

## **The BLT: The Blog of Legal Times**

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### **After Whole Foods' Long Public Battle, Why Settle Now?**

For months, Whole Foods Market and its legal team have waged a very public battle against the Federal Trade Commission's charges that the high-end grocer's 2007 merger with Wild Oats Markets violated antitrust laws.

The court fight started in June 2007 when FTC lawyers first tried to prevent the merger by filing suit in the U.S. District Court for the District of Columbia. Then, last October, Whole Foods raised the stakes by unleashing lobbying and media campaigns against the FTC.

After all of that, this morning's announcement that Whole Foods has agreed to settle with the FTC raises an obvious question: Why?

Dechert partner Paul Denis, who has represented Whole Foods since 2007 in defending the merger, says it primarily came down to money. "This is a very expensive process," he says, adding that Whole Foods "thought if made sense to try to eliminate that cash burden." In December, Whole Foods said it had spent \$16 million on attorney and expert fees since 2007.

Asked whether allocating additional resources to the public fight against the FTC was worth it for his client, Denis says, "You do what you have to to defend yourself. ...You can never ask yourself is it worth it."

Denis led the Dechert team that represented Whole Foods from the beginning of its fight with the FTC, but last October, Whole Foods also added lawyers from Orrick, Herrington & Sutcliffe, led by partner Lanny Davis. Dechert continued to defend the company against administrative litigation brought by the FTC, while Orrick's Davis headed up the media and lobbying blitz. Davis also repped Whole Foods in a separate lawsuit filed by the grocer against the FTC alleging bias and due process violations. (That case was withdrawn from the U.S. District Court for the District of Columbia for procedural reasons in January, and is no longer being pursued.)

While Davis has been the public face of Whole Foods' fight, when it came time to sit down at the negotiating table, Denis says he took the lead. He says he and Whole Foods executive vice president, Jim Sud, hammered out the agreement with the FTC lawyers.

Under the settlement, Whole Foods has to sell 32 of the former Wild Oats stores, of which 13 are currently operating, and 19 are not. One of the terms of the settlement is that if the 13 operating stores are sold, they have to be shut down for up to 30 days so they can be stripped of all Whole Foods branding.

Denis says this was vital for his client. "It was important to get their intellectual property out. They didn't want to transfer that because these stores had been turned into Whole Foods stores."

Whole Foods will incur the costs associated with divesting the 32 stores, but Denis says, "It's a reasonable compromise in terms of what it's going to cost them."

According to a press release issued by Whole Foods, the company expects to pay as much as \$19 million relating to the potential sale of the 13 operating stores, and no additional material expenses related to the 19 closed stores.

Posted by Marisa McQuilken on March 06, 2009 at 02:12 PM in [D.C. Courts and Government](#), [Legal Business](#), [Politics](#)

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They settled it because the FTC wanted to save face. This is no big deal for Whole Foods; they successfully completed a consolidating transaction that eliminated their biggest competitor. This is just a small add-on to the transaction costs of a half-billion dollar deal.

Posted by: [Josh King](#) | [March 06, 2009 at 04:06 PM](#)

I wish this meant that our former Wild Oats store would return to Long Beach, CA. We miss them!

Posted by: [Stephanie Paul](#) | [March 06, 2009 at 03:15 PM](#)

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