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# Judge Blocks FTC Request To Stop Grocery Merger

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*Thursday, Aug 16, 2007* --- A judge on Thursday thwarted the Federal Trade Commission's attempt to put a stop to a merger between Whole Foods Market Inc. and Wild Oats Markets Inc., the two largest natural food stores in the United States, denying the Commission's request for a preliminary injunction.

Judge Paul L. Friedman of the U.S. District Court for the District of Columbia sealed his 93-page opinion, but filed a public order in the case.

Because most large mergers fall apart if a preliminary injunction is issued, the order is pivotal to the deal's success. Judge Friedman presided over a two-day proceeding over the injunction starting in late July.

"The District Court's ruling affirms our belief that a merger between
Whole Foods and Wild Oats is a winning scenario for all stakeholders," said Whole Foods CEO John Mackey."We believe the synergies gained from this combination will create long term
value for customers, vendors, and shareholders as well as exciting opportunities for team members."

The FTC can appeal the District Court's ruling and can seek a stay to preclude the closing of the merger pending appeal.

The stores agreed with the FTC to not close the merger until Aug. 20, Whole Foods said. But absent a stay pending appeal, the companies can close the deal after that.

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 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.

“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.

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 didn't immediately respond to a request for comment Thursday evening.

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.

 