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 the District of Columbia, Civ. No. 07-cv-01021-PLF**
WHOLE FOODS MARKET, INC.	)	
and	)	**<u>EMERGENCY MOTION - RULING REQUESTED BY NOON, EDT, AUGUST 20, 2007</u>**
WILD OATS MARKETS, INC., Defendants.	)	

EMERGENCY MOTION OF THE FEDERAL TRADE COMMISSION

<u>FOR AN INJUNCTION PENDING APPEAL</u>

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Preliminary Statement

Plaintiff-appellant Federal Trade Commission ("Commission") seeks emergency relief to enjoin pending appeal the acquisition by Whole Foods Market,

granting the requested interim relief [illegible]

assure that its review is meaningful.

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

An injunction pending appeal is necessary and in the public interest to allow

acquisition of Wild Oats, aptly named "Project Goldmine." The

[illegible] 712 (under Section 12(1)) [illegible]

in fact violate Section 7 of the Clayton Act. 'The determination [illegible] is reserved for

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 [illegible]

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

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

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

concluded that entry into the premium natural and organic supermarkets market by

(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

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

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

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

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*

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" –

CONCLUSION

appeal should be granted.

Respectfully submitted,

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