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Wait. Why Is the F.T.C. After Whole Foods?

DECEMBER 15, 2008, 8:11 AM

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It's becoming clear that the Federal Trade Commission and **Whole Foods Market** need to take their continuing legal spat out of the courtroom and into the grocery store, The New York Times's Andrew Martin argues in his latest "The Feed" column.

That's right. Pack up the legal briefs. Grab a cab. There's a Safeway on L Street about a mile north of the F.T.C. headquarters in Washington.

A field trip is in order because the reasoning behind the F.T.C.'s efforts to stop a merger between Whole Foods Market and a smaller competitor, **Wild Oats Market**, has been undercut by marketplace realities.

Since the F.T.C. first challenged the merger in June 2007, Whole Foods has increasingly lost its hold on the organic and natural foods marketplace. Larger competitors like **Safeway** and **Kroger** have vastly expanded their store-brand offerings of natural and organic products, and they are often cheaper than those at Whole Foods.

The situation has only accelerated as the economy has soured. Whole Foods has mounted an aggressive campaign to convince consumers that it isn't so expensive. The store now offers more discounts and store-brand products, which are cheaper.

Wall Street, at least, isn't convinced. Whole Foods' stock is down more than 70 percent this year.

So why continue with the litigation?

Several antitrust lawyers told Mr. Martin that the fight had become more about personalities than legal reasoning.

Andrew G. Berg, who specializes in antitrust matters for Sonnenschein Nath & Rosenthal, said the F.T.C. took on Whole Foods after a string of defeats, thinking that it would be an easy victory. Now, he says, the agency is "backed into a corner."

"I've predicted for a long time that this is a case that the F.T.C. should forget about," Mr. Berg said.

Ronald F. Wick, an antitrust lawyer at Baker Hostetler, said lawyers could become so hellbent on winning that they "don't tend to be terribly flexible in recognizing economic realities."

David P. Wales, acting director of the F.T.C.'s bureau of competition, denied that

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personalities were driving the case.

“The goal is not to drive Whole Foods out of business,” he said. “It’s not a personal vendetta. Our job is to protect competition and that is what we are doing here.”

Mr. Wales said the agency wasn’t contending that Whole Foods and Wild Oats did not have any other competition. Instead, he argues, there is a special level of competition between the two that matters to consumers.

He said the F.T.C. would present evidence showing that Whole Foods still maintains a unique spot in the premium marketplace for organic and natural products; he declined to elaborate.

It’s important to remember that, at least initially, the F.T.C. had some pretty compelling reasons to bring a case against Whole Foods. And John P. Mackey, co-founder and chief executive of Whole Foods, has very publicly thumbed his nose at the F.T.C.

Whole Foods, based in Austin, Tex., announced in February 2007 that it was acquiring Wild Oats, in part so the two could compete against the likes of Wal-Mart Stores and Safeway.

But the F.T.C. didn’t buy that argument, and it maintained that the merger would hurt competition and increase prices in markets where the two stores were rivals. As part of its evidence, the agency produced some internal documents and e-mail postings by Whole Foods executives.

For instance, Whole Foods documents referred to Wild Oats stores as a “cash cow” and a “monopoly” in markets where Whole Foods didn’t exist. The documents also said Whole Foods was waging “war” on prices in markets where the two competed.

And then there were blog postings by Mr. Mackey himself. Using a pseudonym discovered by the F.T.C., Mr. Mackey wrote in March 2006: “The end game is now under way for OATS. Whole Foods is systematically destroying their viability as a business market by market, city by city.”

That may have been true in 2006. Today, it’s Whole Foods’ health that is in question.

The case has taken several jarring turns. Whole Foods won an initial round in court, when a federal judge ruled in August 2007 that the market for natural and organic foods was much broader than Whole Foods and Wild Oats.

But a year later, with the merger almost complete, an appellate court ruled that the initial decision had been rushed and needed to be reconsidered. Shortly thereafter, the F.T.C. decided to proceed with its own internal hearing on the merits of the merger.

Last week, Whole Foods sued the F.T.C., asserting that the agency’s administrative hearing would violate the company’s due-process rights. The lawsuit’s opening lines quote the Queen of Hearts scene in “Alice in Wonderland”:

“Now for the evidence,” said the King, “and then the sentence.”

“No!” said the Queen. “First the sentence and then the evidence.”

The additional lawsuit means that there are three separate cases wending their way through the system for a case that no longer makes much sense.

Whole Foods officials say they have spent at least \$16.5 million defending the merger. The F.T.C. declined to say how much it had spent so far.

Both sides would be wise to take that trip to the Safeway. Whole Foods might learn a thing or two about how to compete against a larger, more efficient rival. And the F.T.C.’s lawyers might see that even if they lost the battle with Whole Foods, they were

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- 1. December 15th, 2008 9:46 am
 

This article misses a critical component of the issue—the merger has already happened. Some Wild Oats stores have been closed, others sold, and most converted to the Whole Foods brand. All of the Wild Oats senior management and administrative infrastructure is gone. The eggs are already scrambled.

The FTC should stop and explain how it plans to unscramble the eggs before it spends another \$1 of taxpayer money on this idiotic crusade. Save us from stupidity Obama.

— Posted by Ron Burkle

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  - 2. December 15th, 2008 10:22 am
 

Certainly this FTC action is unwarranted in a day and age where we let the largest of the large banks merge to where “they are too big to fail”, the pre-monopoly-busting telecom firms are all back together, and where we are even hearing discussions of the “big 3” automakers perhaps becoming the “Big 2”. Whole Foods has upset someone on a personal level, and a vendetta is what drives this action.

As the article said: one only need go to local supermarkets to find rampant competition to Whole Foods. Organics are showing up \*everywhere\* now, including Wal Mart. I shop at Whole Foods, and Trader Joes, and Wal Mart, and other local grocers — each offers very similar products. I go to Whole Foods for the wide variety they offer and certain items I can find nowhere else. This FTC action needs to end!

— Posted by Mike Eberhart

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  - 3. December 15th, 2008 3:23 pm
 

This piece is seems to be right in its assessment of the FTC’s continuing crusade as not much more than payback. After looking at the facts of the case and just shopping in the real world, it’s plain idiotic to think that Whole Foods Market has the market cornered. Natural and organic products no longer command niche prices because they’ve ceased to be niche products. I don’t usually defend big corporations, but what the FTC is doing is bullying and harrassing. Can we please get back to good and fair governance? Leave the petty stuff elsewhere.

— Posted by Josh Seigel

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  - 4. December 15th, 2008 5:01 pm
 

AT&T and Cingular can merge without comment, but two small grocery companies can’t. I guess WF didn’t bribe the right politicians.

— Posted by Steve

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