

## **Federal Appeals Court Revives FTC Objections to Whole Food/Wild Oats Merger**

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*Largest US "organic" grocery chain, already under seige from California for Carcinogens in Body Care Products, faces very serious legal challenge in DC Appeals Court ruling that merger must go back to lower court, as Federal Trade Commision requested*

Introductory Note: With 40 years of consistent shopping for organic food items, I have for quite some time objected to this merger as monopolistic, speaking from personal experience here in Santa Fe. I strongly commend the FTC for hanging in there and the Appeals Court for seeing the errors in the lower court's hasty ruling. I also appreciate the prior insights of Reuters journalists and Dow Jones Reporting in compiling this article.

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A federal appeals court Tuesday said a trial judge improperly dismissed the Federal Trade Commission's challenge to the 2007 merger between Whole Foods Markets Inc. and Wild Oats Markets Inc. The ruling brings back to life legal proceedings over the merger and gives the FTC a chance to force Whole Foods to sell part of its operations to meet competitive concerns raised by the merger. The two companies merged in a \$565 million transaction after a federal trial court rejected the FTC's challenge. The 2-1 ruling, issued by the Washington-based U.S. Circuit Court of Appeals, said the trial judge handling the case made mistakes when he expedited review of the agency's challenge.

"We appreciate that the district court expedited the proceeding as a courtesy to the defendants. But the court should have taken whatever time it needed to consider the FTC's evidence fully." The ruling added that the trial judge improperly analyzed data and incorrectly concluded the FTC had little chance of prevailing in its challenge to the merger. "We reverse the district court's conclusion that the FTC showed no likelihood of success," the panel's majority said. The trial judge must now take a fresh look at the strength of the government's case.

The FTC argued earlier this year in a legal brief filed with the appeals court that the full integration of the two companies would take several years to complete. The commission asked for the court to stop Whole Foods from rebranding or closing the remaining Wild Oats stores "to preserve the possibility of reconstituting Wild Oats as an independent competitor." The appeals court did not rule on the FTC's request, choosing instead to leave that decision to the trial judge.

Whole Foods and Wild Oats agreed to merge in February, 2007. The FTC challenged the combination in June, resulting in legal activity ending in August, 2007 after the federal court refused to delay the merger. Whole Foods is the largest natural and organic foods retailer and Wild Oats was a smaller rival. The companies argued they faced competition from traditional grocery retailers while the FTC has maintained the merger would reduce competition in the natural and organic foods market.

U.S. District Judge Paul Friedman "underestimated the FTC's likelihood of success on the merits" when he denied the agency's request, the three-judge appeals court panel said in its ruling. One of the judges dissented from the opinion. The appeals court remanded the case back to Friedman for further proceedings.

Whole Foods issued a statement saying it was disappointed by the decision and that it might ask for a review by the full appeals court, and that it would carry on "business as usual."

Rating agency Standard & Poor's said in a statement it did not see the ruling changing Whole Foods' daily operations or its continued integration of Wild Oats stores. Wild Oats had been effectively "deconstructed" since the acquisition.

Judge Friedman denied the FTC's request to block the deal in August of last year, concluding that the FTC had failed to prove the merger would hurt competition. The agency then asked the D.C. appeals court to stop the merger, but was turned down. The companies went ahead with their deal that same month. The appeals court on Tuesday rejected Whole Foods' argument that the FTC appeal is irrelevant because the agency does not have the authority to undo a completed merger. Federal courts "have the power to grant relief on the FTC's complaint, despite the merger's having taken place," the court said. The FTC had said the combination of Whole Foods and Wild Oats raised antitrust concerns in 21 geographical areas where the two chains were each other's closest competitors. Whole Foods argued that its stores compete in a broader market against all supermarkets, not just organic grocery stores. The FTC disagreed, saying they competed in the premium organic market. The FTC is seeking an administrative trial before the agency's five commissioners.

The director of the FTC's competition bureau, Jeffrey Schmidt, issued a statement on Tuesday saying agency officials looked forward to future proceedings before the district court, leading to a full trial on the merits before the commission. However, Whole Foods said the decision "provides a roadmap for Friedman to once again deny the FTC's request for a preliminary injunction. The appeals judges agreed with the FTC that judge Friedman had misconstrued a key legal point used to define the market at issue in the case. They said Friedman's error led him to ignore key evidence and the FTC's main argument: that Whole Foods and Wild Oats were in a battle of their own over a distinct market for "core" organic grocery customers.

Howard University law professor Andrew Gavil said it could take a long time for the FTC to get an injunction because of legal procedures, giving Whole Foods even more time to integrate the two companies." Given where things are in this case it's going to be very hard to really undo the merger and come up with an effective remedy"; Gavin said the ruling would be important for the FTC as it sets a precedent strengthening the agency's hand in seeking a preliminary injunction in future cases.

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"The court should have taken whatever time it needed to consider the FTC's evidence fully," Judge Janice Rogers Brown wrote for the divided court. "The district court must independently exercise its discretion considering the circumstances of the case, including the fact that the merger has taken place."

"The court of appeals' decision provides a roadmap for Judge Friedman to once again deny the FTC's request for a preliminary injunction," spokeswoman Libba Letton said in an e-mailed statement. "We await the U.S. District Court's response so this issue can be resolved." While the district court is unlikely to block the merger, it may decide to order the sale of as many as 18 stores where the combined companies face little or no competition, said Jane Willis, an antitrust lawyer with Ropes & Gray in Boston. "It's difficult to unscramble the egg, but there are other various remedies," Willis said in an interview. "If Whole Foods does not want to continue paying high litigation fees, they might even go to the FTC and propose a divestiture plan."

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Art Gallery, but primary purpose here is our consumer protection efforts, above all, getting aspartame banned in every nations and in every state

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