to a Person other than the registered holder of such Certificate or establish to the satisfaction of the Surviving Corporation that such Tax has been paid or is not applicable. Until surrendered as contemplated by this Section 2.6(f), each Certificate (other than a Certificate representing shares of Company Common Stock cancelled in accordance with Section 2.6(c) and other than Dissenting Shares) shall be deemed at any time after the Effective Time to represent only the right to receive upon such surrender the Merger Consideration, without interest, into which the shares of Company Common Stock theretofore represented by such Certificate shall have been converted pursuant to Section 2.6(a). No interest will be paid or will accrue on the consideration payable upon the surrender of any Certificate.

(g) No Further Ownership Rights in Company Common Stock. All consideration paid upon the surrender of Certificates in accordance with the terms of this Article II shall be deemed to have been paid in full satisfaction of all rights pertaining to the shares of Company Common Stock theretofore represented by such Certificates, subject, however, to any obligation of the Surviving Corporation to pay any dividends or make any other distributions with a record date prior to the Effective Time that may have been authorized or made with respect to shares of Company Common Stock that remain unpaid or unsatisfied at the Effective Time, and there shall be no further registration of transfers on the stock transfer books of the Surviving Corporation of the shares of Company Common Stock that were outstanding immediately prior to the Effective Time. If, after the Effective Time, the Certificates are presented to the Surviving Corporation or the Exchange Agent for any reason, they shall be cancelled and exchanged as provided in this Article II, except as otherwise provided by applicable law.

(h) Termination of the Exchange Fund. Any portion of the Exchange Fund that remains undistributed to the holders of the Certificates for one year after the Effective Time shall be delivered to the Surviving Corporation, and any holders of the Certificates who have not theretofore complied with this Article II shall thereafter look only to the Surviving Corporation and only as general creditors thereof for payment of their claim for the Merger Consideration and, if applicable, any unpaid dividends or other distributions that such holder may be due on Company Common Stock, under applicable law.

(i) No Liability. None of the Company, Merger Sub, Purchaser, the Surviving Corporation or the Exchange Agent, or any employee, officer, director, stockholder, agent or affiliate thereof, shall be liable to any Person in respect of any cash delivered to a public official pursuant to any applicable abandoned property, escheat or similar law.

(j) Investment of the Exchange Fund. The Exchange Agent shall invest any cash included in the Exchange Fund, as directed by the Surviving Corporation, on a daily basis. Any interest and other income resulting from such investments shall be paid to the Surviving Corporation. To the extent that there are losses with respect to such investments, or the Exchange Fund diminishes for other reasons below the level required to make prompt payments of the Merger Consideration as contemplated hereby, the Surviving Corporation shall promptly replace or restore the portion of the Exchange Fund lost through investments or other events so as to ensure that the Exchange Fund is, at all times, maintained at a level sufficient to make such payments.

(k) Withholding Rights. The Surviving Corporation shall be entitled to deduct and withhold from the consideration otherwise payable pursuant to this Agreement to any holder of shares of Company Common Stock such amounts as the Surviving Corporation is required to deduct and withhold with respect to the making of such payment under the Internal Revenue Code of 1986, as amended (the Code ), or any provision of state, local or foreign tax law. To the extent that amounts are so deducted and withheld by the Surviving Corporation, such withheld amounts shall be treated for all purposes of this Agreement as having been paid to the holder of the shares of Company Common Stock in respect of which such deduction and withholding was made by the Surviving Corporation.



(l) Lost Certificates. If any Certificate shall have been lost, stolen or destroyed, upon the making of an affidavit of that fact by the Person claiming such Certificate to be lost, stolen or destroyed and, if required by the Surviving Corporation, the posting by such Person of a bond in such reasonable amount as the Surviving Corporation may require as indemnity against any claim that may be made against it with respect to such

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Certificate, the Exchange Agent will issue in exchange for such lost, stolen or destroyed Certificate the Merger Consideration payable in respect thereof pursuant to this Agreement.

### **Section 2.7. Stock Plans.**

(a) Not later than the Effective Time, the Company shall take all actions necessary to provide that, either (i) at the Effective Time (or to the extent practicable, immediately prior to the time (the Purchase Time ) at which the Purchaser consummates the purchase of tendered Shares pursuant to the Offer), each then outstanding option to purchase shares of Company Common Stock (the Options ) granted under any of the Company's stock option plans listed in Section 4.3 of the Company Disclosure Schedule, each as amended (collectively, the Option Plans ), or granted otherwise, whether or not then exercisable or vested, shall be cancelled in exchange for the right to receive from Merger Sub or the Surviving Corporation an amount in cash in respect thereof equal to the product of (x) the excess, if any, of the Offer Price over the exercise price thereof and (y) the number of shares of Company Common Stock subject thereto (such payment to be net of applicable withholding Taxes) or (ii) any Option that is not cancelled as described in Section 2.7(a)(i) above shall represent, upon exercise on or after the Effective Time, the right to receive Company Common Stock which has been converted into the right to receive the Merger Consideration.

(b) Except as provided herein or as otherwise agreed to by the parties and to the extent permitted by the Option Plans, (i) the Company shall cause the Option Plans to terminate no later than the Effective Time and, except as set forth in Section 2.7(c), cause the provisions in any other plan, program or arrangement providing for the issuance or grant by the Company of any interest in respect of the capital stock of the Company or any of its Subsidiaries to terminate and have no further force or effect as of the Effective Time and (ii) the Company shall ensure that following the Effective Time no holder of Options or any participant in the Option Plans or anyone other than Purchaser shall hold or have any right to acquire any equity securities of the Company, the Surviving Corporation or any Subsidiary thereof.

(c) Substantially concurrently with the approval of this Agreement, the Compensation Committee of the Company Board will take any and all actions with respect to the Company's Employee Stock Purchase Plan (the ESPP ) as are necessary to provide that: (i) all offering periods under the ESPP will be immediately suspended and any contributions made for the current offering periods will be returned to ESPP participants, and (ii) the ESPP will terminate, effective immediately as of the Purchase Time, except that all administrative and other rights and authorities granted under the ESPP to the Company, the Company Board or any committee or designee thereof shall remain in effect and reside with the Company following the Purchase Time.

**Section 2.8. Time and Place of Closing.** Unless otherwise mutually agreed upon in writing by Purchaser and the Company, the closing of the Merger (the Closing ) will be held at 10:00 a.m., Austin, Texas time, on the first business day following the date that all of the conditions precedent specified in Article VI (other than those conditions that by their nature are to be satisfied at the Closing, but subject to the fulfillment or waiver of those conditions) have been satisfied or waived by the party or parties permitted to do so (such date being referred to hereinafter as the Closing Date ). The place of Closing shall be at the offices of the Purchaser in Austin, Texas, or at such other place as may be agreed between Purchaser and the Company.

## **ARTICLE III**

### **REPRESENTATIONS AND WARRANTIES OF MERGER SUB AND PURCHASER**

Except as set forth in the Disclosure Schedule delivered by Purchaser and Merger Sub to the Company at or prior to the execution and delivery of this Agreement (the Purchaser Disclosure Schedule ), each of Merger Sub and Purchaser hereby represents and warrants to the Company as follows:

Section 3.1. Organization. Each of Merger Sub and Purchaser is a corporation duly organized, validly existing and in good standing under the laws of the jurisdiction in which it is organized and has the requisite corporate power and authority to own, operate or lease the properties that it purports to own, operate or lease and to carry on its business as it is now being conducted.

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Section 3.2. Capitalization. The authorized capital stock of Merger Sub consists of 1,000 shares of Merger Sub Common Stock. As of the date hereof, 100 of such shares are issued and outstanding, duly authorized, validly issued, fully paid and nonassessable and owned beneficially and of record by Purchaser free and clear of any liens, security interests, pledges, agreements, claims, charges or encumbrances of any nature whatsoever ( Liens ). There are no options, warrants or other rights, agreements, arrangements or commitments of any character obligating Merger Sub to issue or sell any shares of capital stock of or other equity interests in Merger Sub. Except for obligations or liabilities incurred in connection with its incorporation or organization and the transactions contemplated by this Agreement and except for this Agreement and any other agreements or arrangements contemplated by this Agreement, Merger Sub has not and will not have incurred, directly or indirectly, any obligations or liabilities or engaged in any business activities of any type or kind whatsoever or entered into any agreements or arrangements with any person. Merger Sub does not directly or indirectly own any equity or similar interest in, or any interest convertible into or exchangeable or exercisable for any equity or similar interest in, any corporation, partnership, limited liability company, joint venture or other business association or entity.

Section 3.3. Authority. Each of Merger Sub and Purchaser has the necessary corporate power and authority to enter into this Agreement and carry out their respective obligations hereunder. The execution and delivery of this Agreement by each of Merger Sub and Purchaser and the consummation by each of Merger Sub and Purchaser of the transactions contemplated hereby have been duly authorized by all necessary corporate action on the part of each of Merger Sub and Purchaser and no other corporate proceeding is necessary for the execution and delivery of this Agreement by either Merger Sub or Purchaser, the performance by each of Merger Sub and Purchaser of their respective obligations hereunder and the consummation by each of Merger Sub and Purchaser of the transactions contemplated hereby. This Agreement has been duly executed and delivered by each of Merger Sub and Purchaser and, assuming this Agreement constitutes a legal, valid and binding obligation of the other parties hereto, constitutes a legal, valid and binding obligation of each of Merger Sub and Purchaser, enforceable against each of Merger Sub and Purchaser in accordance with its terms, except that (i) such enforcement may be subject to applicable bankruptcy, insolvency, reorganization, moratorium or other similar laws, now or hereafter in effect, relating to creditors' rights generally and (ii) equitable remedies of specific performance and injunctive and other forms of equitable relief may be subject to equitable defenses and to the discretion of the court before which any proceeding therefor may be brought.

Section 3.4. No Conflict; Required Filings and Consents.

(a) The execution and delivery of this Agreement by each of Merger Sub and Purchaser does not, and the performance of this Agreement by each of Merger Sub and Purchaser and the consummation of the transactions contemplated hereby will not, (i) subject to the requirements, filings, consents and approvals referred to in Section 3.4(b), conflict with or violate any law, regulation, court order, judgment or decree applicable to Merger Sub or Purchaser or by which their respective property is bound or subject, (ii) violate or conflict with the Certificate of Incorporation or By-Laws of Merger Sub or the Certificate of Incorporation or By-Laws of Purchaser or (iii) subject to the requirements, filings, consents and approvals referred to in Section 3.4(b) and Section 3.4(c), result in any breach of or constitute a default (or an event which with notice or lapse of time or both would become a default) under, or give to others any rights of termination or cancellation of, or result in the creation of a Lien on any of the property or assets of Merger Sub or Purchaser pursuant to, any contract, agreement, indenture, lease or other instrument of any kind, permit, license or franchise to which Merger Sub or Purchaser is a party or by which either Merger Sub or Purchaser or any of their respective property is bound or subject except, in the case of clause (iii), for such breaches, defaults, rights or Liens that would not materially impair the ability of Purchaser or Merger Sub to consummate the transactions contemplated hereby.

(b) Except for applicable requirements, if any, of the Exchange Act, the Securities Act, the pre-merger notification requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the HSR Act ), and the filing and recordation of the Certificate of Merger as required by the DGCL, and except as set forth in Section 3.4(b) of the

Purchaser Disclosure Schedule, neither Purchaser nor Merger Sub is required to submit any notice, report or other filing with any Governmental Entity in connection with the execution, delivery or performance of this Agreement or the consummation of the transactions contemplated hereby, except for such of the foregoing, including under Regulatory Laws, as are required by reason of the legal or regulatory status or the activities of the Company or its Subsidiaries or by reason of facts specifically pertaining to any of them. No waiver,

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consent, approval or authorization of any Governmental Entity is required to be obtained or made by Purchaser or Merger Sub in connection with their execution, delivery or performance of this Agreement, except for such of the foregoing as are required by reason of the legal or regulatory status or the activities of the Company or its Subsidiaries or by reason of facts specifically pertaining to any of them. For purposes of this Agreement, Regulatory Laws means any federal, state, county, municipal, local or foreign statute, ordinance, rule, regulation, permit, consent, waiver, notice, approval, registration, finding of suitability, license, judgment, order, decree, injunction or other authorization applicable to, governing or relating to the legal or regulatory status or the activities of the Company or its Subsidiaries, including, without limitation, with respect to alcoholic beverage control, health and safety and fire safety.

(c) Although Purchaser does not require the approval of its lenders under that certain Third Amended and Restated Credit Agreement, dated as of October 1, 2004 and as amended to date, to which the Purchaser, its Subsidiaries and JPMorgan Chase Bank, N.A., as agent, are parties (Purchaser's Bank Credit Agreement) to consummate the Merger, such approval would be required in order to consummate the Offer; and Purchaser reasonably anticipates obtaining such approval.

Section 3.5. Financing. Purchaser has available sufficient cash and committed financing sources to satisfy its obligations to cause Merger Sub to purchase and pay for Shares pursuant to the Offer and to cause the Surviving Corporation to pay the aggregate Merger Consideration. Notwithstanding any other provision of this Agreement to the contrary, there is no financing contingency to the closing of the Offer or the Merger.

Section 3.6. Brokers. Except for RBC Capital Markets, no broker, finder or investment banker is entitled to any brokerage, finder's or other fee or commission in connection with the transactions contemplated by this Agreement based upon arrangements made by and on behalf of Merger Sub or Purchaser.

Section 3.7. Offer Documents: Schedule 14D-9; Proxy Statement.

(a) None of the Offer Documents will, at the times such documents are filed with the SEC and are mailed to the stockholders of the Company, contain any untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary in order to make the statements made therein, in light of the circumstances under which they are made, not misleading, except that no representation is made by Purchaser or Merger Sub with respect to information supplied in writing by or on behalf of the Company or any Affiliate of the Company expressly for inclusion therein. The Offer Documents will, at the time the Offer Documents are filed with the SEC and, at the time