IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FEDERAL TRADE COMMISSION,	)	
	)	
Plaintiff-Appellant,	)	**No. 07-5276**
	)	
v.	)	**Appeal from the United**
	)	**States District Court for**
WHOLE FOODS MARKET, INC.	)	**the District of Columbia,**
	)	**Civ. No. 07-cv-01021-PLF**
and	)	
	)	
	)	
WILD OATS MARKETS, INC.,	)	
	)	
Defendants-Appellees.	)	

FEDERAL TRADE COMMISSION'S
MOTION TO SET BRIEFING SCHEDULE

Briefing of this appeal would ordinarily be automatically stayed, pursuant to Cir. Rule 27(g)(3), by the filing of a motion to dismiss on grounds of mootness by Whole Foods Market, Inc. ("Whole Foods"). The Federal Trade Commission ("FTC," "Commission"), however, respectfully requests that this Court set a prompt briefing schedule in this matter at this time.[1] As discussed below, this appeal raises fundamental legal questions respecting the appropriate role of district courts in the statutory scheme set forth by Congress in Sections 5(b) and 13(b) of

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[1] Counsel for the Commission has been informed that Whole Foods does not consent to this motion.

the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § § 45(b), 53(b). The district court's decision, which denied the Commission's application for a preliminary injunction preventing Whole Foods' acquisition of Wild Oats Markets, Inc., contains fundamental legal errors that threaten the Commission's performance of its law enforcement mission. Moreover, actions that Whole Foods may take, unless restrained by an order maintaining the status quo, may adversely affect the range of remedies available to the Commission if it ultimately rules against Whole Foods on the merits in administrative adjudication, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b).

1. The Statutory Scheme.

Prompt resolution of this appeal is vital because of the remarkable degree to which the court below subverted the Commission's statutory role as an expert adjudicatory agency with respect to the trade regulation matters entrusted to it under Section 5(b) of the FTC Act, as well as the standard for preliminary injunctions under Section 13(b) of the FTC Act. Unless corrected, the district court's errors may significantly undermine the agency's ability to fulfill its statutory mission.

Congress created the Commission to be an expert agency, carrying out adjudicative as well as other functions, and to act as the ultimate decisionmaker,

subject to review only by the courts of appeals, in cases brought to halt unfair methods of competition under Section 5(b) of the FTC Act.[2] As the author of the original bill establishing the Commission explained,

> the determination of the question whether a method of competition is unfair is not a determination purely of fact, but necessarily involves the determination of a question of law. The Federal Trade Commission will, it is true, have to pass upon many complicated issues of fact, but the ultimate question for decision will be whether the facts found constitute a violation of the law against unfair competition. In deciding that ultimate question the commission will exercise power of a judicial nature * * * .[3]

The statutory provision empowers the Commission to issue an administrative complaint, whenever it has "reason to believe" that an entity is engaged in "any unfair method of competition * * * and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public." 15 U.S.C.§ 45(b). Such "proceedings" are entrusted to the Commission, not to the federal district courts. After conducting a hearing on the merits, the Commission may issue cease-and-desist orders against such practices, fashioning relief, in the words of President Wilson, "to adjust the remedy to the wrong in a way that will

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[2] The Supreme Court has recognized this Congressional intent and the Federal Trade Commission's unique role in trade regulation matters. *See, e.g., FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986); *Humphrey's Executor v. United States,* 295 U.S. 602, 624 (1935).

[3] Congressional Record, Sept. 10, 1914, pp. 14931-33 (remarks of Rep. Covington).

meet all the circumstances of the case."[4] Such Commission orders are subject to review only in the courts of appeal. 15 U.S.C. § 45(c).

Section 13(b) of the Act was enacted to strengthen the effectiveness of the Commission's adjudicatory function. Rather than being forced either to disentangle already-merged parties, or to resort to the All Writs Act in an effort to halt a merger before consummation, the Commission is able to obtain injunctive relief in federal district court, under Section 13(b)'s carefully crafted public interest standard. *FTC v. Weyerhaeuser,* 665 F.2d 1072, 1081(D.C. Cir. 1981) (R. Ginsburg, J.) Section 13(b) incorporated the principle that common law standards governing the issuance of preliminary injunctions are "'not * * * appropriate for the implementation of a Federal statute by an independent regulatory agency where the standards of the public interest measure the propriety and the need for injunctive relief.'" *Id., quoting* H.R. Rep. No. 624, 93d Cong., 1st Sess. 31 (1971). As the Fourth Circuit declared in an early case interpreting Section 13(b), "the district court is not authorized to determine whether the antitrust laws have been or are about to be violated. That adjudicatory function is vested in FTC in the first instance. The only purpose of a proceeding under Section 13 is to preserve the status quo until FTC can perform its function." *FTC v. Food Town Stores,* 539

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[4] H.R. Doc. H.R. Doc. No. 625, 63rd Cong., 2d Sess. 5 (1914).

F.2d 1339, 1342 (4th Cir. 1976).

2. The District Court Failed to Apply This Court's Standard on the Prospect of Success on the Merits.

This Court has recognized the district courts' limited role in considering the merits, when the Commission seeks injunctive relief under Section 13(b). "'The district court is not authorized to determine whether the antitrust laws have been or are about to be violated. That adjudicatory function is vested in the FTC in the first instance.'" *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001), *quoting FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1342 (4th Cir. 1976).

Under this Court's jurisprudence, the Commission meets its burden of showing prospects for success on the merits by raising questions "so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals."[5] The Commission is not required to show that it probably will succeed at a plenary trial, but that "it has a fair and tenable chance of ultimate success on the merits."[6] Instead of applying this legal standard, the district court acted as though it was the final arbiter of the

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5 *FTC v. Heinz*, 246 F.3d at 714-15.

6 *FTC v. Beatrice Foods Co.*, 587 F.2d 1225, 1229 (D.C. Cir. 1978).

case, imposing on the Commission a far more extensive burden than Congress intended when it enacted Section 13(b).[7]

Not surprisingly, since the district court's conclusion that the Commission was not likely to succeed on the merits was based on only 30 days of pre-trial discovery and a two day hearing, the district court committed multiple critical errors in its analysis of the antitrust issues involved in the Commission's challenge. As Judge (now Justice) Ginsburg has observed, district courts in such proceedings are ill-equipped, as compared to plenary trial courts, to make such decisions. *See Weyerhaeuser Co.*, 665 F.2d at 1083 (D.C.Cir. 1981) (district courts' ruling in a Section 13(b) case "must be made under time pressure and on incomplete evidence" and "the risk of an erroneous assessment is therefore higher than it is after a full evidentiary presentation."). Indeed, the district court itself noted that "[u]nfortunately the court * * * has had to act under severe time constraints (and with fewer resources than counsel has had) in evaluating the evidence and arguments, reaching its decision and attempting quickly to articulate

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[7] *See, e.g.*, "[T]he FTC *has not met its burden to prove* that 'premium natural and organic supermarkets' is the relevant product market in this case for antitrust purposes" (*FTC v. Whole Foods*, 502 F. Supp. 2d at __, Op. at 64) (emphasis added); "[T]he FTC *has not proven* that it is likely to prevail on the merits at an administrative proceeding and subsequent appeal to the court. " *FTC v. Whole Foods*, 502 F. Supp. 2d at __, Op. at 92 (emphasis added.).

that decision in a reasonably thorough and comprehensible opinion." *FTC v. Whole Foods Market, Inc.*, 502 F. Supp. 2d 1, __ (D.D. C. 2007), Op. at 3.

More fundamentally, focusing on the ultimate merits of the Section 7 challenge, the district court never addressed whether there were "questions going to the merits so serious, substantial, difficult and doubtful as to make them a fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance." As will be more fully addressed in the briefs on the merits of the appeal, the district court could not properly have concluded that there was not a fair ground for litigation had it addressed that issue.

3. The District Court Failed to Balance the Equities and to Consider the Public Interest.

The court below compounded its error by cutting its analysis short upon concluding that the Commission had failed to meet its supposed burden of proving its case at the preliminary injunction stage. Under the statutory standard, it is necessary to balance the equities and consider the public interest. Under Section 13(b), courts "must * * * weigh the equities in order to decide whether enjoining the merger would be in the public interest." *FTC v. H.J. Heinz Co.,* 246 F.2d 708, 725 (D.C. Cir. 2001). This is a required, not discretionary, step in the analysis. Moreover, "private equities do not outweigh effective enforcement of the antitrust

laws." *FTC v. Weyerhaeuser,* 665 F.2d at 1083. And, where the weighing of the equities favors the Commission, this "necessarily lightens the burden on the FTC to show likelihood of success on the merits." *FTC v. Heinz,* 246 F.2d at 727. Contrary to these controlling principles, the district court squarely refused to weigh the equities or consider the public interest at all. *FTC v. Whole Foods,* 502 F. Supp. 2d at __, Op. at 92.

4. Setting a Prompt Briefing Schedule Will Allow Expeditious Correction of Legal Errors and Preserve the Possibility of Effective Relief.

As set forth in the Commission's opposition to Whole Foods' motion to dismiss, the instant appeal is not moot because the courts retain the ability to grant effective relief in the form of a hold-separate order, or other limited injunctive relief, to preserve the Wild Oats brand and stores in order to facilitate an eventual divestiture order. The merger parties' actions and statements to date indicate that the effects of the merger will develop over time, not overnight. Nevertheless, some Wild Oats stores have been closed already, and others are slated to be closed.[8] Whole Foods has represented that it has "now beg[u]n the integration

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[8] *See. e.g.,* Gail Appleson, ST. LOUIS POST-DISPATCH, *Fruit and Spice Flavors Lend a Hint of the Exotic,* Oct. 10, 2007 at L-9 ("Wine and food shoppers will find business as usual at Wild Oats . . . although the store is slated to close next summer.")

process," and intends to make substantial changes over the next two years."[9] Accordingly, it is vital that the present appeal go forward promptly, so that, upon reversal of the flawed decision below, the Commission can obtain relief freezing the status quo before Whole Foods completes its planned integration.

Setting a briefing schedule at this time will allow for timely disposition of the appeal, and preserve the possibility of effective relief, on both an interim and a permanent basis. Such a briefing schedule will not disadvantage the merger parties or impose any burden on this Court; for the immediate future, the schedule would simply set the date on which the Commission's opening brief is to be filed.

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[9] *See* Whole Foods Form 8K (Aug. 28, 2007), http://www.sec.gov/Archives/edgar/data/865436/000110465907065555/a07-22865_1ex99d1.htm

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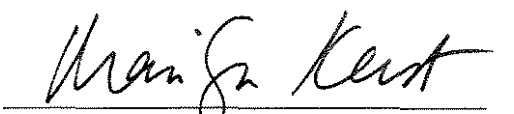

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