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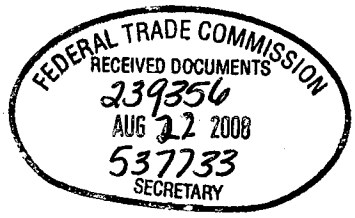


UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
WHOLE FOODS MARKET, INC.	)	
a corporation,	)	**Docket No. 9324**
and	)	**PUBLIC**
WILD OATS MARKETS, INC., **a corporation,**	)	

RESPONDENT'S MOTION TO DISQUALIFY THE COMMISSION AS ADMINISTRATIVE LAW JUDGE AND TO APPOINT A PRESIDING OFFICIAL OTHER THAN A COMMISSIONER

Respondent Whole Foods Market, Inc. ("WFM"), pursuant to Rule 3.42(a)(2) of the

preliminary injunction against the WFM/Wild Oats merger or to advance its appeal of the denial of its motion for preliminary injunction. It qualified none of them by a "reason to believe" limitation. At a minimum, these statements may lead a disinterested observer to conclude that the Commission has prejudged important issues to be decided in this administrative proceeding.

Accordingly, the Commission should recuse itself and appoint an independent ALJ to preside

[redacted]

upon the trial of this matter.

[redacted]

BACKGROUND FACTS

On June 5, 2007, pursuant to section 13(b) of the FTC Act, the Commission voted

ARGUMENT

I. The Commission's Statements to the Court of Appeals Demonstrate that the Commission Has Already Decided Key Merits Issues

In the federal court proceedings, the Commission was plaintiff-appellant and all conclusions expressed in the FTC's pleadings were the Commission's own conclusions. Lead counsel on the appellate briefs was the General Counsel. Before the Court of Appeals, the Commission pressed arguments that, on their face, state that the Commission has reached judgments on key issues going to the merits of this administrative proceeding.

For this reason, the Commission should recuse itself from sitting as ALJ in the administrative hearing. An impartial trier of fact should, in the first instance, address questions of credibility, admissibility and weight, and render an initial decision on the Section 7 merits based on the record in that proceeding. The Administrative Procedure Act requires that the ALJ

[redacted]

The Commission has recognized that an ALJ should not hear a case if a "reasonable person would have had a reasonable basis for doubting the judge's impartiality." *In re Kellogg*

The Commission took District Judge Friedman to task for stating that "the 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." *Brief for Appellant Federal Trade Commission* (Jan. 14, 2008) ("*1/14/08 Br.*") at 26. The Commission [redacted] standard appropriate for a final adjudication on the merits" rather than the more limited "serious, substantial" standard of § 13(b). *Id.* at 35. Under § 13(b), according to the Commission, it "is not required to *prove* any element of its case." *Reply Brief for Appellant Federal Trade Commission* (Feb. 27, 2008) ("*2/27/08 Br.*") at 3 (emphasis by FTC).

The Commission told the Court of Appeals, however, that the agency had proven the relevant market before Judge Friedman – an assertion that, by the Commission's own analysis,

[redacted]

market for antitrust purposes." *1/14/08 Br.* at 40 (emphasis added).

B. Competitive Effects

Similarly, the Commission made unambiguous and unequivocal representations to the Court of Appeals regarding proof of likely competitive effects that show prejudgment and create doubts about impartiality for the plenary trial. The Commission told the Court of Appeals that "the combination of Whole Foods and Wild Oats will substantially lessen competition." 9/17/07

deposition testimony. But the Commission has already concluded that none of this testimony

[redacted]

In the District Court, WFM offered into evidence sworn declaration testimony from a

whom WFM called in the District Court proceeding – attacking the analysis, among other ways, as "garbage" (*1/14/08 Br.* at 52), a "sheer guess" (*Reply in Support of Emergency Motion of the Federal Trade Commission for an Injunction Pending Appeal* (Aug. 20, 2007) at 7), and lacking "any" empirical foundation. *1/14/08 Br.* at 24 & 52.

Judge Friedman observed Dr. Scheffman and Dr. Murphy testify in person, asked each a number of questions from the bench, and found Dr. Scheffman's opinions to be more convincing. The Commission's vitriol regarding Dr. Scheffman's economic analysis is thus

would be applicable to a plenary adjudication in a Section 7 case." *1/14/08 Br.* at 38-39 (emphasis added).

II. The Commission Has No Compelling Reason to Sit as the ALJ in this Case and Fairness Cannot be Ensured if it Does

The Supreme Court held in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (1951), that "the plain language of the [Administrative Procedure Act] directs a reviewing court to

[redacted]

independent ALJ in the instant case, but, if the "central objective" here is to "expedite" the

[redacted]

administrative process, then that objective is unattainable and already lost.

If expeditious litigation were the goal, then the Commission would not have stayed the Part III proceedings on its own initiative, on August 7, 2007. Had the Commission imposed the schedule at that time that it imposed in the *Inova* case this year, then the administrative case either would be over (because by now the Commission would have dismissed the complaint after trial on the merits) or on appeal in a U.S. Court of Appeals (because the Commission had found a Section 7 violation). Instead, the case is still in its Part III infancy. The Chairman's stated "central objective" for bypassing an independent ALJ has no relevance here.

Chairman Kovacic also told *The Antitrust Source* that, in regard to the appointment of Commissioner Rosch as ALJ in the *Inova* case, "[t]o ensure fairness in that process, Commissioner Rosch did not participate in the decision to prosecute." *Id.* That laudable goal also is unattainable in this case – no matter whether the Commission sits as ALJ or, as it did in *Inova*, appoints one of the Commissioners to do so. As the Commission surely knows, all four Commissioners voted unanimously to issue the administrative complaint in this case. All four Commissioners, moreover, comprised the plaintiff-appellant in the federal court proceedings, during which all the foregoing statements suggesting prejudgment on the merits and conclusions

judge," however, the Commission must also recognize circumstances, like here, where a consequence of going beyond zealous advocacy to conclusions about the merits is the inability, or appearance of the inability, to serve impartially as trier-of-fact in the hearing on the merits.

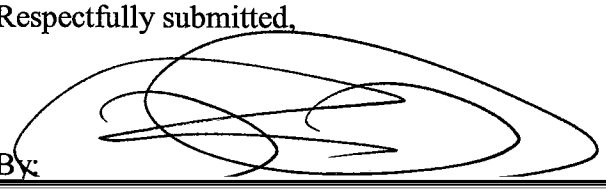
CONCLUSION

In his *Inova* Order, ALJ Rosch remarked that the "[t]he Commission's ALJs undoubtedly are highly competent as judges." *Order Certifying Respondents' Motion to Recuse to the Commission and Accompanying Statement by J. Thomas Rosch*, Docket No. 9326 (May 29, 2008) at 11-12. The Commission should not have [redacted]

this case an ALJ who is not a Commissioner and who is not the Commission.

Dated: August 22, 2008

Respectfully submitted,



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[redacted]

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: **William E. Kovacic, Chairman**
Pamela Jones Harbour
Jon Leibowitz
J. Thomas Rosch

In the Matter of	)	
WHOLE FOODS MARKET, INC., **a corporation,**	)	**Docket No. 9324**
and	)	**PUBLIC**
WILD OATS MARKETS, INC., **a corporation,**	)	

ORDER GRANTING RESPONDENT'S MOTION TO DISQUALIFY THE COMMISSION AS ADMINISTRATIVE LAW JUDGE AND TO APPOINT A PRESIDING OFFICIAL OTHER THAN A COMMISSIONER

On August 22, 2008, Respondent Whole Foods Market, Inc. filed a Motion that the Commission disqualify itself as administrative law judge ("ALJ") in this matter and appoint a

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion was served this August 22, 2008, on the following persons by the indicated method:

By Hand Delivery and Email:

Donald S. Clark, Secretary

[redacted]

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Complaint Counsel

By: _____