COMPETITION LAW360

Portfolio Media, Inc. | 648 Broadway, Suite 200 | New York, NY 10012 | www.law360.com
Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomedia.com

FTC Appeals Order In Whole Foods Case

By **Erin Coe**, erin.coe@portfoliomedia.com

Friday, Aug 17, 2007 --- The Federal Trade Commission has challenged a district judge's ruling denying the Commission's demand for a preliminary injunction on a merger between Whole Foods Market Inc. and Wild Oats Markets Inc.

The FTC said in a court filing on Friday it plans to appeal the decision to the U.S. Court of Appeals for the District of Columbia Circuit after Judge Paul L. Friedman of the U.S. District Court for the District of Columbia refused to block the combination of the two largest natural food stores in the U.S.

On Thursday, Friedman sealed his 93-page opinion, but filed a public order in the case. The order was crucial to the deal's success, considering that most large mergers tend to fall apart if a preliminary injunction is issued.

The attorney representing Whole Foods, Paul T. Denis, said the judge's opinion denying the preliminary injunction was firmly grounded in the facts and the law.

"We are confident that the merger will be allowed to proceed, which will benefit the customers, vendor partners, shareholders and communities of Whole Foods Market and Wild Oats Markets," said Denis, a co-chair of Dechert LLP antitrust practice.

But David Balto, a former FTC policy director, said the Commission stands a good chance at getting the decision reversed by the D.C. Circuit, which was responsible in 2001 for reversing a district court's denial of an injunction in the proposed $185 million baby food merger between H.J. Heinz Co. and Beech-Nut Nutrition Corp., the second and third largest baby food makers.

"I presume that the FTC's loss was partially based on the judge rejecting the FTC's definition of the premium natural and organic supermarkets. The D.C. Circuit is known as a careful circuit for relevant market definition decisions," Balto said.

He added that the FTC does not seek an appeal unless it believes it has a strong case, and the D.C. Circuit tends to take a broader look at the legal aspects of the district court's decision and how that will impact antitrust enforcement and the law in general.

In February, Whole Foods and Wild Oats announced that they had signed a merger agreement for Whole Foods to acquire Wild Oats' outstanding common stock in a cash tender offer of $18.50 a share, or about $565 million. Whole Foods would also assume Wild Oats' existing net debt, which was reported to be about $106 million in September 2006.

The FTC sued to block the merger in early June, saying that the merger would allow the company to dominate the growing natural and organic foods market. Among the claims contained in the FTC's complaint is that Whole Foods intends to fold Wild Oats into it, and then sell and close numerous Wild Oats stores.

Its complaint was chock full of comments from Whole Foods CEO John Mackey, who also blogged about the merger on the company's Web site.

According to its complaint, Mackey told the company's board of directors: “By buying [Wild Oats]...we eliminate forever the possibility of Kroger, Super Value or Safeway using their brand equity to launch a competing national natural/organic food chain to rival us...[Wild Oats] may not be able to defeat us but they can still hurt us. [Wild Oats] is the only existing company that has the brand and number of stores to be a meaningful springboard for another player to get into this space. Eliminating them means eliminating this threat forever, or almost forever.”

The stores argued throughout the case that their formats are not so distinguishable from traditional supermarkets, such as The Kroger Co., and that if Wild Oats and Whole Foods are distinct companies, nothing prevents conventional stores from repositioning to become more like them.

They also argued that because Wild Oats charges higher prices than Whole Foods, the merger should actually lower prices at Wild Oats stores, and that the chains' pricing and promotional activity is not materially affected by proximity.

Earlier this week, Whole Foods said it was investigating the disclosure of confidential information that the FTC filed with the court.

Included in the information at issue was Whole Foods' mention of its intent to close at least 30 stores if the merger goes through, among other things, according to a report by the Associated Press. The point about the possible closures has been redacted from the documents available in the federal court docket.

Wild Oats, founded in Boulder, Colo. in 1987, boasts sales of about $1.2 billion annually and operates 110 stores. Whole Foods is a much larger company with 196 stores. Founded in 1980 in Texas, it had $5.6 billion in sales in fiscal year 2006.

The FTC declined to comment on the appeal Friday.

Whole Foods is represented in this matter by Dechert LLP and Vinson & Elkins LLP. Wild Oats is represented by Skadden, Arps, Slate, Meagher &

Flom LLP.

The case is Federal Trade Commission v. Whole Foods Market Inc. et al., case number 07-cv-01021, in the U.S. District Court for the District of Columbia.

--Additional reporting by Shannon Henson