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 OPPOSITION TO MOTION TO DISMISS THE APPEAL AS MOOT

The Federal Trade Commission ("FTC," "Commission") opposes the motion filed by Whole Foods Market, Inc. ("Whole Foods") to dismiss this appeal as moot. Whole Foods seeks to avoid a review of a district court decision and order that ignored Congress's careful allocation of adjudicative responsibilities for merger cases brought by the Commission and was contrary to this Court's controlling legal standards under section 13(b) of the FTC Act. The premise of this motion is that the consummation on paper of Whole Foods' acquisition of Wild Oats Markets, Inc. ("Wild Oats") makes meaningful relief impossible. Nothing could be further from the truth. Although a full-stop preliminary

injunction is preferable in the first instance, relief preserving the status quo during the pendency of adjudicative proceedings before the Commission is still viable, particularly since Whole Foods' business plans call for operating most of the Wild Oats assets separately for the time being. Such an order would not only ameliorate any harm to consumers Whole Foods' acquisition may be causing but would preserve the Commission's current ability to remedy any anticompetitive consequences if the Commission ultimately determines the acquisition is unlawful after a full plenary trial.

1. The merits of the Commission's appeal concerns the proper division of adjudicative responsibility between the Commission and the courts in the merger enforcement scheme Congress created in Sections 5 and 13(b) of the FTC Act, 15 U.S.C. §§ 45, 53(b). By enacting Section 5, Congress gave the Commission full adjudicative authority over trade regulation matters, subject only to review in the courts of appeals. In both Section 5 itself and its legislative history, Congress declined to give district courts the authority to judge whether or not conduct or transactions violate the antitrust laws, including the Clayton Act, but instead designated the Commission as an agency that is uniquely qualified to make that judgment. Congress later enacted Section 13(b) to *enhance*, not displace, the Commission's adjudicative authority under Section 5 by enabling the Commission

to obtain a preliminary injunction during the pendency of the Commission's administrative adjudication, thereby fully preserving the Commission's ability to order effective relief for antitrust violations during the pendency of an administrative trial. The important but carefully limited role of the district courts in this scheme is to determine whether, "weighing the equities and considering the Commission's likelihood of ultimate success, such [a preliminary injunction] would be in the public interest * * *." 15 U.S.C. § 53(b).

Accordingly, this Court has held that under Section 13(b), district court consideration of the merits is limited to determining whether there is "fair ground for thorough investigation, study, deliberation and determination *by the FTC* in the first instance * * * ." *FTC v. H.J. Heinz Co.*, 246 F.2d 708, 714-715 (D.C. Cir. 2001) (emphasis added.). The Court in *Heinz* specifically recognized that "Congress intended this standard to depart from what it regarded as the then-traditional equity standard" for preliminary injunctions. *Id.* at 714 (citing legislative history of Section 13(b).[1] Other courts have similarly embraced the same standard. *FTC v. University Health, Inc.*, 938 F.2d 1206, 1218 (11th Cir.

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[1] Section 13(b) likewise departs in this respect from the standard that this Court applies in ruling on a stay or injunction pending appeal. *See generally Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir.1977).

1991); *FTC v. Warner Communications, Inc.*, 742 F.2d 1156 (9th Cir. 1984); *FTC v. National Tea Co.*, 603 F.2d 694, 698 (8th Cir. 1979); *see also FTC v. Rhinechem Corp.*, 459 F. Supp. 785, 789 (N.D. Ill. 1978); *FTC v. Lancaster Colony Corp.*, 434 F.Supp. 1088, 1091 (S.D.N.Y. 1977).

The court below, however, flouted this standard and effectively usurped the adjudicative role of the Commission. Indeed, the court repeatedly imposed on the Commission a burden of making its case on the merits, as if the proceedings before the district court were the plenary adjudication. The court compounded its error, moreover, by ruling that, in light of its conclusion regarding the underlying merits, it had no need to consider whether the public interest supported issuance of a preliminary injunction – and by not doing so. *FTC v. Whole Foods Market, Inc.*, 502 F. Supp. 2d 1, __ (D.D.C. 2007), Op. at 92. Yet where, as here, the public interest supports the preliminary injunction, this Court has recognized that such a conclusion "necessarily lightens the burden on the FTC to show likelihood of success on the merits * * *." *Heinz,* 246 F.3d at 727 (D.C. Cir. 2001).

2. The issue presented by Whole Food's mootness motion is whether, by closing its acquisition of Wild Oats on paper as soon as the district court ruled, Whole Foods has succeeded in insulating the fundamentally flawed ruling below from this Court's review. Under clear precedent of the United States Supreme

Court and this Court, Whole Food's motion must be denied, for it is incapable of carrying the "heavy burden" of showing mootness. *U.S. v. W.T. Grant Co.,* 345 U.S. 629, 633 (1953).

> [T]o say that [a] case has become moot means that the defendant is entitled to a dismissal as a matter of right. The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.

Id. at 632.

Dismissal on grounds of mootness is appropriate only when "an event occurs which renders it impossible for [a] court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever." *Mills v. Green,* 159 U.S. 651, 653 (1895). It is well established that "even the availability of a partial remedy is sufficient to prevent [a] case from being moot." *Byrd v. EPA,* 174 F.3d 239, 244 (D.C. Cir. 1999), *quoting Calderon v. Moore,* 518 U.S. 149, 150 (1996), and *Church of Scientology v. United States,* 506 U.S. 9, 13 (1992) (internal quotation marks omitted.). The available remedy need not be "fully satisfactory" to avoid mootness. *Church of Scientology,* 506 U.S. at 13.[2]

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[2] *See also Spencer v. Kemna,* 523 U.S. 1 (1998) (where habeas petitioner's incarceration and parole have ended before petition is finally adjudicated, case-or-controversy requirement is satisfied if "some 'collateral consequence' of the conviction * * * exist[s]"; *Gull Airborne Instruments, Inc., v. Weinberger,* 694 F.2d 838, 846 (D.C. Cir. 1982) (disappointed bidder's appeal of denial of preliminary injunction was not necessarily rendered moot by the passage

This Court's ruling in *FTC v. Weyerhaeuser*, 665 F.3d 1072, 1081 (D.C. Cir. 1981 (R. Ginsburg, J.), shows both that consummation of a transaction does not moot a challenge under Section 13(b), and that a full range of relief maintaining the status quo remains available in a situation like the present one. The Court rejected the argument that the consummation of the merger mooted the FTC's appeal of the denial of the preliminary injunction it had sought. 665 F.2d at 1077. The Court recognized that "the precedent relevant in these circumstances" comes from the numerous cases in which courts had ruled that appropriate relief could still be fashioned, even though the principal form of relief originally sought may no longer be possible. *Id.* For example, in *Industrial Bank of Washington v. Tobriner,* 405 F.2d 1321 (D.C. Cir. 1968), a bank had sued to "enjoin [the] D.C. Commissioners from issuing a tax deed," but – in the absence of an injunction pending appeal – they issued the deed while the appeal was pending. This Court held that the case was not moot, "since 'it has long been established that where a defendant with notice in an injunction proceeding completes the acts sought to be enjoined the court may by mandatory injunction restore the status quo.'" *Id.* at 1323, *quoting Porter v. Lee,* 328 U.S. 246 (1946).

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of time; "[i]f * * * the contract has not been fully or satisfactorily performed, then injunctive relief may still be available and appropriate.").

The *Weyerhaeuser* Court also discussed the range of preliminary equitable relief Congress authorized in Section 13(b), rejecting the argument that a full-stop injunction is the only possible relief in a merger case. 665 F.2d at 1083-84.[3] 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).

It is clearly possible to fashion such an order here, both to protect consumers from any interim harm the acquisition may cause them and to preserve the possibility of reconstituting Wild Oats as an independent competitor. Although the parties have consummated the merger on paper, a significant portion of the Wild Oats assets – both tangible, like the Wild Oats stores themselves, and intangible, like the Wild Oats brand – remain viable and distinct from Whole

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[3] As this Court subsequently recognized, *Weyerhaeuser* did not alter "the presumption in favor of a [full] preliminary injunction" when the Commission carries its burden under Section 13(b) and the court is able to act prior to consummation of the transaction. *FTC v. PPG Indus., Inc.*, 789 F.2d 1500, 1506-07 (D.C. Cir. 1986). Nevertheless, *Weyerhaeuser* demonstrates that other forms of preliminary injunctive relief remain available where the circumstances warrant their use.

Foods at this time.

More specifically, Whole Foods has acknowledged that the integration of Wild Oats may take up to two years. *See, e.g.,* Whole Foods Form 8-K (August 28, 2007). In an SEC filing, Whole Foods declared that it will close fewer stores than it originally planned and even those stores slated for closure will remain open for several months or more. *See, e.g.,* 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"); *see also* Kimberley S. Johnson, *Wild Oats in Jeffco Will Close: a Kipling Parkway Store Is the State's Lone Victim of the Whole Foods Deal,* DENVER POST, Oct. 3, 2007 at C-03.

Whole Foods has reassured Wild Oats customers in St. Louis for example, that for the time being, it is "business as usual." 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."). Nor does Whole Foods have any immediate plans to rebrand the remaining stores as Whole Foods stores. See, e.g., Joyzelle Davis, *Jeffco Wild Oats Market Will Close; Whole Foods Plans to Renovate Six Others in the Denver Area,* ROCKY MOUNTAIN NEWS, Oct. 3, 2007

at 3 Business (Whole Foods spokesman said "Whole Foods is in no hurry to phase out the Wild Oats name in Denver * * * 'We'll do it over time when it seems right.'"). 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.

3. 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. *FTC v. Owens-Illinois*, 850 F.2d 694 (D.C. Cir. 1988), cited by Whole Foods, merely reflects the fact that the parties *agreed* that, based on the specific factual circumstances in that case, that the appeal had become moot. Here, in contrast, the facts are very different.

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), are equally unavailing. In *Beatrice Foods*, Judge Bazelon merely abstained from voting on a suggestion for rehearing *en banc*. He in no way suggested that he had determined whether a live case or controversy still existed. Indeed, he did not purport to speak for this Court at all. 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 – not whether the case was moot. *Food Town,* 539 F.2d at 1342. The *Food Town* court's observation that "[d]ivestiture may not be as effective a remedy as prevention of a merger" actually acknowledges that effective relief short of a full-stop injunction is possible. *Id.* at 1343. In this case, viable relief remains available and, accordingly, this appeal, as a matter of law, is not moot.

CONCLUSION

Because "effectual relief" remains available, this Court should not dismiss on grounds of mootness. The Commission has also filed a simultaneous motion asking the Court to set a prompt briefing schedule. Such a schedule will allow for a timely decision on the appeal and maximize the relief available if the Commission prevails.

For the foregoing reasons, this Court should deny Whole Foods' motion to dismiss this appeal as moot.

Respectfully submitted,

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