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FTC Criticizes Whole Foods Ruling

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The fate of **Whole Foods Market Inc.**'s deal to acquire rival grocer **Wild Oats Markets Inc.** could rest on how much weight a federal appeals court gives to the words of Whole Foods' blunt chief executive.

The Federal Trade Commission said in a court filing made public yesterday that U.S. District Court Judge Paul L. Friedman ignored "clear and authoritative" assertions in company emails and other electronic correspondence from Chief Executive John Mackey that the rationale for buying Wild Oats was to eliminate competition and avert price wars. Judge Friedman last week allowed the merger to go forward, denying the federal government's request for a preliminary injunction to block the merger on antitrust grounds. ([Text of ruling](#)¹)

- **The Appeal:** The FTC said a judge ignored comments by Whole Foods' CEO in the decision to allow the company's acquisition of Wild Oats.
- **The Ruling:** Last week, the judge rejected the agency's contention the deal would stifle competition and raise prices.
- **What's Next:** The appellate court asked the sides to provide more information this week.

The government Friday asked a federal appeals court in Washington to delay the merger pending the outcome of an appeal. Monday, the appellate court temporarily blocked the merger, saying it needed more time to decide whether to issue a longer delay.


Whole Foods, based in Austin, Texas, agreed to buy Wild Oats, of Boulder, Colo., for \$565 million in February. The FTC filed suit to thwart the deal in June.

Last week, Judge Friedman rejected the agency's contention that the merger would stifle competition and raise prices for natural and organic groceries. In a 93-page opinion, a public version of which became available yesterday, Judge Friedman said the government is wrong to claim that Whole Foods and Wild Oats operate in a distinct market. Instead, he argued, they are among many supermarket chains selling natural and organic groceries.

If Whole Foods bought Wild Oats and then tried to drive up prices, consumers would turn to chains such as **Safeway Inc.**, making such a move unprofitable for Whole Foods, Judge Friedman argued. That would keep prices in check. "The evidence shows that there are many alternatives to which customers could readily take their business if Whole Foods and Wild Oats merged and Whole Foods imposed" price increases, Judge Friedman wrote.

He said that several chains, including Safeway, have already introduced their own private-label lines of organic foods, and they have retooled their stores to emphasize prepared foods and fresh

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produce, much as Whole Foods stores do.

In his opinion, the judge devoted little attention to statements that Mr. Mackey had made about the marketplace in electronic correspondence, including anonymous online messages that have become the subject of a Securities and Exchange Commission inquiry.

The FTC criticized that element as a key error when it asked the appellate court to delay Judge Friedman's order pending the outcome of an appeal. "The court assigned no weight to contemporaneous, high-level statements and strategic documents authored by senior executives," the commission wrote.

The agency also said Judge Friedman disregarded "abundant evidence" that Wild Oats and Whole Foods "uniquely constrain each other's pricing."

The appellate court has asked both sides to provide more information this week regarding the agency's request for a stay of Judge Friedman's ruling.

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