# ANTITRUST STORM CONTINUES TO THREATEN WHOLE FOODS MERGER

## I. Introduction

On July 29, 2008, a divided three-judge panel of the United States Court of Appeals for the District of Columbia decided in favor of the Federal Trade Commission (the "FTC") in its suit challenging the merger of Whole Foods and Wild Oats. *FTC v. Whole Foods Market, Inc.*, 533 F.3d 869 (D.C. Cir. 2008), *rev'g FTC v. Whole Foods Market, Inc.*, 502 F. Supp. 2d 1 (D.D.C. 2007). Reversing a lower court decision denying the request by the FTC for a preliminary injunction against the merger, the Court of Appeals relied on the unique preliminary injunction standard under Section 13(b) of the FTC Act (15 U.S.C. § 53(b)).

On August 26, 2008, Whole Foods filed with the Court of Appeals a petition for rehearing *en banc*, arguing that the three-judge panel applied the law on interpreting Section 13(b), defining relevant markets, and assessing competitive effects in a manner that conflicts with precedent. The FTC opposed the Whole Foods petition on September 12 and, separately, is proceeding with its administrative hearing on the lawfulness of the merger, which is scheduled to begin February 16, 2009.

We review below the opinions of the district court and the Court of Appeals, as well as the unusual procedural posture of the Whole Foods proceedings.

## II. The District Court Decision

In June of 2007, the FTC filed a complaint in the District Court for the District of Columbia seeking to enjoin preliminarily the merger of Whole Foods and Wild Oats pending an FTC administrative hearing. The district court denied the request after rejecting the FTC's argument that the appropriate product market consisted only of premium natural and organic supermarkets ("PNOS") and excluded regular supermarkets.

According to the district court, Whole Foods presented evidence sufficient to show that competition from regular supermarkets would constrain the pricing of a merged Whole Foods/Wild Oats and that the prospect of losing "marginal customers" to regular supermarkets would make price increases unprofitable. *Whole Foods*, 502 F. Supp. 2d at 34-36.

## III. D.C. Circuit Decision

The Court of Appeals reversed the district court in a two-to-one decision with three separate opinions, including a strongly worded dissent.

*The FTC is likely to interpret the majority opinion as providing more latitude to the FTC to obtain preliminary injunctive relief.* The Court of Appeals found that Section 13(b), which applies only to the FTC -- unlike the preliminary injunction standard facing private litigants and the Department of Justice (the "DOJ") -- does not require the FTC to prove an actual likelihood

of success on the merits. Rather, according to the majority, the FTC is entitled to a *presumption in favor of the preliminary injunction* by "rais[ing] questions going to the merits so serious, substantial, difficult[,] and doubtful as to make them fair ground for thorough investigation." *Whole Foods*, 533 F.3d at 875 (citing *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714-15 (D.C. Cir. 2001)).

The dissent stated that the FTC must show at least some likelihood of success to justify an injunction. The dissent argued that the reasoning of the majority would "allow[] the FTC to just snap its fingers and block a merger." *Whole Foods*, 533 F.3d at 892 (Kavanaugh, J., dissenting). Whole Foods argues the same point in its petition for *en banc* review.

*The majority questioned the commonly understood economic rationale for defining a relevant market.* The majority held that the district court committed legal error by focusing its market definition analysis on "marginal customers." Invoking language from *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962), the court stated that the district court failed to consider whether a group of "core customers" views regular supermarkets as an inadequate substitute to a PNOS. *Whole Foods*, 533 F.3d at 879.

The dissent argued that the question is not whether Whole Foods could raise prices as to some set of "core customers," but whether Whole Foods could raise prices profitably as to all customers in the relevant market. *Whole Foods*, 533 F.3d at 899. Judge Kavanaugh believed that the majority allowed the FTC to "commit[] the basic antitrust mistake" of confusing product differentiation that is a normal part of competition among supermarkets with the existence of discrete product markets. *Id*. at 892; *see also id.* at 896. Whole Food agrees in its petition for *en banc* review.

*The majority and concurring opinions highlight the potential negative impact of "hot" documents at the preliminary injunction stage.* Both the majority and concurring opinions criticized the district court for ignoring documents and other evidence presented by the FTC to support its arguments concerning anticompetitive effects. Among such evidence were pricing data and statements by Whole Foods management that tended to support the existence of a PNOS market. Judge Tatel's concurrence emphasized that, "at this preliminary, pre-hearing stage, [such evidence] is certainly enough to raise 'serious, substantial' questions meriting further investigation by the FTC." *Whole Foods*, 533 F.3d at 890 (Tatel, J., concurring).

*Because the Whole Foods merger was already consummated, the decision adds uncertainty to future litigation with the FTC.* The majority opinion spoke broadly with regard to post-merger relief available to the FTC -- up to and including an unwinding of portions of the transaction. As the majority noted, "[e]ven remedies which 'entail harsh consequences' would be appropriate to ameliorate the harm to competition from an antitrust violation." *Whole Foods*, 533 F.3d at 874 (citing *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 327 (1961)).

## IV. Implications

The long-term implications of the Court of Appeals decision are unclear, as both parties are pursuing further litigation. The Court of Appeals has not yet decided Whole Foods' petition for *en banc* review.

In the short term, however, the decision may yield additional complexities for parties contemplating a transaction. The level of risk associated with obtaining antitrust clearance may depend on whether the proposed transaction is reviewed by the FTC or the DOJ. The FTC is likely to interpret this decision as an affirmation of its position that Section 13(b) presents a lower burden to the agency, compared to that faced by the DOJ or a private plaintiff, when seeking to enjoin a merger.

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