PUBLIC VERSION

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

FEDERAL TRADE COMMISSION,	)	
	)	
Plaintiff,	)	**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	)	
	)	**EMERGENCY MOTION -**
	)	**RULING REQUESTED**
WILD OATS MARKETS, INC.,	)	**BY NOON, EDT,**
Defendants.	)	**AUGUST 20, 2007**

EMERGENCY MOTION OF THE FEDERAL TRADE COMMISSION FOR AN INJUNCTION PENDING APPEAL

JEFFREY SCHMIDT
Director

KENNETH L. GLAZER
Deputy Director
Bureau of Competition

MICHAEL J. BLOOM
RICHARD B. DAGEN
THOMAS J. LANG
CATHARINE M. MOSCATELLI
THOMAS H. BROCK
MICHAEL A. FRANCHAK
Attorneys

August 17, 2007

WILLIAM BLUMENTHAL
General Counsel

JOHN D. GRAUBERT
Principal Deputy General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

MARILYN E. KERST
Attorney
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580
Ph. (202) 326-2158
Fax (202) 326-2477
mkerst@ftc.gov

TABLE OF CONTENTS

PAGE

Preliminary Statement 1

Statement of Jurisdiction 4

Statement of the Case 4

ARGUMENT 5

I. THE COMMISSION IS LIKELY TO SUCCEED ON THE MERITS OF ITS APPEAL 5

A. The Commission Made a Strong Showing of Entitlement to Injunctive Relief 6

B. Defendants Have Failed to Refute the Commission's Presumptive Entitlement to a Preliminary Injunction. 12

C. The Lower Court's Ruling Contains Numerous Reversible Errors . 13

II. THE EQUITIES AND THE PUBLIC INTEREST ALL FAVOR ENTRY OF AN INJUNCTION PENDING APPEAL 16

A. The Public Interest Will Suffer Irreparable Injury If This Court Does Not Grant the Injunction Pending Appeal 16

B. The Possibility That a Brief Injunction Pending Appeal Will Harm to the Merger Parties Is Low 18

CONCLUSION 18

APPENDIX A – Opinion of District Court

APPENDIX B – Certificate of Parties and Amici

Preliminary Statement

Plaintiff-appellant Federal Trade Commission ("Commission") seeks emergency relief to enjoin pending appeal the acquisition by Whole Foods Market, Inc., the largest national operator of premium natural and organic supermarkets, of Wild Oats Markets, Inc., its largest competitor. This motion is filed pursuant to Fed. R. App. P. 8(a) and Circuit Rules 8 and 27(f). Counsel for the Commission has contacted counsel for the other parties by telephone and has served them by hand and electronically, pursuant to Circuit Rule 8(a)(2). The Commission has filed a notice of appeal and a motion for an injunction pending appeal in the district court.

The parties have informed the Commission that, unless enjoined, they will consummate their transaction at any time after noon, EDT, on August 20, 2007 – dismembering Wild Oats and closing a [redacted] of its stores that compete with Whole Foods stores. The Commission therefore asks this Court to consider its motion at this time, pursuant to FRAP 8, because it will be impracticable to wait to submit this motion until after a ruling from the district court on the Commission's motion for an injunction pending appeal.[1] Only by

---

[1] The notice of appeal and motion for injunction pending appeal were filed in the district court at approximately 11:20 am, August 17, 2007.

granting the requested interim relief can this Court maintain the status quo and assure that its review is meaningful.

The decision below, entered on Thursday, August 16, 2007, warrants scrutiny by this Court. The district court, first, has utterly ignored the bulk of the Commission's case, including clear and authoritative statements by the principals that the rationale for the transaction is to eliminate competition. Second, as to the material that the district court *did* rely on, it was thoroughly rebutted at trial. The district court's misapplication of the unilateral effects doctrine in this case presents a serious issue that warrants review by this Court.

In the court below, the Commission used the defendants' own business records and testimony to show that, prior to their agreement to merge, Whole Foods and Wild Oats were uniquely fierce competitors. Whole Foods sought "to crush" its only national competitor through every available means up to and including opening large and lavish stores as close to Wild Oats stores as possible. Recently, Wild Oats began its own aggressive expansion and pricing programs to take the competitive fight to Whole Foods – then stopped these efforts with the launching of the proposed merger. Whole Foods proposes to acquire Wild Oats, which was trading at $15 per share before the deal was struck, for $18.50 per share. Whole Foods' CEO, John Mackey, justified the price tag to a member of

his Board of Directors, saying that by buying Wild Oats and closing a significant number of its stores Whole Foods would avoid "nasty price wars" and prevent another company from using Wild Oats as a springboard into the premium natural and organic supermarket market. PX0773.

The Commission established that the proposed merger will eliminate Whole Foods' only premium natural and organic supermarket competitor in defined areas in the following 17 locations: Albuquerque, NM; Boston, MA; Boulder, CO; Hinsdale, IL (suburban Chicago); Evanston, IL (suburban Chicago); Cleveland, OH; Denver, CO; West Hartford, CT; Henderson, NV; Kansas City-Overland Park KS; Las Vegas, NV; Los Angeles, CA; Louisville, KY; Omaha, NE; Pasadena, CA; Portland, ME; and St. Louis, MO. Murphy Supp. Rebut. Report (PX02883) ¶ 8, Exhibit 2 at 012-023, 025-026. The proposed merger will reduce the number of competitors from three to two in a defined area in Portland, OR. *Id.* at 024.

Where, as here, the Commission has shown a likelihood of success on the merits, only a strong showing of equitable considerations can justify anything less than a full-stop injunction pending the completion of Commission adjudication. *See FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1087 (D.C. Cir. 1981) (R. Ginsburg, J.). Here defendants presented no such extraordinary equities, and made no attempt to show that any efficiencies might result from the merger.

An injunction pending appeal is necessary and in the public interest to allow meaningful appellate review on the important issues presented in this case.

Statement of Jurisdiction

This is an appeal from the denial of a statutory preliminary injunction sought under Section 13(b) of the FTC Act in aid of an administrative proceeding to determine the legality of defendants' transaction under Section 7 of the Clayton Act, 15 U.S.C. § 18, 15 U.S.C. § 21; *Heinz,* 246 F.3d at 711.

This Court has jurisdiction over this appeal under 28 U.S.C. §§ 1291 and 1292(a)(1). The order under review denied all relief sought by the Commission in the district court and resolved all issues before that court. The order is also reviewable as an order refusing to grant an injunction. This emergency motion has been filed promptly and is properly before this Court pursuant to Fed. R. App. P. 8(a).

Statement of the Case

Whole Foods is, in effect, paying its principal rival a large sum of money to close competing stores. That makes financial sense because Whole Foods knows that in locality after locality the majority of customers of the closed Wild Oats stores–in some instances more than [redacted]–will be captured by Whole Foods. These

projections come directly from Whole Foods' own evaluation of the proposed acquisition of Wild Oats, aptly named "Project Goldmine." The [redacted] capture rate, emblematic of the fact that a substantial portion of consumers regard Whole Foods and Wild Oats as uniquely close substitutes, is why the combination of Whole Foods and Wild Oats will substantially lessen competition. The Commission filed its complaint and motion for a preliminary injunction on June 6, 2007. The court held a two-day hearing based on the papers and live expert testimony, as the parties had stipulated, and, on August 16, 2007, entered the decision and order denying the Commission a preliminary injunction that is the subject of this appeal. The Commission immediately filed a Notice of Appeal and requested an injunction pending appeal, pursuant to Fed. R. Civ. P. 62 (c).

ARGUMENT

I. THE COMMISSION IS LIKELY TO SUCCEED ON THE MERITS OF ITS APPEAL.

In reviewing a preliminary injunction ruling, this Court "do[es] not afford deference when the appeal presents a substantial argument that the trial court's decision was premised upon an erroneous legal conclusion." *Ayuda, Inc. v. Thornburgh,* 948 F.2d 742, 757 (D.C. Cir. 1991), *citing Foundation on Economic Trends v. Heckler,* 756 F.2d 143, 152 (D.C. Cir. 1985). *See also Heinz,* 246 F.3d

at 713 (under Section 13(b) "the court evaluates whether it is in the public interest to enjoin the proposed merger.")

Moreover, the district court made clearly erroneous factual determinations that cannot withstand appellate scrutiny. *See United States v. Microsoft,* 253 F.3d 34, 229 (D.C. Cir. 2001) (clearly erroneous standard "does not compel us to accept factfindings that result from the District Court's misapplication of governing law or that otherwise do not permit meaningful appellate review"), *citing Pullman-Standard v. Swint,* 456 U.S. 273, 292 (1982); *Inwood Labs., Inc. v. Ives Labs., Inc.,* 456 U.S. 844, 855 n.15 (1982); *Serono Labs., Inc. v. Shalala,* 153 F.3d 1313, 1318 (D.C. Cir. 1998).

A. The Commission Made a Strong Presumptive Showing of Entitlement to Injunctive Relief.

Under Section 13(b) an injunction is appropriate if the Commission "raise[s] 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 714-715; *FTC v. University Health, Inc.,* 938 F.2d 1206, 1218 (11th Cir. 1991); *FTC v. Staples, Inc.,* 970 F. Supp. 1066, 1072 (D.D.C. 1997). The Commission "need not prove that the proposed merger would

in fact violate Section 7 of the Clayton Act. 'The determination . . . is reserved for the FTC and is, therefore, not before [the] Court.'" *FTC v. Cardinal Health*, 12 F. Supp. 2d 34, 45, *quoting Staples*, 970 F. Supp. at 1070; *accord, e.g., Heinz*, 246 F.3d at 714-15; *FTC v. Alliant Techsystems, Inc.*, 808 F. Supp. 9, 19 (D.D.C. 1992). Doubts are to be resolved against the transaction and in favor of a preliminary injunction. *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 906 (7th Cir. 1989), *citing United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 362-63 (1963).

Product market was a key issue in this case. The Commission proved that the premium natural and organic supermarkets market is the appropriate relevant product market in which to analyze the Whole Foods-Wild Oats merger, using factors set forth in *Brown Shoe Co. v. United States,* 370 U.S. 294, 325 (1962): "industry or public recognition . . ., distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." As the parties' own statements indicated, premium natural and organic supermarkets sell distinct products – tens of thousands of natural and organic products figuratively wrapped in lifestyle branding – in distinct ways, to distinct customers, as industry participants and

watchers acknowledge.[2] Whole Foods seeks a dominant position in this distinctive market, by buying out its nearest competitor. In *Heinz,* this Court preliminarily enjoined a proposed acquisition in a very similar set of circumstances:

> Heinz's own documents recognize the wholesale competition and anticipate that the merger will end it. Indeed, those documents disclose that Heinz considered three options to end the vigorous wholesale competition with Beech-Nut: two involved innovative measures while the third entailed the acquisition of Beech-Nut. Heinz chose the third, and least pro-competitive, of the options.

Heinz, 246 F.3d at 717.

The conclusion that the relevant product market is premium natural and organic supermarkets is supported by extensive evidence presented to the district court showing that: (1) where one of the Defendants is the only premium natural and organic supermarket in a geographic area, it is viewed by the Defendants as having a monopoly; (2) Whole Foods' valuation of the merger ("Project Goldmine") projects that it will capture [redacted] revenue from each Wild Oats store it plans to close; (3) Wild Oats' "Competitive Intrusion" analysis, like

---

[2] *Compare FTC v. Staples, Inc.,* 970 F. Supp.1066, 1075 (D.D.C. 1997) (sale of consumable office supplies through office superstores was a sound relevant product market, notwithstanding that "[t]he products in question are undeniably the same no matter who sells them" and many types of retailers do sell them).

"Project Goldmine," shows Whole Foods capturing a large share of Wild Oats' revenue when it invades an existing Wild Oats market; and (4) economic analysis by the Commission's expert economist confirms what the parties' own documents show – that, where the two firms compete head-to-head, defendants are constrained by each other in ways in which they are not constrained by any other retailers.

Until the acquisition was announced, Whole Foods often referred to Wild Oats' markets (where Whole Foods was not present) as "non-competitive," "cash cow" markets, and even "monopoly" markets. Exhibit 34 (PX00713) (from 2001); Exhibit 18 (PX00712) (from 2001). As Mr. Mackey wrote in October 2004, "[i]t seems highly probable to me that OATS is dependent upon its stores in non-competitive markets for any profits that it is currently generating . . . ." Exhibit 35 (PX00719). In a May 2006 email, forwarded by Mr. Mackey to his executive team, a Whole Foods executive observed that "prices were higher at [the newly opened Wild Oats store in Tampa, Florida, because] *[b]eing the only game in town* gives them that freedom ." Exhibit 16 (PX00080 at 001-002 (emphasis added)); *see also* Exhibit 38 (PX01372 (Fall 2006 list of stores showing that if there is no Whole Foods, there is "no Major Competitor" in the market)).

As for Whole Foods' market position, one high level Whole Foods

executive observed, ". . . I'd say that WFM currently has a dominant position in the marketplace . . . ." Exhibit 37 (PX00774); Similarly, Wild Oats called Whole Foods "the leading full-service competitor." Exhibit 39 (PX00469).

Such characterizations by the Defendants are consistent *only* with a premium natural and organic supermarkets market. The views of the Defendants, as industry participants, are one of the highly probative "practical indicia" set forth in *Brown Shoe* showing that this is a relevant product market – yet the district court ignored this evidence. As discussed further below, the court instead relied on an economic model based on speculation and erroneous assumptions.

B. Defendants Failed to Refute the Commission's Presumptive Entitlement to a Preliminary Injunction.

By proving that the acquisition will increase concentration significantly in the premium natural and organic supermarkets market, the Commission established its *prima facie* case that a merger is anticompetitive. *Heinz*, 246 F.3d at 716 (likelihood of success demonstrated by showing that market concentration would increase substantially). The burden of production and proof shifted to the defendants to rebut this presumption of anticompetitive harm.[3] As this Court has twice held, "the more compelling the *prima facie* case, the more evidence the

---

[3] *U.S. v. Marine Bancorporation*, 418 U.S. 602, 631 (1974); *Heinz*, 246 F.3d at 715; *Baker Hughes*, 908 F.2d at 982-83.

defendant must present to rebut it successfully." *Heinz*, 246 F.3d at 725, *quoting Baker Hughes*, 908 F.2d at 991.

Defendants made no serious attempt to rebut the Commission's case, beyond arguing that – despite their own testimony and documents – premium natural and organic supermarkets do not constitute a relevant product market. Defendants certainly could not (and did not) attempt to deny that the commanding market shares of Whole Foods and Wild Oats in that market would make their combination presumptively unlawful. Nor did defendants attempt to rebut the Commission's *prima facie* case by pointing to extraordinary features of this market that would make historical market share an inaccurate gauge of competitive strength. *Cf. United States v. General Dynamics Corp.*, 415 U.S. 486, 497 (1974).

While defendants argued that conventional supermarkets will be able to reposition and relieve any anticompetitive effects of the merger, this contention was undercut by their own testimony and documents. Whole Foods' witnesses testified that it takes a minimum of three years between deciding to open a premium natural and organic supermarket and opening it for business (Meyer Dep JX 10 at 107:8-14), and that site selection involves complex demographic analyses that take years to complete. Kadish Dep. JX 7 at 40:25-60:21. A February 2007

study by The Hartman Group, a research firm well-regarded by both defendants, concluded that entry into the premium natural and organic supermarkets market by conventional supermarkets or other food retailers is unlikely. PX02508 at 026. In Mr. Mackey's opinion, conventional supermarkets cannot effectively compete in this market:

> Safeway and other conventional retailers will keep doing their thing – trying to be all things to all people. . . . They can't really effectively focus on Whole Foods Core Customers without abandoning 90% of their own customers.

PX00785.

C. The Lower Court's Ruling Contains Numerous Reversible Errors.

In denying the Commission's motion for a preliminary injunction under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b),[4] the court made a number of reversible errors, including:

---

[4] Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the FTC to seek, and the district court to grant, preliminary relief pending the completion of administrative proceedings challenging the proposed acquisition. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 711 (D.C. Cir. 2001); *FTC v. PPG Industries, Inc.*, 798 F.2d 1500, 1501-02 (D.C. Cir. 1986). The Commission commenced its administrative proceeding on June 28, 2007, FTC Dkt. No. 9324. A Commission proceeding includes full discovery and a trial on the merits before an administrative law judge – whose 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).

(a) The court assigned no weight to contemporaneous, high-level statements and strategic documents authored by senior executives, describing their view of the market realities and of the effect of the merger. *See Brown Shoe Co. v. United States,* 370 U.S. 294, 325 (1962) (indicia regarding product market definition include "industry or public recognition").[5]

(b) The court assigned significant weight to postlitigation affidavits from corporate employees, even after acknowledging that such "made for litigation documents" are suspect. Opinion at 2-3.

(c) The court relied upon an economic analysis of prices (based on a sample of data from *a single post-litigation day*) that did not reflect discounts, and thus did not reflect actual prices paid by consumers. In general, the court accepted the testimony of defendants' expert even though its factual underpinnings were thoroughly rebutted.

(d) The court fundamentally misconstrued and misapplied the testimony concerning the "critical loss" theory of market definition in this case. First, the Court incorrectly assumed that "actual loss" of customers following a price increase would exceed the "critical loss" that would defeat such a price increase, despite defendants' expert's admission that he did not attempt to calculate actual loss, and when, in fact, no economic, empirical, or statistical analysis of actual loss was performed – given the well-known economic critiques of critical loss analysis that are included in the record and unrebutted – and there was no actual evidence of consumer purchasing patterns.

Moreover, the court failed to recognize that if, post-merger, a Whole Foods store raises its prices, at least part of the business it loses will

---

[5] *See also* 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").

be diverted to a Wild Oats store then operated by Whole Foods. As a result, a small but significant and nontransitory increase in prices by the Whole Foods store will not cause an actual loss of business by the company as great as defendants' expert or the Court predicted. *See* Opinion at 30. Instead, another company store will retain at least a portion of that business and the small but significant and non-transitory increase in prices will be profitable to the company as a whole. This error caused the court to reject the Commission's product market definition.

(e) The court disregarded the abundant evidence that Wild Oats and Whole Foods uniquely constrain each other's pricing.

(f) The court erroneously concluded that diversions even of [redacted] of Wild Oats' volume to Whole Foods would not support a separate premium natural and organic supermarkets market, despite the Commission's expert's unrebutted testimony to the contrary.

(g) The court ignored substantial evidence, including a study relied on by both defendants, showing that conventional supermarkets cannot successfully and timely reposition themselves to act as a constraint on the merged company's prices.

(h) The court erroneously failed to recognize that the planned closures of Wild Oats' stores constitute price increases in their geographic markets.

As this Court has held, the district court in a merger challenge has jurisdiction to determine – on what can only be a preliminary record – whether 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. If so, a preliminary injunction should issue, and full adjudication proceeds before the Commission.

The many problems encountered and created by the district court simply confirm that there are "serious, substantial" merits issues requiring plenary adjudication. *Heinz*, 246 F.3d at 714-15. The district court should have granted the preliminary injunction, thus permitting the Commission to adjudicate the issues.

II. THE EQUITIES AND THE PUBLIC INTEREST ALL FAVOR AN EMERGENCY INJUNCTION PENDING APPEAL.

A. The Public Interest Will Suffer Irreparable Injury If This Court Does Not Grant the Injunction Pending Appeal.

In balancing the equities, the principal public equity is the effective enforcement of the antitrust laws. *Heinz*, 246 F.3d at 726. Without a preliminary injunction, the government often cannot restore competition via divestiture, to the public's detriment. *Id.*; *Weyerhaeuser*, 665 F.2d at 1086 n.31. Section 13(b) enables the Commission to protect that interest by preventing businesses from being acquired so that competition will continue in the marketplace until the legality of the proposed acquisition is finally determined. Indeed, "Section 13(b) itself embodies congressional recognition of the fact that divestiture is an

inadequate and unsatisfactory remedy in a merger case . . . ."[6] Accordingly, where, as here, the Commission has demonstrated a likelihood of success on the merits, defendants face a difficult task of "justifying anything less than a full stop injunction." *PPG*, 798 F.2d at 1506; *Weyerhaeuser,* 665 F.2d at 1087; *see Heinz*, 246 F.3d at 726; *Staples*, 970 F. Supp. at 1091. The strong presumption in favor of a preliminary injunction can be overcome only if: (1) significant equities compel that the transaction be permitted; (2) a less drastic remedy would preserve the Commission's ability to obtain complete relief at the conclusion of administrative litigation; and (3) a less drastic remedy would check interim competitive harm. *Weyerhaeuser,* 665 F.2d at 1087. Defendants made no such showing in the court below.

The relief the Commission seeks by this motion is protection against interim competitive harm, and preservation of the ability to afford effective relief after adjudication on the merits. *Weyerhaeuser,* 665 F.2d at 1087. The task of "unscrambling the eggs" is difficult enough where the scrambled eggs are kept intact. *See Heinz*, 246 F.3d at 726 (citing *FTC v. Dean Foods Co.*, 384 U.S. 597,

---

[6] *Heinz,* 246 F.3d at 726 (citing legislative history); *PPG*, 798 F.2d at 1508; *FTC v. Rhinechem Corp.*, 459 F. Supp. 785, 787, 790 (N.D. Ill. 1978); *FTC v. Lancaster Colony Corp.*, 434 F. Supp. 1088, 1096 (S.D.N.Y. 1977)("At best, divestiture is a slow, cumbersome, difficult, disruptive and complex remedy").

606 n.5 (1966)). Here, Whole Foods proposes to close a [redacted] Wild Oats stores and dismantle all of those stores' employment and supply relationships. It strains credulity to suppose that the Commission will be in a position to fashion "adequate ultimate relief" under these circumstances. *See Weyerhaeuser*, 665 F.2d at 1087.

B. The Possibility That a Brief Injunction Pending Appeal Will Harm to the Merger Parties Is Low.

Nor have defendants presented any "strong equities" favoring their being allowed to consummate their transaction. Defendants predictably argued that a preliminary injunction will "kill the deal," focusing on the expiration of their current financing commitment. They failed to point to any unusual urgency, however, or to show any reason why, "[i]f the merger makes economic sense now, * * * it would not do so later." *Heinz*, 246 F.2d at 726. Similarly, the Eleventh Circuit observed in *University Health*:

> [T]he FTC only asks for a preliminary injunction; if the appellees can demonstrate the legality of the proposed acquisition to the FTC or, ultimately, the court of appeals, the acquisition will take place. We do not think that this delay, in and of itself, will spell disaster for [the acquired firm] or grave harm to the public. *Rather, we think the public will be best served by enjoinment of this acquisition pending extensive analysis of its competitive effect.*

938 F.2d at 1225 (emphasis added). The district court here committed legal error

in allowing defendants' private equity claim to outweigh serious public concerns. *Id.; Warner Communications,* 742 F.2d at 1165.

The equitable considerations discussed above regarding the need for a preliminary injunction – *i.e.,* the prospect of the immediate and irreversible loss of competition in the market, and the impracticability of "unscrambling the eggs" – constitute serious irreparable injury that justifies an injunction pending appeal. For the reasons identified in Part I above, entry of an injunction pending appeal is strongly in the public interest. The district court has committed serious errors of law that warrant careful appellate review, and the Commission's ability to obtain effective ultimate relief depends upon entry of emergency relief now. Under these circumstances, the strong public interest in effective enforcement of the merger laws requires entry of an injunction pending appeal. *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.,* 559 F.2d 841, 843 (D.C. Cir. 1977).

CONCLUSION

For the foregoing reasons, the FTC's motion for an injunction pending appeal should be granted.

Respectfully submitted,

JEFFREY SCHMIDT
Director

KENNETH L. GLAZER
Deputy Director
Bureau of Competition

MICHAEL J. BLOOM
RICHARD B. DAGEN
THOMAS J. LANG
CATHARINE M. MOSCATELLI
THOMAS H. BROCK
MICHAEL A. FRANCHAK
Attorneys

August 17, 2007

WILLIAM BLUMENTHAL
General Counsel

JOHN D. GRAUBERT
Principal Deputy General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

/s/

MARILYN E. KERST
Attorney
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580
Ph. (202) 326-2158
Fax (202) 326-2477
mkerst@ftc.gov