FTC to nix Whole Foods-Wild Oats

by Cecile Kohrs Lindell in Washington Posted 05:08 EST, 5, Jun 2007

Whole Foods Market Inc. and **Wild Oats Markets Inc.** vowed to fight for their merger, despite being notified by the Federal Trade Commission that it would sue to block the deal.

"We continue to believe very strongly that this merger is in the best interest of all our constituents," said Greg Mays, chairman and CEO of Wild Oats.

"Whole Foods and Wild Oats are each other's closest competitors in premium natural and organic supermarkets, and are engaged in intense head-to-head competition in markets across the country," said Jeffrey Schmidt, director of the FTC's Bureau of Competition. "If Whole Foods is allowed to devour Wild Oats, it will mean higher prices, reduced quality, and fewer choices for consumers. That is a deal consumers should not be required to swallow."

Mays, however, was not so reticent and called the FTC's position "without legal and factual merit."

"We are confident that, once presented with the facts, the court will agree that this merger is pro-competitive and the FTC's application for an injunction will be denied," Mays said.

The companies had previously revealed that the FTC had been carefully scrutinizing Austin, Texas-based Whole Foods' planned $700 million takeover of rival Wild Oats, because of the similar operations of the two full-service grocery story chains, which specialize in organic foods and environmentally friendly items.

The deal between two rivals in a specialty market tees up the same key issues that caused the FTC to challenge the merger between **Staples Inc.** and **Office Depot Inc.** a decade ago.

The FTC won that case after a federal court ruled that the agency proved that while other stores sold office supplies, in some cases more cheaply, many consumers tended to gravitate to the office supply stores to buy bulk consumable items, such as pens or paper. In places where the two specialty stores competed, consumers paid lower prices than in other markets where only one of the two chains had a store.

Bill Baer, the leader of **Arnold & Porter LLP**'s antitrust group, was the senior antitrust official at the FTC when it challenged the Staples deal. According to Baer, the FTC is certain to lean on economic evidence and evaluate how the two stores set their prices both where they compete, and where they don't.

As in the Staples case, the key argument is likely to be "that there's a unique zone of competitiveness" between the chains, Baer said.

And while there have been rumors of proposed divestitures, the FTC has likely decided that selling off some stores could not provide consumers with the same level of competition they now enjoy.

"You have to be a certain size to actually be an effective competitor," Baer said. If a smaller rival tried to buy up the discarded stores, there's a good chance that the rival would be too small to be able to buy the same items at a low enough discount to adequately compete with the merged firm, he explained.

In those cases, the fact that the merger will create important efficiencies "can kind of bite you," Baer said, because that becomes an argument that the cost savings will give the merged company greater buying power than smaller rivals.

In this case, the companies are certain to argue that consumers have other options for organic and locally grown produce. Many large chains are moving toward specialty organic sections inside their stores, while many well known brands, such as Gerber, are introducing organic lines to be sold in competition with their traditional lines.

According to the Wild Oats and Whole Foods Web sites, the two chains compete in about 15 cities, including: Colorado Springs, Colo.; Denver, Evanston, Ill.; Hartford, Conn.; Henderson, Nev.; Louisville, Ky.; Overland Park, Kan.; Pasadena and Santa Monica, Calif.; Phoenix; Portland, Maine; Princeton, N.J.; and St. Louis. That would include a substantial number of Wild Oats' 72 American outlets, although it could not be determined how close the competing stores are.

The FTC lost its most recent merger challenge last month in a district court in Albuquerque, N.M. In that case, the agency tried to block a **Western Refining Inc.**'s $1.4 billion purchase of Giant Industries Inc.

That deal closed May 31, after an appeals court refused to block the merger, though it did agree to hear the FTC's appeal of the district court's decision in September. n