

ORIGINAL



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)
)
WHOLE FOODS MARKET, INC.,)
)
)
a corporation.)
_____)

Docket No. 9324
[Public Record Version]

**COMPLAINT COUNSEL'S MEMORANDUM REGARDING RESPONDENT'S
MOTION TO WITHDRAW THE MATTER FROM ADJUDICATION**

This memorandum sets forth Complaint Counsel's views regarding Respondent's January 26, 2009, motion to withdraw this matter from adjudication for the purpose of considering a proposed consent agreement. Complaint Counsel takes no position with respect to Respondent's motion, but rather seeks to identify several issues relevant to this Court's and the Commission's consideration of Respondent's motion and the proposed settlement of this matter.

A consent agreement may be the most efficient and effective method of resolving this matter, particularly because the prospect for effective relief will continue to diminish over time. For the same reason, however, it is critical that discussions regarding a proposed settlement to this matter not delay the ultimate resolution of the case through trial in the event that a settlement cannot be reached. Such a delay would impair significantly the Commission's ability to secure effective relief if it is ultimately determined that such relief is warranted.

By its own admission, Whole Foods has integrated the Wild Oats assets “faster, further and deeper” than in any of the 18 acquisitions in the company’s history. This integration has included the closing of 19 competing stores (with more closings planned over the next two months), abandoning plans to open additional competing stores, and the near-complete elimination of the “Wild Oats” brand from the marketplace. And, the Wild Oats stores that have remained opened are being weakened significantly : [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].}

The closing and deterioration of Wild Oats stores continued even while the case was pending before the Court of Appeals, and indeed even after the Court of Appeals held that the Commission had established the requisite likelihood of success under § 13(b) of the Federal Trade Commission Act. Commission staff twice requested that Whole Foods stay further integration of the Wild Oats assets – in each instance, Whole Foods declined. Only recently has Whole Foods agreed to a so-called “stay of integration,” but even now it reserves for itself the right to close additional stores and dispose of additional leases.

In light of the continued integration and wasting of the Wild Oats assets, it is critical that this matter proceed expeditiously before the district court and in administrative litigation in order to preserve the Commission’s ability to obtain relief, if warranted, following the administrative trial. Thus, if the Court or the Commission determines to withdraw this matter from adjudication to pursue a possible settlement, we respectfully urge that settlement discussions be conducted

expeditiously, and, if unsuccessful, that the administrative and federal litigation proceed without undue delay.

Dated: February 3, 2009

Respectfully submitted,

By: Matthew J. Reilly / JRC

J. Robert Robertson, Esq.
Matthew J. Reilly, Esq.
Jeffrey H. Perry, Esq.
Albert Y. Kim, Esq.

Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
Telephone: (202) 326-2350
Facsimile: (202) 326-2886
mreilly@ftc.gov

Complaint Counsel

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2009, I filed via hand and electronic delivery an original and two copies of the foregoing Complaint Counsel's Memorandum Regarding Respondent's Motion to Withdraw the Matter from Adjudication-Public Version with:

Donald S. Clark, Secretary
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W., Rm. H-159
Washington, D.C. 20580

I also certify that on February 3, 2009, I delivered via hand delivery two copies of the foregoing to:

The Honorable D. Michael Chappell
Chief Administrative Law Judge
via Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

I also certify that on February 3, 2009, I delivered via electronic mail one copy of the foregoing to:

Paul Denis, Esq.
Paul Friedman, Esq.
Jeffrey Brennan, Esq.
James Fishkin, Esq.
Michael Farber, Esq.
Dechert LLP
1775 I Street, N.W.
Washington, D.C. 20006
paul.denis@dechert.com
paul.friedman@dechert.com
jeff.brennan@dechert.com
james.fishkin@dechert.com
michael.farber@dechert.com

By: _____


Albert Y. Kim

Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20580
Telephone: (202) 326-2952
akim@ftc.gov