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ORAL ARGUMENT SCHEDULED FOR APRIL 23, 2008
No. 07-5276

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

FEDERAL TRADE COMMISSION,
Plaintiff-Appellant,

v.

WHOLE FOODS MARKET, INC., and
WILD OATS MARKETS, INC.,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Columbia, Civ. No. 07-cv-01021-PLF

PROOF REPLY BRIEF FOR APPELLANT FEDERAL TRADE COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(1)(1), Appellant Federal Trade Commission certifies as follows:

(A) PARTIES

FEDERAL TRADE COMMISSION *(Plaintiff)*

WHOLE FOODS MARKET, INC. *(Defendant)*

WILD OATS MARKETS, INC. *(Defendant)*

APOLLO MANAGEMENT HOLDING LP *(Intervenor)*

DELHAIZE AMERICA. INC. *(Interested Party)*

H.E. BUTT GROCERY COMPANY *(Intervenor)*

KROGER CO. *(Intervenor)*

PUBLIX SUPER MARKETS, INC. *(Intervenor)*

SAFEWAY INC. *(Intervenor)*

SUPERVALU INC *(Intervenor)*

TRADER JOE'S COMPANY *(Intervenor)*

TARGET CORPORATION *(Movant)*

WAL-MART STORES, INC. *(Intervenor)*

WINN-DIXIE STORES INC *(Intervenor)*

WEGMANS FOOD MARKETS, INC. *(Movant)*

AMICI CURIAE

AMERICAN ANTITRUST INSTITUTE

CONSUMER FEDERATION OF AMERICA

ORGANIZATION FOR COMPETITIVE MARKETS

(B) RULING UNDER REVIEW

Federal Trade Commission v. Whole Foods Market, Inc., 502 F. Supp. 2d 1 (D.D.C. 2007).

(C) RELATED CASES

The case on review has not previously been before this Court or any other court. Appellant is not aware of any related cases in this Court or any other court.

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SUMMARY OF ARGUMENT

There is no dispute that the preliminary injunction standard in this case is the one articulated in *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001). Whole Foods misstates *Heinz*, however, in an effort to excuse the district court's failure to follow it. Under *Heinz,* the Commission makes a "proper showing" when it raises "serious, substantial" questions that create a "fair ground" for further investigation and study. *Id.* at 714-15. Whole Foods' brief recasts the "proper showing" language in Section 13(b) as a "burden to prove," as if a preliminary injunction hearing were a plenary trial on the merits, and transforms *Heinz*' "serious, substantial" standard into the more stringent traditional equity requirement to show "substantial likelihood" of success. However, this just underscores how far the district court strayed from the *Heinz* standard.

Whole Foods also devotes much of its brief to describing evidence that supposedly supported its factual contentions. However, that is irrelevant to the question before this Court. The issue on this appeal is not whether Whole Foods presented a detailed factual case in the court below, but whether the district court violated the *Heinz* standard when it ignored the heart of the Commission's case.

Whole Foods' assertion that this appeal is moot fails, because there remains judicial power to grant the Commission effective relief, albeit not in the form of a full-stop injunction.

ARGUMENT

I. WHOLE FOODS DOES NOT ADDRESS THE DISTRICT COURT'S FAILURE TO APPLY THIS COURT'S *HEINZ* STANDARD.

A. Whole Foods Confuses the Requirement of a "Proper Showing" With a "Burden to Prove," and the *Heinz* Standard with the Traditional Equity Standard.

Whole Foods repeatedly professes to embrace the *Heinz* standard. Br. at 32, 40, 44, 45. Like the court below, it also pays lip service to that standard, reciting that the FTC is required only to "show questions on the merits so serious and substantial that they are fair ground for thorough investigation by the FTC in the first instance and ultimately by the Court of Appeals." Br. at 43. However, Whole Foods, like the court below, distorts the *Heinz* standard and the position of the Commission in this case.

1. Whole Foods misstates the Heinz standard in at least three different ways, in an attempt to paper over the district court's departure from it. First, it contends that "[t]he district court's understanding that the FTC must meet its 'burden to prove'" the relevant product market "is no different than the statute's

textual requirement that the FTC make a 'proper showing' to obtain a preliminary injunction." Br. at 43.[1] This ignores the fact that the proceeding below involved an application for a preliminary injunction under the special statutory standard of Section 13(b), not a plenary adjudication. In such a proceeding, the Commission is not required to *prove* any element of its case. Rather, in light of the "narrow issue" to be adjudicated in such a proceeding, it is not the role of the court to "resolve the conflicts in the evidence, compare concentration ratios and effects on competition in other cases, or undertake an extensive analysis of the antitrust issues." *See FTC v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1164 (9th Cir. 1984).

Second, Whole Foods would have this Court adopt the very standard it rejected in *Heinz* – asserting that the district court correctly required the Commission to show a "'substantial likelihood' that [it] can prove its asserted product market." Br. at 46 (quoting Op. at 92; JA__). If this was indeed the test applied by the district court, it was plain error as a matter of law. A "substantial likelihood" standard is identical to the "more stringent, traditional" standard that

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[1] In pertinent part, Section 13(b)(2) of the FTC Act provides that, "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, * * * a preliminary injunction may be granted * * * ." 15 U.S.C. § 53(b)(2).

Heinz held to be inapplicable.[2] *Heinz,* 246 F.3d at 714 (in enacting Section 13(b), Congress rejected "the more stringent, traditional 'equity' standard for injunctive relief") (citations omitted.).

Third, and most fundamentally, Whole Foods ignores *Heinz*'s holding that Congress's enactment of Section 13(b) "demonstrated its concern that injunctive relief be broadly available to the FTC by incorporating a unique public interest standard." *Heinz,* 246 F.3d at 714 (citations and internal quotation marks omitted). Whole Foods suggests that, because the district court concluded that the Commission had not proven a "likelihood" of success, it was justified in ending its analysis without further "consider[ing] the equities *and* the public interest." *See* Br. at 41; Op. at 92, JA___ (emphasis added). But the public interest is *always* at the heart of a proper analysis under Section 13(b), as we have shown previously.

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[2] *See, e.g., Davenport v. Int'l Bhd. of Teamsters*, 166 F.3d 356, 360 (D.C. Cir. 1999); *Serono Lab. v. Shalala*, 158 F.3d 1313, 1317-1318 (D.C. Cir. 1998). *See also FTC v. Nat'l Tea Co.*, 603 F.2d 694, 698 (8th Cir. 1979) (rejecting "more stringent standards" of "strong likelihood" or "substantial likelihood," in order to "insure[] that the courts will invoke their independent judgment in reviewing applications for preliminary injunctive relief without raising so strict a requirement that the statute's intended protection of the public interest will be frustrated.").

See Opening Br. at 29, 34.[3]

2. In addition to thus misstating the *Heinz* standard, Whole Foods misstates the Commission's position, asserting that the Commission claims it is "automatically" entitled to a preliminary injunction "simply because it seeks one." Br. at 39. This is a red herring. The Commission has never contended that federal district courts are rubber stamps; rather, it has argued exactly what *Heinz* held: that the district court's "independent judgment" is properly directed to determining whether the Commission has raised "serious, substantial" questions. Opening Br. at 30-33. There is no small irony in Whole Foods' argument that the district court was not required to consider *only* the Commission's evidence, given that the district court erred in ignoring the Commission's evidence wholesale.

The standard that the Commission urges – based on the enactments of Congress, the policies reflected in their legislative history, and the precedents of this Court – does not make the district court a "rubber stamp" in a Section 13(b)

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[3] The district court explicitly acknowledged that it did not consider the public interest. [JA__; Op. at 92] ("Because the FTC has not demonstrated a likelihood of success on the merits, the Court need not consider the equities *and the public interest*.") (emphasis added.). The position taken by the court below equates consideration of all of the factors bearing on whether the public interest will be served by issuance of a preliminary injunction with only one of those factors. That is contrary to both the statutory language and the legislative history of Section 13(b)

proceeding. There could certainly be instances in which the evidence presented by the Commission would be so deficient that a district court could properly determine that there was not a "fair ground" for administrative litigation and that the public interest in having the Commission decide whether a merger is legal would not otherwise be served by issuance of a preliminary injunction. In those circumstances, a preliminary injunction could properly be denied. But given the compelling evidence from the merging parties' own mouths presented by the Commission, and the undisputed opinions of the Commission's economic expert corroborating that evidence, that certainly was not this case.

B. The District Court's Treatment of the Evidence Shows That It Failed to Follow the *Heinz* Standard.

The district court ignored the Commission's direct evidence of market definition and the likely anticompetitive effects of the merger. The court did not mention the pre-litigation statements of Mr. Mackey and other senior executives at Whole Foods and Wild Oats that the merging parties viewed each other as each others' closest substitutes; that conventional supermarkets were not effective competitors and could not quickly reposition themselves to provide such competition; and that, in local markets where each was located, Whole Foods and Wild Oats engaged in fierce competition both as to the pricing of their products

and the size and features of their stores. *See* Opening Br. at 7-11. Nor did the district court mention the pre-litigation statements of Mr. Mackey concerning the purpose and probable effect of the transaction – to avoid "nasty price wars" and to prevent conventional supermarkets from entering into competition with Whole Foods by acquiring Wild Oats. *See* Opening Br. at 11-14. In addition, the district court did not mention most of the Commission's economic evidence. *See* Opening Br. at 15-22. At the same time, the district court accepted evidence that Whole Foods said supported its contrary assertions, but which failed to meet those questions head-on, much less dispel them.

Such a one-sided treatment of contested evidence is always error, but it is especially inimical to the proper role of a district court in a Section 13(b) case, which is to ascertain whether there are "serious, substantial" issues warranting plenary consideration by the Commission. The district court's treatment of the evidence further demonstrates that it failed to apply the correct legal standard.

1. The District Court Failed to Consider, Or Even Mention, the Most Probative Direct Lay Evidence.

a. The District Court Ignored the Direct Evidence of the Parties' View of the Relevant Product Market in This Case.

The district court passed over the Commission's evidence of high-level contemporaneous strategic planning and comments by Whole Foods' CEO to the Whole Foods Board of Directors and to investment analysts, without any mention whatever. *See* Opening Br. at 7-14. These were not just a few "aggressive" statements by Whole Foods' CEO; instead, they showed that Whole Foods and Wild Oats were each other's closest substitutes, and that conventional supermarkets were not effective substitutes and were not likely to be in the near future. As contemporaneous assessments of market conditions by business leaders engaged in market activities, they are among the most probative evidence that can be adduced.[4] That the district court considered *none of this evidence* in denying the preliminary injunction is reversible error.

The Commission also adduced evidence in the form of Whole Foods' "Project Goldmine" predictions of the merger's effects. Whole Foods argues here,

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[4] *See* John Harkrider, *Proving Anticompetitive Impact: Moving Past Merger Guidelines Presumptions,* 2005 Colum. Bus. L. Rev. 317, 319 ("documents written by senior management about the rationale for the transaction * * * should be given great weight.").

as it did in the district court, that if the Commission's view of the relevant market were correct, the Goldmine predictions would inevitably show higher capture rates[5] in areas where the merger would create a "monopoly" and lower capture rates where it would not. Br. at 27. Indeed, Whole Foods claims that the capture rate should be near 100 percent if this were a valid antitrust market. Br. at 27, 54.[6] The significance of these predicted capture rates is not in their absolute magnitude, however, but in their predicted reduction of the amount of actual loss Whole Foods would suffer if it raised prices. It was undisputed that a capture rate as low as [ ] percent would dictate the conclusion that Whole Foods could profitably increase prices by 5 percent after the merger. *See* discussion at pp. 11-14 below. The district court found that the average capture rate was [ ] percent – *over 4 times* that amount. [JA__; Op. at 60.]

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[5] "Capture rate" means the amount of sales Whole Foods predicted it would gain by closing a nearby Wild Oats store.

[6] Whole Foods' testimony reveals, however, that the predicted capture rates were based not only on whether the merger would create a "monopoly" but also on geographic and other factors. [JA__; PX2858 at 197-200.] Naturally, if Whole Foods closed a Wild Oats store that was right across the street from a Whole Foods store, its predicted capture rate would be greatly enhanced. Conversely, the predicted capture rate would be lower where Wild Oats' customers would have to change their driving patterns in inconvenient ways to get to a Whole Foods store after the Wild Oats closed, or make do with inferior substitutes, out of necessity.

Yet the district court simply ignored this direct evidence that Whole Foods and Wild Oats were uniquely close substitutes, and that this acquisition enables Whole Foods to exercise monopoly power, to the detriment of consumers.

b. The District Court Ignored the Direct Evidence That the Merger Would Lead to Higher Prices.

The district court did not consider or even mention the assertions of Whole Foods' CEO, who told his Board of Directors that the merger would allow Whole Foods to avoid "nasty price wars." [JA__; PX773-001] Whole Foods seeks to justify that by suggesting that the Commission should have presented evidence of prior price increases. Br. at 25-26. But it offers no authority that such evidence is required under Section 7, even in a plenary merits proceeding, and there is no such authority. Moreover, Whole Foods' assertion that its "internal documents show no intention to raise prices" (Br. at 26) is belied by the very statements that the district court disregarded: avoidance of "price wars" would allow Whole Foods to charge higher prices than if it had Wild Oats as a competitor.[7]

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[7] Insofar as the district court relied on post-challenge testimony and declarations from the merger parties' employees, that was clear error. Probative value is "limited not just when evidence is actually subject to manipulation, but rather * * * whenever such evidence *could arguably be* subject to manipulation." *Chicago Bridge & Iron Co. v. FTC,* 2008 U.S. App. LEXIS 1776 (5th Cir. Jan. 25, 2008) at *48; *see also Hosp. Corp. of Am. v. FTC,* 807 F.2d 1381, 1384 (7th Cir. 1986) ("Post-acquisition evidence that is subject to manipulation by the party

In sum, the district court's failure to consider the Commission's most probative lay evidence cannot be squared with the *Heinz* standard.

2. The District Court Failed to Consider, or Even Mention, Most of the Commission's Unrebutted Expert Testimony.

Trying to cloak the district court's failure to consider most of the Commission's expert evidence, Whole Foods seeks to harmonize the experts' views. Br. at 33, 51. This supposed harmony is an illusion. The Commission's expert provided extensive evidence that unquestionably raised "serious, substantial" issues satisfying the *Heinz* standard.

a. The District Court Ignored the Most Probative Evidence on Critical Loss.

The Commission's expert, Professor Murphy, like Whole Foods' expert, Dr. Scheffman, submitted a critical loss analysis in order to evaluate the merger. Whole Foods contends that both experts had to "estimate" the value of actual loss for purposes of this analysis. Br. at 29-30. In fact, Professor Murphy based his estimate on empirical data that came *from Whole Foods*, while Dr. Scheffman's value for actual loss was only a guess. Dr. Scheffman did not propose any alternative for the [ ] percent capture rate that Professor Murphy calculated

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seeking to use it is entitled to little or no weight").

would make a significant post-transaction price increase profitable. *Id.* at 21.

Nor did he challenge Dr. Murphy's conclusion, supported by Whole Foods' Project Goldmine, that Whole Foods' actual capture rate was higher than that. Whole Foods also tries to justify the district court's failure to consider Professor Murphy's critical loss analysis by arguing that Professor Murphy ignored "actual consumer behavior" – *i.e.,* that simply because many Whole Foods and Wild Oats customers also shop at conventional grocery stores. Br. at 53-54. But Dr. Scheffman did not rely on "actual consumer behavior" either. He relied instead on a review of industry literature that had been supplied to him by Whole Foods' counsel.[8]

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[8] Whole Foods also attempts to excuse the district court's uncritical acceptance of this nonempirical evidence by making much of the statements of its paid industry expert, Dr. Stanton. Br. at 5-7. The opinions he gave in this case, however, are contradicted by his statements in other circumstances, and thus should have carried no weight. For example, Dr. Stanton opined in the present case that all supermarkets compete with all other supermarkets by differentiating themselves from each other (Br. at 6), but elsewhere opined that highly lucrative "niche" markets exist within food retailing. In Dr. Stanton's words, "[t]here are riches in niches." http://www.knoxstudio.com/shns/story.cfm?pk=OBESITY-07-14-04&cat=AN
As recently as May, 2007, Dr. Stanton is reported to have said that:

> Marketers have now realized targeting a particular band of consumers rakes in more money than the mega stores. Niche marketing tactics involve setting up different kinds of stores with different kinds of products of limited range at a special price for a special group of consumers. These consumers feel more comfortable shopping in the

That industry literature in turn is irrelevant in defining the relevant product market in this case. If, as Whole Foods says, "virtually all Whole Foods customers also regularly grocery shop at other supermarkets" (Br. at 11), that does not mean the merger is unlikely to lessen competition. What is necessary to know, as an economist would say, is to what extent these stores are or are not substitutes for each other – in other words, to what extent customers are buying *different* products in the two types of stores, and to what extent they are buying *the same* products.

A customer who goes to Whole Foods or Wild Oats for natural and organic perishables and prepared foods, then goes to a conventional supermarket for Twinkies, Tide, and Kool Filter Kings, is buying entirely different products at the two stores. A customer who follows this basic pattern but occasionally picks up some organic produce from the conventional supermarket's limited selection would be in an intermediate zone.[9]

> niche markets since the market is tailor-made for them, making the customer buy more and more.

http://www.lankabusinessonline.com/fullstory.php?newsID=1184495994&no_view=1&SEARCH_TERM=17)

[9] Whole Foods does not address the industry study by the highly-regarded Hartman Group that found that consumers in fact buy different products at the different types of stores. [PX2072-110; JA__.] Testimony from [ ]

This is exactly the kind of issue that warrants further "investigation [and] study" in an administrative adjudication. *Heinz,* 246 F.3d at 715.

b. The District Court Ignored Almost All of the Commission's Econometric Evidence.

Whole Foods also tries to excuse the district court's failure to consider almost all of the econometric evidence by suggesting that the two experts' views are in harmony. This cannot be done either. Only Professor Murphy conducted any econometric studies. And, far from concluding that his results were "not statistically significant" (Br. at 20), Professor Murphy testified to the contrary. According to Professor Murphy, especially given the thin profit margins in this industry, his studies based on margin data yielded results that were statistically

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that directly follows what Whole Foods quotes (Br. at 9) confirms that [

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[JA__; PX2870 at 34-35.]

significant when taken together. [JA__; Tr. at 135, 7/31/07 a.m.] To check what his econometric studies showed, Professor Murphy also considered the merger parties' own contemporaneous statements and documents, concluding that both types of evidence supported the same conclusion: that the merger's effect "may be substantially to lessen competition." [JA__; PX2878-029, ¶ 70.][10]

3. Conclusion: The District Court Failed to Apply the *Heinz* Standard.

The Commission does not ask this Court to referee disputed facts or the district court's resolution of them. Rather, the important point here – of which the district court wholly lost sight – is that the existence of such disputes, including conflicting expert submissions, makes this precisely the sort of case in which the Commission must be afforded an effective opportunity to exercise its statutory authority to adjudicate and remedy the alleged violation of law in the first

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[10] Dr. Scheffman did conduct a one-day price study, which purported to show that Whole Foods' prices were not affected by the presence or absence of Wild Oats in a geographic market. Dr. Scheffman used Whole Foods' register prices from one day – after this litigation was filed. Insofar as the district court credited this evidence though, that was clear error. This is quintessentially the type of evidence that is manipulable by the party that seeks to use it. Such evidence must be given little weight in a Section 7 case. Otherwise, "violators could stave off such actions merely by refraining from . . . anticompetitive behavior when such a suit was threatened or pending." *United States v. Gen. Dynamics,* 415 U.S. 486, 504-05 (1974); *accord Alberta Gas Chems. Ltd. v. E.I. Du Pont de Nemours & Co.,* 826 F.2d 1235, 1244 (3d Cir. 1987).

instance. *See* Opening Br. at 28-29. Even if the district court's adoption of Whole Foods' factual assertions were not erroneous, it remains manifest legal error for the court below not to have recognized, on a record such as this, that the Commission has

> raised questions going to the merits 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.

Heinz, 246 F.3d at 714-15.

C. The District Court's Legal Analysis Ignored Key Aspects of Modern Merger Jurisprudence.

As demonstrated by the discussion of the evidence, both above and in our opening brief, the Commission made a strong showing below not only of the traditional indicia of product market definition, but also a *direct* showing of the anticompetitive effects likely to ensue from this acquisition – *i.e.*, profitable, *unilateral* prices increases by Whole Foods, made possible by its acquisition of its closest rival and the closure of many stores, whose customers will be captured by Whole Foods in large numbers. *See* pp. 8-11 above; Opening Br. at 6-13. As we

explained previously, such a showing not only affords a possible means of establishing a Section 7 violation without a formal market analysis,[11] but is also highly salient to a proper product market definition. Opening Br. at 37-39.

Whole Foods makes no attempt to rebut this argument directly, and tries to shrug off the district court's failure to consider the direct evidence of anticompetitive effects by suggesting that the Commission has not challenged the district court's Section 7 analysis. Br. at 45 n.17.[12] As we have shown previously, however, the district court's failure to deal with the effects evidence, in the course of its market definition analysis, contravened this Court's instruction that the merged entity's ability to exert market power is "the ultimate consideration" under Section 7, *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 992 (D.C. Cir. 1990), and that where there are "better ways" than market share "to estimate market power, the court should use them." *United States v. Baker Hughes, Inc.*,

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[11] *See* Opening Br. at 38 & n.26. The further investigation and study of the applicability of such a theory to the present case is another of the important matters that the Commission should have an opportunity to address in further administrative proceedings. *Cf.* Br. at 52-58.

[12] Ironically, Whole Foods elsewhere suggests that the district court really meant to say that, "regardless of the market definition," the Commission "would not be able to prove that the effect of the proposed acquisition may be substantially to lessen competition." Br. at 1-2. Such a statement appears nowhere in the district court's opinion, which fails to address the Commission's direct evidence of competitive effects.

908 F.2d 981, 992 (D.C. Cir. 1990) (Thomas, J.) (quoting *Ball Mem'l. Hosp. v. Mut. Hosp. Ins.*, 784 F.2d 1325, 1336 (7th Cir. 1986).

Whole Foods simply confirms the unduly narrow approach that both it and the court below have taken to market definition, by attacking the Commission for supposedly proffering "[m]ultiple unwieldy, amorphous multi-factor definitions," that do not mirror the precise "characteristics" that have distinguished market definition in prior cases. Br. at 46-47. This argument ignores the case-specific analysis that both the Supreme Court and this Court require. *See, e.g., Brown Shoe Co. v. United States,* 370 U.S. 294, 322 n. 38 (1962) ("only * * * examination of the particular market – its structure, history and probable future – can provide the appropriate setting for judging the probable anticompetitive effect of [a] merger"); *Heinz,* 246 F.3d at 717. Competition and markets are dynamic, and antitrust law recognizes that new means of providing combinations of goods and services may require the recognition of distinct antitrust markets. *See, e.g., FTC v. Staples, Inc.,* 970 F. Supp. 1066 (D.D.C. 1997) (recognizing distinct nature of market for "office superstores"). Whole Foods and other premium natural and organic supermarket companies have recognized and profited from a consumer desire for a distinct combination of product mix, ambience, and high service that has set them apart from conventional supermarkets. The delimitation of the

precise bounds of such a market is complex, but this is often the case with highly differentiated products.[13]

Ultimately, antitrust markets are not defined by reference to the physical characteristics or functions of products, but rather by whether and to what extent sellers of those products can "force a purchaser to do something that he would not do in a competitive market." *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 464 (1992) (citations omitted.). Here, the Commission showed that the combination of features offered by stores such as Whole Foods and Wild Oats has attracted customers who are willing to pay a substantial premium (even if they also make purchases elsewhere) and who, by Whole Foods' own projections, are likely enough to divert from one such store to another so that a small but significant price increase by a post-merger Whole Foods would be profitable. That showing amply satisfies modern merger jurisprudence, and raised "serious, substantial" legal questions that created a "fair ground" for litigation.

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[13] For example, a BMW is a very different product from a Honda Civic, based on different styling, performance, and amenities. The explanation of these differences is arguably "unwieldy" and certainly "multi-factor," but that does not mean that the two are necessarily in the same antitrust market.

II. THIS APPEAL IS NOT MOOT.

Throughout these proceedings, the Commission has sought relief that, under the circumstances, would best serve the interests of protecting consumers from the loss of competition and preserve its ability to craft effective final relief in the event that it determines that Whole Foods' acquisition of Wild Oats is unlawful. When it filed its application for a preliminary injunction in the district court, prior to the merger's consummation, it sought the form of relief that best serves these interests, and is the presumptive remedy when the Commission makes a proper showing under Section 13(b) – *i.e.*, a full-stop preliminary injunction to prevent consummation of the transaction. *See FTC v. PPG Indus.*, 798 F.2d 1500, 1506-07 (D.C. Cir. 1986). After such relief was initially denied, the Commission immediately applied for an injunction pending appeal, first from the district court and then from this Court. Now that the transaction has been closed and such relief is no longer available, the Commission seeks an order that will preserve, as well as possible, the assets and commercial identity of Wild Oats, to facilitate any eventual divestiture order. Contrary to Whole Foods' contentions (Br. at 34), there is no inconsistency in these positions, which have followed a logical progression as events have unfolded.

For present purposes, what matters is whether effectual (even if not perfect)

interim relief remains possible. Whole Foods has done nothing to refute our initial showing that such relief remains possible. Whole Foods has acknowledged that the integration of Wild Oats may take up to two years. *See, e.g.*, JA__; Whole Foods Form 8-K (August 28, 2007). In another SEC filing, Whole Foods declared that it will close fewer stores than it originally planned and that even those stores slated for closure will remain open for several months or more. *See* JA__; Whole Foods Form 8-K (Oct. 2, 2007) ("Regarding the * * * 74 Wild Oats and Capers banner stores * * * the Company currently intends to close nine stores and relocate another eight stores to existing Whole Foods Market sites in development."). Thus, Whole Foods' own pronouncements establish that the consummation of the merger on paper does not mean that the integration of the two companies is complete. It is that integration that the Commission seeks to prevent in this action. Maintaining the current status quo would preserve, to the greatest extent possible, that opportunity for meaningful relief.

Whole Foods' brief does nothing to dispel that conclusion. It does not contend that the Wild Oats banner has been changed to the Whole Foods banner – or that the Wild Oats banner has been abandoned – an any, much less all, of the local markets which the district court found were the relevant markets. It does not even contend that will happen before this appeal is decided. Br. at 31. It just

argues that it is using common product sources (which it says were common to all supermarkets before the merger) and has made some changes to Wild Oats' stores and personnel which are not part of the record in the district court or on appeal. *Id.* Indeed, in touting the increased sales it has enjoyed since closing the Wild Oats stores it has closed (*id.*), Whole Foods tends to confirm the fact that most of the revenue captured from the closed stores would inure to the benefit of Whole Foods and hence to reinforce the critical loss analysis proffered by the Commission's expert.

Whole Foods' citation to *FTC v. Owens-Illinois, Inc.*, 850 F.2d 694 (D.C. Cir. 1988), for the proposition that the consummation of the merger automatically renders this Commission's appeal moot, is misplaced. This Court's brief *per curiam* opinion gave no indication of its reasons for dismissal, and certainly did not suggest that consummation of a merger renders any subsequently available relief ineffective in all cases. Moreover, the fact that the Commission concluded that its appeal in *Owens-Illinois* was moot, based on the specific factual circumstances there, has no bearing here, where Whole Foods' public pronouncements indicate that it has no immediate plans to erase Wild Oats' identity or its presence in the market. No court has dismissed a Commission case as moot where another measure such as a hold separate order was available as

secondary, but viable, relief.

Remedies for acquisitions that violate Section 7 are meant to be flexible, tailored to the specific circumstances. As this Court held in *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1083-84 (D.C. Cir. 1981), a full-stop injunction is not the only possible relief in a merger case. 665 F.2d at 1083-84. The Court recognized, for example, that "[a] hold separate order was an established device in antitrust law enforcement" when Congress enacted Section 13(b), and further held that the courts have flexibility in "mold[ing] decrees 'to the necessities of the particular case.'" *Id.* at 1084 (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)).

Weyerhaeuser noted that mootness may depend on whether "all parties necessary to effective review and disposition of the controversy" are present before the court. 665 F.2d at 1077 (D.C. Cir. 1981). This does not mean that an acquiring company can insulate itself from appeal by selling to a third party assets that have no relation to the anticompetitive effects of the merger. In this case, notably, Whole Foods has *not* sold the stores that operate under the Wild Oats name – which are the ones that raise competitive concerns.[14] Although Whole

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[14] Whole Foods' sale of Wild Oats' stores that operate under the names Sun Harvest and Henry (Br. at 30) has no relevance here. Only the larger stores that operate under the Wild Oats name raised a competitive concern. [JA__; PX2878 at 10, ¶ 26.] For this reason, effective relief can be fashioned without

Foods is undoubtedly moving forward to integrate Wild Oats, it does not deny that this effort will take the two years it has announced.

The other cases cited by Whole Foods, *FTC v. Beatrice Foods Co.,* 587 F.2d 1225, 1226 (D.C. Cir. 1978), and *FTC v. Food Town Stores, Inc.,* 539 F.2d 1339, 1342-43 (4th Cir. 1976), also do not support a finding of mootness here. In *Beatrice Foods,* Judge Bazelon merely explained his reasons for abstaining from voting on a suggestion for rehearing *en banc*, after the merits panel had granted rehearing. 587 F. 2d at 1226. He did not suggest that he had evaluated the precise circumstances in order to determine whether a live case or controversy still existed. In *Food Town*, the court considered whether a district court's denial of a temporary restraining order to prevent a merger was a final, appealable order under 28 U.S.C. § 1291. *Food Town,* 539 F.2d at 1342. The question was whether there was appellate jurisdiction for purposes of granting an injunction pending appeal, not whether there could be "any effectual relief whatever."

As a practical matter, even mergers that have long been consummated can be undone. For instance, in *Chicago Bridge & Iron Co. v. FTC,* 2008 U.S. App. LEXIS 1776 (5th Cir. Jan. 25, 2008) at *67-*71, the Court of Appeals affirmed an

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regard to the Sun Harvest or Henry stores.

order to divest sufficient assets to restore competition – almost seven years after the transaction. Although disentangling the assets after a merger may be difficult, it is the appropriate remedy where "the violation is the acquisition of a previously viable and independent entity." *Id.* at *68.

Whole Foods claims that the fact that the Commission's administrative proceeding remains stayed somehow shows that this matter is moot. Br. at 37-38. To the contrary, simple concerns of judicial and administrative economy counsel against conducting this appeal and a plenary trial at the same time. *See* 16 C.F.R. § 3.26 (setting forth procedures for staying the Commission's administrative adjudications and for respondents to "obtain consideration of whether continuation of an adjudicative proceeding is in the public interest after a court has denied preliminary injunctive relief.") The current stay of the administrative proceeding allows this appeal to proceed without requiring trial counsel for both sides to embark on a plenary proceeding, which would include full discovery and a trial on the merits before an administrative law judge.[15]

Because an effective remedy remains available, this appeal is not moot.

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[15] The ALJ's decision may be appealed to the full Commission. The Commission's final decision, if adverse to the merging parties, is reviewable by a Court of Appeals. 15 U.S.C. § 21(c).

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below and enter an order enjoining any further integration of Wild Oats into Whole Foods, pending a final administrative adjudication on the merits. The Commission further respectfully requests that this Court remand the matter to the district court with instructions to oversee implementation of this injunctive relief.

Respectfully submitted,

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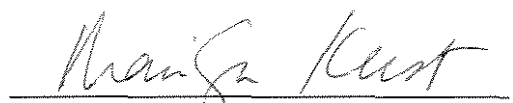
February 27, 2008

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32(a), I certify that the attached Reply Brief for Appellant Federal Trade Commission was prepared using WordPerfect X3, and 14-point Times New Roman, a proportionally-spaced typeface. It contains 6340 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(2).



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