



ORGANIC FARMERS ASSOCIATION

April 21, 2022

Lina M. Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, D.C. 20580

Jonathan Kanter
Assistant Attorney General
Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530

Re: FTC-2022-0003-0001, Request for Information on Merger Enforcement

Dear Chairwoman Khan and Assistant Attorney General Kanter,

The Organic Farmers Association (OFA) is a membership organization that represents America's certified organic farmers. Our organization was founded by and is controlled by certified organic farmers, and only domestic certified organic farmers vote on OFA's policies and leadership. We appreciate the opportunity to provide comments on the Federal Trade Commission and Department of Justice guidelines for the enforcement of antitrust laws with respect to mergers.

While many assume that organic agriculture has better competition and therefore better economic outcomes for farmers because it is a specialized market where products are usually sold for a premium, organic farmers are increasingly raising the alarm that their markets suffer the same negative effects of extreme consolidation as the rest of agriculture.

A specific example of the impacts that inadequate review of mergers has on farm families is a crisis in the organic dairy market in the Northeast that is happening right now. In August 2021, Horizon Organic (owned by Danone North America) notified organic dairy farms in Maine, Vermont, New Hampshire and several counties in New York that it would terminate their contracts in the summer of 2022. This decision is directly impacting 89 organic family farms. Since the original announcement, Danone announced that it will keep the impacted farms on contract for an additional six months (for a total of 18 months from the original notice), but will still be pulling out of Maine, Vermont, New Hampshire and several counties of eastern New York. This is a crisis for the farm families who have to cope with the loss of their milk contract,

but will also have a devastating effect on the rural communities where these farms are located, other organic farmers who supply these operations with feed and local businesses who provide services to these farms.

While the crisis caused by Horizon's decision to exit the Northeast is focused in one region of the country, extreme consolidation plagues the entire organic dairy sector nationwide. In the organic dairy market, there are two national brands: Horizon Organic owned by Danone North America, whose parent company is Danone with headquarters in France, and Organic Valley, owned by CROPP Cooperative based in Wisconsin. The leading retail seller of organic dairy products is store brand/private label products supplied by CROPP Cooperative and very large, confinement-style, vertically integrated organic dairies, such as Aurora Dairy farms and milk plants in Texas, Colorado and Missouri. The vertically integrated dairies have the economies of scale that allow them to undercut competitors in the price sensitive store brand/private label retail market, which by its nature has a lower retail price than branded organic product.

In addition to economies of scale, there are ongoing problems with the enforcement of organic standards at these large operations, including requirements that organic dairy cows receive access to pasture and rules for how conventional animals can be transitioned into organic production. This enforcement is the responsibility of the U.S. Department of Agriculture (USDA), which oversees organic certification. This enforcement problem goes hand in hand with the consolidation of the organic dairy sector – as these large vertically integrated operations entered the market, weaknesses in USDA's enforcement system became more pronounced, and small-scale operations now compete on an unlevel playing field that puts them at a significant economic disadvantage in a market dominated by a few large buyers.

Previous decisions about mergers in the organic dairy market have allowed consolidation to worsen and should be revisited. When Danone purchased White Wave in 2017, the Department of Justice mandated that a condition of purchase was that Stonyfield Organic (owned by Danone with a supply contract with CROPP Cooperative) would have to be sold as a remedy to prevent monopsony in the region. Stonyfield Organic was sold to Lactalis, the second largest dairy company in the world. This means that the exit of Horizon from the Northeast leaves only one major alternative buyer for the organic milk from the 89 farms that are losing their contracts, CROPP Cooperative. CROPP's major customer in the northeast for their raw milk is Lactalis. Lactalis purchases 80 percent of its total milk supply from CROPP and purchases the other 20 percent by direct procurement from Northeast farms or other sources. CROPP milk from New England and eastern New York is also used in packaged product under the Stonyfield Organic label licensed to CROPP by Lactalis. Recently, rumors have surfaced that Lactalis could be poised to buy some brands, potentially including dairy brands such as Horizon, from Danone.¹ This would make the inadequate remedy of the 2017 sale even more ineffective for organic dairy farmers around the country.

¹ Corinne Gretler and Albertina Torsoli. "Danone Gains on Lactalis Takeover Speculation, Evian Rebound." Bloomberg. April 20, 2022.

The consolidation of the organic dairy market gives disproportionate power to international companies to dominate both the supply side and the retail market, which has resulted in a lack of regional processing infrastructure in the Northeast and only one major buyer for organic milk. That one buyer can set the price and conditions of any contract or cooperative agreement, leaving the organic dairy farmer only two choices, take the deal or leave organic dairy (or dairy farming altogether), with the resulting repercussions on their family and their rural community. We hope that this dramatic example of the consequences of extreme consolidation offers useful insight into why regulators must do a better job to address the growing market power of a small handful of firms.

In addition to examining how failed federal oversight of the mergers led to the extreme consolidation in the Northeast organic dairy sector, we urge you to expand the scope of impacts that are considered in any evaluation of the potential impacts of proposed mergers.

The trend of consolidation through mergers and acquisitions is widely acknowledged in conventional agriculture supply chains, while the organic and natural food sector is often regarded as home to more innovative start-up operations and brands. But the organic sector has not escaped the consolidation trend, in consumer facing brands and also distribution. This trend has been documented by Dr. Phil Howard, a researcher at Michigan State University, who notes that the trends of consolidation “have only intensified, to the point that nearly all of the 30 largest processors in North America have acquired organic brands.”² This roll up of organic processing and consumer brands results in less competition in organic markets, potentially lowering prices paid for farm products and creating tighter linkages between large processors and large retailers that can thwart the access of new entrants to organic retail shelf space. A particularly dramatic consolidation trend in the organic sector has been in distribution. Dr. Howard notes that in 1982 there were 28 consumer cooperative distributors, but by 2008 there was just one.³

Because the organic and natural food sector is a distinct market, dominance by a small number of companies can have dramatic effects. For example, United Natural Food, Inc. (UNFI) is the largest distributor of natural and organic groceries and is nearly three times larger than the only other nationwide distributor.⁴ UNFI has been a key supplier for Whole Foods Market, which often has represented a third of UNFI’s business, and maintains a supply contract with Whole Foods that runs through 2025.⁵ Amazon pursued Whole Foods Market in part to capture its supplier relationships,⁶ potentially including the relationship with UNFI, which could distort or foreclose supplies of organic and natural grocery merchandise to other organic, natural and healthy grocery retailers.⁷

² Philip H. Howard. “Organic Processing Industry Structure 2020.” <https://philhoward.net/2020/09/24/organic-processing-industry-structure-2020/>

³ Philip H. Howard. “Organic Distribution & Retail Structure.” <https://philhoward.net/2011/11/01/organic-distribution-retail-structure/>

⁴ UNFI. “Building out the store.” Stephens Non-Deal Roadshow. Boston, Mass. September 1, 2015 at 5 and 14.

⁵ Springer, Jon. “UNFI takes a hit in Whole Foods investment.” *Supermarket News*. April 11, 2017; Richards, Brian. “How Whole Foods transformed its relationship with United Natural Foods.” *Motley Fool*. February 19, 2013.

⁶ Deutsche Bank Markets Research. “WFM+AMZN: Making Fresh Prime.” June 19, 2017 at 2.

⁷ UNFI (2015) at 13.

We believe the Agencies should consider more potential impacts of proposed mergers than solely consumer welfare or hypothetical efficiency gains for the merged firm. Specifically, we urge you to expand the guidelines in the following ways:

Assess Previous Merger Impacts: An important step that should be completed before finalizing these draft guidelines is to assess the impact of previously approved mergers, as well as the practices non-merged companies may use, such as coordination and contracting, that have the effect of vertically integrating the supply chain. An analysis of past mergers should also examine whether past mergers have triggered consolidation in other parts of the supply chain or between rival companies (or mergers to expand conglomerates that can develop even tighter relationships with firms in other steps in the supply chain such as retail.)⁸

The acquisition of Whole Foods Markets by Amazon in 2017 would be a particularly useful merger to examine for several types of impact, including effects on innovative food companies that were very dependent on Whole Foods' regional procurement model for accessing store shelves when they were in their early stages of growth;⁹ the impact on small farms serving regional markets who were dependent on Whole Foods Market's regional procurement system; and the creation of tighter linkages between dominant distributors like United Natural Foods Inc. and Whole Foods and the impacts this had on other retailers and sellers in the natural and organic foods market.

And we urge the FTC to pay particular attention to examining impacts of past mergers between other food retailers. The last decade has seen some of the biggest retail grocery mergers in U.S. history. The cascade of retail mergers has impacts up and down the food chain, harming consumers, farmers and workers. A white paper by the National Grocers Association details how "power buyers" in food retail rely on unfair practices that disadvantage independent grocery retailers in many urban and rural areas.¹⁰

Private Label Products: The agencies should examine the growth of private label food products, controlled through contracts or outright owned by retailers (both online and brick and mortar), and the impact this has on competition in upstream markets for crops and livestock. There is currently a growing trend of large retailers creating their own supply chains, with Costco branching out into chicken production and Walmart opening a milk processing plant and

⁸ Patrick Woodall and Tyler L. Shannon. "Monopoly Power Corrodes Choice and Resiliency in the Food System." *The Antitrust Bulletin*. April 26, 2018, Pg. 11.

⁹ The organic, natural and healthy food innovators have long struggled to get onto traditional supermarket shelves because smaller manufacturers often cannot deliver sufficient quantities or accept the often unfairly low prices the biggest retailers offered. Before being acquired by Amazon, Whole Foods Market was regarded as a rare opportunity for local food manufacturers to access retail shelf space in local stores, with the potential to expand to more stores regionally or nationally. Before being acquired by Amazon, Whole Foods had started to shift towards a more centralized distribution system, and several reports since the acquisition describe changes to terms for suppliers to Whole Foods stores that seriously impact the margins for sellers.⁹

¹⁰ National Grocers Association. "Buyer Power and Economic Discrimination in the Grocery Aisle: Kitchen Table Issues for American Consumers." <https://www.nationalgrocers.org/wp-content/uploads/2021/03/NGA-Antitrust-White-Paper25618.pdf>

establishing its own beef supply chain.¹¹ The continued rise of private label products controlled or owned by retailers needs to be examined in terms of obstacles created for new entrants or existing rival brands that cannot access store shelves because the retailer is promoting its private label brand. The potential for online retailers to manipulate the visibility of rivals to their private label brands should also be examined.

Adverse Competitive Effects on Rivals: If a processor acquires (or uses marketing or forward contracts to control) the farm level production of a crop or livestock, the adverse effects may go beyond the merged firm's ability to foreclose a rival's access at a competitive price. The ability of a firm to foreclose a rival's access to a product should also be carefully examined in light of the ability of large processors to virtually lock up the supply of critical ingredients like specific varieties of hops or aluminum cans to foreclose access by craft brewers, or specific products like certified organic ingredients that may be vital to innovative start up food companies but are in limited supply with long timeframes for building up availability.

Thank you for your consideration. If you have questions or need more information, please contact Patty Lovera, pattylovera20@gmail.com, (202) 526-2726.

Sincerely,



Kate Mendenhall
Director

¹¹ Grant Gerlock. "Costco Builds Nebraska Supply Chain For Its \$5 Rotisserie Chickens." National Public Radio. October 22, 2018; Anna-Lisa Laca. "Dozens More Farmers Lose Milk Contracts." *Dairy Herd Management*. March 5, 2018; Tom Polansek. "Walmart creates Angus beef supply chain, cutting out meat processors." *Reuters*. April 24, 2019.