

Merger Info. Should Be Sealed: Whole Foods To FTC

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Wednesday, Aug 15, 2007 --- Whole Foods Market Inc. is angry about confidential information it said the Federal Trade Commission filed with the court Tuesday in the regulator's fight to keep the grocer from merging with Wild Oats Markets Inc.

The natural food stores are awaiting word from the court on whether it will grant the FTC's request for a preliminary injunction in the case. The FTC was filing its final documents for the judge's review, which included the information with which Whole Foods took umbrage.

"The district court has twice ordered this information to be held under seal," Whole Foods said Tuesday. "Until the merger is complete, Whole Foods will not have sufficient information, including store level financial statements, to make any final decisions regarding future operations. All information shared with the FTC was done so with the reasonable understanding that it would be handled appropriately."

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.

An FTC spokesman said he couldn't comment on the filing or the Whole Foods investigation into its disclosure.

There are some controversial details in what can still be found in the the FTC's filing of more than 100-pages of proposed finding of fact. The regulator said that Wild Oats punished former CEO Perry Odak after he said Whole Foods—not Trader Joe's—was the chain's key competitor.

"After receiving the transcript of Mr. Odak's testimony, the defendants appear to have withheld certain payments due to Mr. Odak and plainly did abrogate the joint defense agreement, which also had conveyed the financial benefits to Mr. Odak," the motion said.

Starting in late July, Judge Judge Paul L. Friedman in the U.S. District Court for the District of Columbia held a two-day proceeding over granting a preliminary injunction in the case. If a preliminary injunction is granted, most mergers fall apart, meaning his ruling could effectively end the deal.

The FTC sued in early June to block the merger of the two largest natural food stores in the United States. 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 has 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 have 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.

The case has fascinated antitrust attorneys, partly because there are few competition cases that are litigated and partly because of the FTC's use of Mackey's comments.

"I think what this case does is shows so clearly is that in merger law there's a lot of focus on the economics, but what matters is the parties documents," said Mark Ostrau, co-chair of Fenwick & West's Antitrust and Unfair Competition Group on Wednesday. "Since all of merger law is based on predicting the future, a big part of that has to include what the merging parties intend to do. The CEO's statements have to have a lot of influence on this case. But if nothing else, this case is a great teaching case to clients on the importance of writing smart documents."

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.

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.

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.