

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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FEDERAL TRADE COMMISSION,)	
)	
Plaintiff,)	Case No.: 1:07-cv-01021-PLF
)	
v.)	
)	
WHOLE FOODS MARKET, INC.,)	
)	
Defendant.)	
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**FEDERAL TRADE COMMISSION’S DESCRIPTION OF
RELIEF SOUGHT IN REMAND PROCEEDING**

In its January 8, 2009 Order, this Court instructed the Federal Trade Commission (“FTC”) to “state with some specificity, either in a filing with the Court or a letter to opposing counsel, the remedies it seeks.” Order at 6. The Court further ordered the parties to “discuss whether they could agree on some interim relief during the pendency of these proceedings in order to ensure that any relief obtained by the FTC would be effective.” Order at 7. Pursuant to the Court’s Order, the FTC hereby summarizes the voluntary interim relief it has proposed to Whole Foods’ counsel, as well as the preliminary injunctive relief it intends to seek under § 13(b) of the FTC Act, 15 U.S.C. § 53(b), should this Court ultimately rule for the FTC on the equities. This information was communicated to Whole Foods’ counsel by letter dated January 11, 2009. *See* Letter from M. Reilly to P. Denis (Jan. 11, 2009) (attached).

Interim Relief During Pendency of Equities Hearing

The FTC has requested that Whole Foods immediately cease further integration activities until this Court has the opportunity to evaluate whether preliminary injunctive relief under § 13(b) is warranted. The FTC previously requested that Whole Foods stay further integration of

the acquired Wild Oats assets in August 2008. *See* Letter from M. Reilly to P. Denis (Aug. 11, 2008) (attached). Whole Foods declined and, by all accounts, has instead continued to integrate the acquired Wild Oats assets over the past several months. Assuming that Whole Foods agrees to complete the equities hearing before this Court in a timely manner, we believe that this limited relief (a stay of further integration) is a reasonable way of maintaining the Wild Oats assets until this Court concludes a hearing on the equities. Of course, more significant interim relief may be necessary if the equities hearing cannot be completed expeditiously.

Preliminary Relief Under § 13(b)

If the Court determines that the balance of the equities favors the FTC, the FTC intends to seek as relief: (1) a continued stay of integration, and (2) a hold separate order. The hold separate order would require rebranding of all former Wild Oats stores and the appointment of a trustee or special master. The trustee would be charged with overseeing Whole Foods' compliance with the ordered relief, and would establish an independent management team to manage the Wild Oats assets. The trustee, together with the management team, would have complete managerial responsibility for the Wild Oats assets. This relief is more limited than the typical relief obtained in § 13(b) cases, and is less extreme than the alternatives of partial or total rescission contemplated by the Court of Appeals. The FTC's request tracks the narrower relief upheld by the D.C. Court of Appeals in *FTC v. Weyerhaeuser*¹ and is similar to a recent interim order issued by a court in the Eastern District of Virginia during the pendency of a

¹665 F.2d 1072, 1090 (D.C. Cir. 1981). The *Weyerhaeuser* Court specifically acknowledged that a hold separate order was "less drastic than a full stop order." *Id.* at 1084.

consummated merger challenge.² The FTC believes that this preliminary injunctive relief is necessary and reasonable to preserve interim competition and maintain the Commission's ability to fashion an effective remedy should it be warranted after a plenary trial.

Status of Meet & Confer

The FTC transmitted its letter proposal to Whole Foods on Sunday, January 11, 2009. The FTC plans on meeting and conferring with Whole Foods as soon as possible in order to submit to the Court by January 16, 2009, a joint report on the method of proceeding and a proposed schedule.

Dated: January 12, 2009

Respectfully submitted,

By: /s/ Matthew J. Reilly

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²Order to Preserve and Maintain Assets, *United States v. Microsemi Corp.*, No. 1:08cv1311 (E.D.V.A. Dec. 24, 2008) ("Microsemi is hereby ordered to appoint a person or persons to oversee the Semicoa Assets who will be responsible for Microsemi's compliance with this Order and shall have complete managerial responsibility for such assets."). This order was imposed *prior to a finding of likelihood of success*, and at the acquiescence of both parties.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 12, 2009, I filed the foregoing FTC's Description of Relief Sought in Remand Proceeding via CM/ECF with the clerk of the court.

I FURTHER CERTIFY that on such date I served the foregoing on the following counsel by electronic mail:

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