IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WHOLE FOODS MARKET, INC.,
a Texas Corporation,
550 Bowie Street, Austin, TX 78703,

Plaintiff,

v.

FEDERAL TRADE COMMISSION,
a federal administrative agency,
600 Pennsylvania Avenue, N.W.,
Washington, D.C. 20580,

Defendant.

Case: 1:08-cv-02121
Assigned To : Friedman, Paul L.
Assign. Date : 12/8/2008
Description: Admin. Agency Review

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

"'Now for the evidence,' said the King, 'and then the sentence.'
'No! said the Queen. 'First the sentence, and then the evidence.'"

-- The Queen of Hearts, in Lewis Carroll's "Alice in Wonderland"

1. The Defendant Federal Trade Commission ("FTC" or "Commission") has acted no less blatantly than the Queen of Hearts in violating both the Constitutional due process rights of Plaintiff Whole Foods Market, Inc. ("Whole Foods") and the Administrative Procedure Act ("APA").

2. Having failed during the past 18 months to convince a federal court to block the merger of Plaintiff Whole Foods and Wild Oats Market, Inc. ("Wild Oats"), the Commission is now attempting to get a second bite at the apple by challenging this merger in administrative proceedings conducted by and within the Commission itself. To the extent this end-run around the independent federal courts is constitutionally sound at all, it is undeniable that Whole Foods is entitled to a fair and impartial proceeding that gives Whole Foods the ability to reasonably and adequately defend itself at trial.

3. However, the Commission has deprived Whole Foods of these fundamental due process rights by:

- Prejudging, in appearance if not in reality, the outcome of Whole Foods' case in public legal briefs by reaching categorical, unqualified conclusions on the ultimate merits of the Whole Foods/Wild Oats merger *prior to* commencing what is required to be a fair and impartial administrative proceeding;
- Imposing an unreasonably truncated and arbitrary discovery schedule that was developed by a Commissioner (not an independent Administrative Law Judge) acting as Presiding Official over the proceedings, and that prejudices Whole Foods by giving it just *five months* to defend its merger in *29 separate geographical markets across the United States*;
- Appointing as Presiding Official of the administrative proceeding one of its own Commissioners who had prejudged the case, and then subsequently replacing the Commissioner with an Administrative Law Judge ("ALJ") and stripping him of his

independence to modify the truncated schedule without the full Commission's permission; and

- Failing — despite these due process violations — to disqualify the Commissioner who acted as Presiding Official and the Commission, from adjudicating the ultimate merits of the Whole Foods/Wild Oats merger.

4. Each of the foregoing violations alone constitutes sufficient grounds for this Court to immediately bar the Commission from continuing to prosecute its administrative action against Plaintiff Whole Foods. Moreover, the violations taken together paint an unmistakable picture of prejudgment, bias, and denial of fundamental Due Process on the part of the Commission.

5. The Commission's published prejudgments on the crucial factual and legal issues in this case, its imposition of an unfairly truncated schedule, and its stripping of the ALJ's independence to modify the schedule, have fatally infected not only the Commission's appearance of objectivity, but the reality as well. The Commission has developed an improper "will to win" and is acting like the "the man who has buried himself in one side of an issue." *See Grolier Inc. v. FTC*, 615 F.2d 1215, 1220 (9th Cir. 1980) (condemning such conduct). In *Amos Treat & Co., Inc. vs. SEC*, 306 F.2d 250, 264 (D.C. Cir. 1980), the Securities and Exchange Commission was enjoined on due process grounds from proceeding in an administrative case where just *one* Commissioner had previously served as the chief of the enforcement division that had originally brought the case. In the present case, it is not just one Commissioner who has infected the agency, but the *entire* Commission — which, in its published prejudgments as well as in its unprecedented and prejudicial scheduling order, has clearly exhibited both a "will to win" and the mindset of being "buried . . . on one side of an issue."

6. Whole Foods does not dispute that the Commission can proceed, if it chooses to do so, pursuant to Section 13(b) of the Federal Trade Commission Act for permanent injunctive

relief before an independent federal judge in the U.S. District Court. The fundamental principles of Due Process and the APA, however, prohibit the Commission from presiding over an administrative proceeding that is not, in fact or in perception, fair and impartial. Because the Commission's conduct has created irreversible and fundamental infirmities in the administrative proceedings, this case is ripe for immediate judicial review and relief.

7. Like the King in Lewis Carroll's classic, the federal courts' approach to this and other mergers is quite logical: "Now for the evidence and then the sentence." In contrast, the Commission's conduct invokes the Queen of Hearts by turning that approach on its head in its internal administrative action against Whole Foods: "No! First the sentence, and then the evidence."

8. In sum, the only remedy for the Commission's transgressions is for this Court (i) to enjoin the Commission from adjudicating this case by terminating the administrative proceedings as fundamentally flawed on due process and APA grounds, and (ii) to order the Commission to proceed, if it chooses to do so, pursuant only to Section 13(b) of the Federal Trade Commission Act for permanent injunctive relief in the U.S. District Court.

PARTIES

9. Whole Foods, established in 1980, is a corporation organized and doing business under the laws of the State of Texas, with its office and principal place of business located at 550 Bowie Street, Austin, Texas 78703. On August 28, 2007, Whole Foods acquired Wild Oats Markets, Inc. ("Wild Oats") after this Court had rejected the Commission's motion for a preliminary injunction and after the D.C. Circuit had denied the Commission's emergency motion for an injunction pending appeal. Over the past year, Whole Foods has invested significant time, money and resources in consummating its merger with Wild Oats. Whole

Foods currently operates more than 260 stores in the U.S., in 37 states and in the District of Columbia, and has more than 50,000 employees.

10. The FTC is an independent administrative agency of the United States. Among other things, the Commission is empowered to initiate administrative proceedings pursuant to Section 5(b) of the Federal Trade Commission Act, and to seek injunctive relief in federal district court pursuant to Section 13(b) of the Federal Trade Commission Act. However, because the cases decided by the Commission are first reviewed by an ALJ, the Commission is not authorized to reach decisions on the merits until it has before it the entire record of the ALJ.

JURISDICTION AND VENUE

11. This action arises under the Constitution and laws of the United States, and this Court has federal question jurisdiction over this action pursuant to Article III of the Constitution and 28 U.S.C. § 1331.

12. Plaintiff's right to immediate judicial review in this Court with respect to the Defendant's alleged conduct is based on the Due Process Clause of the Fifth Amendment, the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, and the federal Declaratory Judgment Act, 28 U.S.C. § 2201.

13. Venue is proper in this district under 5 U.S.C. § 703 and 28 U.S.C. § 1391(e) because Defendant FTC is an administrative agency of the United States and a substantial part of the events and conduct by Defendant giving rise to the claims in this action occurred or failed to occur at the Commission's headquarters located in the District of Columbia.

FACTUAL BACKGROUND

A. Whole Foods Agrees To Acquire Wild Oats, and the Commission Opens an Investigation.

14. On February 21, 2007, Whole Foods and Wild Oats executed an agreement whereby Whole Foods would acquire all of the voting securities of Wild Oats for $565 million in cash and assume $148 million in Wild Oats' debt for a total acquisition price of $713 million. Whole Foods and Wild Oats competed as food retailers and together represented a small fraction of the total supermarkets in the United States that sell organic and natural foods.

15. Pursuant to the Hart-Scott-Rodino Act ("HSR"), Whole Foods notified the Commission of its intent to acquire Wild Oats. On March 13, 2007, before the expiration of the HSR waiting period, the Commission requested additional information (the "Second Request") from Whole Foods and Wild Oats, and the FTC proceeded to investigate the proposed acquisition over the course of next several months. Whole Foods fully cooperated with the Commission's investigation, producing approximately 2.5 million pages of documents and approximately 2300 MB of data. Wild Oats produced more than 14 million pages of documents and more than 100 MB of data. The Commission also conducted depositions of numerous Whole Foods' and Wild Oats' employees. During this time period, Whole Foods did not, nor could it, engage in any formal discovery or review any third-party evidence being compiled by the Commission.

16. In total, Whole Foods spent more than $12 million dollars in legal and expert fees and costs in complying with the Commission's Second Request and investigation and defending the merger through September of 2007 — and has spent through September 2008 an additional $4.5 million in defending the merger.

B. The FTC Seeks a Preliminary Injunction and Opens an Administrative Proceeding Which it Then Stays Pending Consideration of its Preliminary Injunction Motion.

17. Notwithstanding substantial evidence that the Whole Foods/Wild Oats merger was unlikely to lessen competition among all supermarkets, the Commission on June 5, 2007,

filed a Complaint for Temporary Restraining Order and Preliminary Injunction in the U.S. District Court for the District of Columbia (the "District Court").

18. On June 7, 2007, Judge Paul L. Friedman granted the Commission's motion for a temporary restraining order to preserve the status quo pending the Commission's motion for a preliminary injunction. The parties conducted expedited discovery. (Whole Foods had two weeks to conduct limited fact and expert discovery, but did not have sufficient time to conduct third-party discovery on the competitive dynamics in each of the 29 geographical markets presently being challenged by the Commission in the administrative proceedings.) The District Court held a hearing on July 31 and August 1, 2007.

19. On June 27, 2007, the Commission voted to issue the administrative complaint recommended by the FTC staff members who had been conducting the investigation of the merger.

20. On August 7, 2007, the Commission issued an order unilaterally staying the administrative proceedings "[i]n light of the pendency of the federal court proceedings." In doing so, the Commission necessarily recognized that the federal court proceedings were relevant to the administrative proceedings and should be resolved before the administrative matter commenced.

21. At the preliminary injunction hearing before the District Court, the Commission argued that the relevant antitrust market was not all supermarkets but rather "premium natural and organic supermarkets" ("PNOS") — a novel market definition that no one in the supermarket or food-retailing industry had ever heard of before. According to the Commission, the "PNOS" market consisted of only four firms, of which Whole Foods and Wild Oats were the largest.

C. The District Court Denies the FTC's Motion for a Preliminary Injunction.

22. On August 16, 2007, after a hearing and extensive briefing, the District Court denied the Commission's request for a preliminary injunction, which the Commission had sought pursuant to Section 13(b) of the Federal Trade Commission Act. *See FTC v. Whole Foods Market, Inc.*, 502 F. Supp. 2d 1, 19 (2007). The District Court's 95-page opinion detailed findings of fact and conclusions of law supporting its conclusion that the Commission had "failed to demonstrate a likelihood of success on the merits." The District Court made the following findings, among others:

a. "[T]he relevant product market within which to evaluate the proposed transaction must be at least as broad as the retail sale of food and grocery items in supermarkets." *Id.* at 19.

b. "[T]he evidence shows that there are many alternatives to which customers could readily take their business if Whole Foods and Wild Oats merged and Whole Foods imposed small but significant and nontransitory price increases so that such price increases would not be profitable." *Id.* at 34.

c. "[T]he evidence shows that Whole Foods and Wild Oats do not uniquely compete with each other, but with all other supermarkets . . . [and] customers view natural and organic food products at many stores other than Whole Foods as adequate substitutes for those they can obtain at Wild Oats." *Id.* at 35.

d. "The fact is that a large number of Whole Foods and Wild Oats customers today shop frequently at other supermarkets for the same products they sometimes also buy at Whole Foods and Wild Oats-so-called cross-shopping." *Id.*

e. "The evidence presented persuades the Court that certainly beyond the point of critical loss, enough customers would . . . switch some or all of their purchases to

other food retailers, thus rendering unprofitable any post-merger effort by Whole Foods to increase prices beyond a certain point." *Id.*

f. "Whole Foods and Wild Oats view other, more conventional supermarkets as their primary competitors, and they plan their strategies accordingly through 'comp' shopping, price checking, and real estate site selection, among other things. The same is true in reverse. Conventional supermarkets like Delhaize, Publix, Safeway and Wegmans consider Whole Foods to be a significant competitor in the marketplace." *Id.* at 36.

g. "[W]hen Whole Foods does enter a new market where Wild Oats operates Whole Foods takes most of its business from other retailers, not from Wild Oats." *Id.* at 22.

h. "Whole Foods competes vigorously with other supermarkets to retain the business of its many marginal customers." *Id.*

i. "Delhaize, Safeway, Publix, Kroger, Supervalu, and Wegmans have already repositioned themselves to compete vigorously with Whole Foods and Wild Oats for the consumers' premium natural and organic food business. To put it colloquially, this train has already left the station." *Id.* at 48.

j. "Whole Foods prices are essentially the same at all of its stores in a region, regardless of whether there is a Wild Oats store nearby." *Id.* at 22.

23. Immediately following the District Court's August 16, 2007 decision denying the Commission's motion for a preliminary injunction, the Commission moved in the D.C. Circuit for an emergency injunction that would prevent Whole Foods from acquiring Wild Oats pending

the Commission's appeal. At the same time, the Commission left in place its August 7, 2007 order staying the administrative proceedings.

D. The D.C. Circuit Denies the Commission's Emergency Motion To Enjoin The Merger Pending Its Appeal, and Whole Foods Acquires Wild Oats.

24. On August 23, 2007, Circuit Judges Sentelle, Tatel and Kavanaugh unanimously denied the FTC's motion for an emergency injunction, holding that the FTC had "failed to make a 'strong showing that it is likely to prevail on the merits of its appeal.'" *FTC v. Whole Foods Market, Inc.*, No. 07-5276, 2007 U.S. App. Lexis 20539 (D.C. Cir. Aug. 23, 2007) (per curiam).

25. On August 28, 2007, Whole Foods closed its merger with Wild Oats based on the finding by four federal judges (District Judge Friedman and Circuit Judges Sentelle, Tatel and Kavanaugh) that the Commission had not demonstrated the requisite likelihood of success for preliminary injunctive relief, and in light of the requirement in the merger agreement to use its best efforts to close by August 31, 2007, after which time it was subject to a $4 million breakup fee.

26. Despite having failed to obtain an injunction against the merger from the District Court and the D.C. Circuit, and despite knowing about the August 31, 2007 closing deadline for the merger, the Commission did *not* lift its stay of the administrative proceedings, nor did it request the D.C. Circuit to expedite the Commission's appeal.

27. After closing the merger, Whole Foods devoted substantial time and resources to integrating the existing Wild Oats assets into the Whole Foods network. (Whole Foods sold all of the stores that had traded under the names "Sun Harvest" and "Henry's.") Whole Foods spent millions of dollars and over 200,000 hours of training for Wild Oats' personnel, in its effort to integrate and re-brand Wild Oats stores into the culture, personnel practices, and other intangible goodwill represented by the "Whole Foods" brand. As part of the integration, Whole

Foods taught former Wild Oats employees the know-how and trade-secret information that Whole Foods had developed for operating its stores.

E. The Commission's Appellate Briefs Reveal Its Bias and Prejudgment.

28. The appellate briefs filed by the Commission before the D.C. Circuit reveal that the Commissioners — well before the start of the administrative trial — had made up their mind on the merits of the merger. Among other things, the Commission reached the following conclusions on the merits:

a. The Commission has "*established* that premium natural and organic supermarkets constitute a distinct market for antitrust purposes." *See* Brief for Appellant FTC at 40 ("1/14/08 Br.") (emphasis added).

b. The Commission has "*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." *See* Emergency Motion of the FTC for an Injunction Pending Appeal at 6-7 ("8/17/07 Br.") (emphasis added).

c. The Commission's "*conclusion* that the relevant product market is premium natural and organic supermarkets is supported by extensive evidence presented to the district court." *See* 8/17/07 Br. at 8 (emphasis added).

d. "[T]he combination of Whole Foods and Wild Oats *will* substantially lessen competition." *See* 8/17/07 Br. at 5 (emphasis added).

e. Whole Foods' expert economic analysis was "*garbage*," a "sheer guess" and lacked "any" empirical foundation. *See* 1/14/08 Br. at 52, 24 (emphasis added).

f. Whole Foods' industry expert, Dr. Stanton, was a "paid industry expert" whose testimony "carried *no weight*." *See* Reply Brief for Appellant FTC at 12 n.8 (Feb. 27, 2008) ("2/27/08" Br.) (emphasis added).

g. Whole Foods' employees gave "*exceptionally unreliable*" testimony and allowed themselves to be "*subject to manipulation.*" *See* 1/14/08 Br. at 24; 2/27/08 Br. at 10 n.7 (emphasis added).

29. The foregoing statements made by the Commission collectively express without qualification that the Commission had already reached its decision on *the merits of the merger*, not just on the merits of a preliminary injunction. The statements thus demonstrate "bias, prejudgment [and] apparent unfairness." *See Cinderella Career and Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) ("an administrative hearing must be attended, not only with every element of fairness but with the very appearance of complete fairness"); *Amos Treat & Co v. SEC*, 306 F.2d 260, 267 (D.C. Cir. 1962).

30. In past legal briefs to the federal courts, the Commission has demonstrated greater care to qualify important assertions of facts and law regarding merger cases that were still pending on its administrative docket. For example, in *FTC v. H.J. Heinz,* No. 00-5362 (D.C. Cir. 2000), the Commission's appellant brief referred to "*a reasonable probability*" that the merger would "increase[] the *likelihood*" of anticompetitive conduct. (Emphasis added.). In *FTC v. Arch Coal,* Civ. No. 1:04CV00534 (D.C. Cir. 2004), the Commission's appellant brief in support of an emergency injunction pending appeal stated that "[t]he testimony of numerous customers confirmed that the SPRB coal market is *susceptible* to coordinated interaction and the proposed acquisition is *likely* to increase the risk of such coordination" and "that acquisition makes anticompetitive coordination among the major producers more profitable and *easier*, and thus more *likely*." (Emphasis added.) In *FTC v. Tenet Healthcare Corp.,* No. 98-3123 (8th Cir. 1998), the Commission's appellee brief stated that "plaintiffs made an extensive factual showing,

uncontradicted by credible evidence from defendants, that it was *unlikely* there would be such defections [to alternative hospitals to make a price increase unprofitable]." (Emphasis added.)

F. The D.C. Circuit Reverses the District Court.

31. On July 29, 2008 — nearly a year after the Whole Foods/Wild Oats merger had closed — the D.C. Circuit reversed the District Court and remanded for a balancing of the equities and a determination of whether as a practical matter any preliminary injunctive relief was plausible and warranted. The Panel consisted of Circuit Judges Tatel and Kavanaugh (who had earlier denied the Commission's emergency motion to stay pending appeal) and Circuit Judge Brown (in place of Circuit Judge Sentelle).

32. On August 26, 2008, Whole Foods filed a petition with the D.C. Circuit for a rehearing *en banc*. Whole Foods, through its attorney, former U.S. Solicitor General Theodore Olson, filed a reply brief, arguing, *inter alia*, that the Panel's decision "as if in a time warp" had "turned antitrust law on its head" thus "open[ing] the door for questionable and speculative intervention by the FTC to halt free market activity without sound economic foundation."

33. On November 21, 2008, the D.C. Circuit issued a fractured amended decision with three separate opinions. Although none of the judges joined another's opinion, Judges Brown and Tatel agreed that the District Court should be reversed and the case remanded for a weighing of the equities to determine if any preliminary equitable relief should be issued.

34. On that same day, the D.C. Circuit denied Whole Foods' petition for rehearing *en banc*. Circuit Judges Sentelle and Ginsburg concurred in the denial "because, there being no opinion for the Court," they found that the D.C. Circuit's opinion "sets no precedent beyond the precise facts of this case."

35. In his November 21, 2008 amended dissent, Judge Kavanaugh commented as follows regarding the D.C. Circuit's "startling" reversal:

> Both a year ago and now, the same central question has been before the Court in determining whether to approve an injunction: whether the FTC demonstrated the necessary 'likelihood of success' of its §7 case. A year ago, the Court said no. Now, the Court says yes. The now merged entity, the industry, and consumers no doubt will be confused by the apparent judicial-about-face.

FTC v. Whole Foods Market, Inc., No. 07-5276, 2008 WL 5101226, at *20 (D.C. Cir. Nov. 21, 2008) (amended opinion) (Kavanaugh, J., dissenting).

36. Judge Kavanaugh concluded that, "the FTC's case is weak and seems a relic of a bygone era when antitrust law was divorced from basic economic principles." *Id.* at *30. He also noted that "[t]he record does not show that Whole Foods priced differently based on the presence or absence of Wild Oats in the same area," and concluded that "Whole Foods competes in an extraordinarily competitive market that includes all supermarkets, not just so-called organic supermarkets" and thus "there is no sound legal basis to block this merger." *Id.* Judge Kavanaugh added that "[b]y seeking to block a merger without a sufficient product market and that the merged entity could impose a significant and nontransitory price increase, the FTC's position – which Judge Brown and Judge Tatel largely accept – calls to mind the bad old days when mergers were viewed with suspicion regardless of their economic benefits," *id.* at *21 (citing ROBERT H. BORK, THE ANTITRUST PARADOX (1978)).

37. Judge Tatel, concurring in the judgment, provided guidance on how the District Court on remand should "weigh the equities" to determine what preliminary relief, if any, it might grant:

> . . . [T]he companies have already merged, and although this doesn't moot the case, it may well affect the balance of the equities, likely requiring the district court to take additional evidence. . . .
>
> Thus, the district court must consider the extent to which any of the remedial options mentioned above would make it easier for the

> [Commission] to separate Wild Oats and Whole Foods after the Commission's administrative proceeding (should it find a section 7 violation) than it would be if the court did nothing. The court must then weigh this and any other equities opposing the merger against any public and private equities that support allowing the merger to proceed immediately. . . .
>
> [I]f Whole Foods can show some public equity favoring the merger, then the court should also consider private equities on Whole Foods' side of the ledger . . . .

Id. at *18-*19 (Tatel, J., concurring).

G. The Commission Unilaterally Restarts Its Administrative Proceedings and Appoints Commissioner Rosch As The Presiding Official.

38. On August 8, 2008 — nine days after the D.C. Circuit's initial decision reversing the District Court — without awaiting a decision on Whole Foods' *en banc* petition or any remand proceedings, the Commission issued an order unilaterally rescinding its initial stay of the administrative proceedings, which had been in effect for just over 12 months.

39. As noted above, the Commission stated that the initial August 7, 2007 stay had been imposed "in light of the pendency of federal court proceedings and as a matter of discretion." The Commission stated in its August 8, 2008 order that "in order to effectuate the Commission policy . . . to conduct administrative proceedings as expeditiously as possible — the Commission has determined to rescind the stay of the administrative proceeding." However, the rescission was at odds with the FTC's reason for its new policy to expedite proceedings, which was to prevent parties who had not yet merged from calling off their merger because of delay. That justification does not apply here where the Whole Foods/Wild Oats merger has already closed, where federal court proceedings are still pending (i.e., the District Court's remand proceedings), where the Commission had unilaterally maintained a stay on administrative proceeding for just over 12 months; and where Whole Foods is not seeking an "expeditious" trial, but rather a fair trial.

40. In addition to lifting the stay, the August 8, 2008 order by the Commission set a scheduling conference and appointed Commissioner Rosch as the Presiding Official to set the schedule.

41. Commissioner Rosch accepted the appointment even though he was not legally required to do so and could have recused himself from further involvement in the case.

42. On August 22, 2008, Whole Foods filed a Motion to Disqualify the Commission as Administrative Law Judge and to Appoint a Presiding Official Other Than a Commissioner (the "Motion to Disqualify"). Whole Foods argued in its Motion to Disqualify that the Commission's public statements in its D.C. Circuit briefs demonstrated that the Commission had prejudged the merits of the Whole Foods/Wild Oats merger, including the relevant market, the effects on competition, and the quality and character of Whole Foods' evidence and witnesses.

43. On September 5, 2008, the Commission (with Commissioner Rosch participating) issued an Order Denying Respondent's Motion to Disqualify. The Commission did not directly explain or address its statements amounting to public prejudgment set forth in Whole Foods' Motion to Disqualify. Instead, the Commission focused on the fact that the FTC by statute may pursue administrative litigation and federal court injunctions at the same time. No statute, however, much less the Constitution, permits the Commission to prejudge the merits of an administrative case that is before it. Commissioner Rosch participated in the Commission's deliberations over the Motion to Disqualify and in voting to deny it.

H. The Commission Issues a Scheduling Order Based on Commissioner Rosch's Findings That Precludes Whole Foods From Adequately and Reasonably Preparing Its Defense.

44. On September 8, 2008, the Commission issued an amended administrative complaint challenging the merger in 29 separate geographical markets across the United States.

45. That same day, Commissioner Rosch convened a Scheduling Conference to set the discovery, pre-trial and trial deadlines for the administrative proceedings.

46. In advance of the Scheduling Conference, Whole Foods and the FTC's Complaint Counsel ("Complaint Counsel") submitted a Joint Case Management Statement ("JCMS") setting forth their respective, proposed timetables. In the JCMS, Complaint Counsel proposed that fact discovery close on November 20, 2008 (i.e., within two months of the Scheduling Conference) and that trial commence on January 26, 2009 (i.e., within five months of the Scheduling Conference). Whole Foods responded that Complaint Counsel's proposed schedule was "woefully inadequate" because:

a. "Prior cases with discovery schedules comparable to that suggested by Complaint Counsel, such as [the recent Inova Health merger case], involved only a single relevant geographic market in nearby Northern Virginia. In contrast, this case involves 29 alleged relevant geographic markets located throughout the country."

b. "Complaint Counsel's proposed schedule – 2 months of fact discovery beginning in 11 days after the scheduling conference – does not provide sufficient time for third party discovery, which is critical to the defense in this matter."

c. "Unlike Complaint Counsel, [Whole Foods] obtained no discovery during the Commission's Second Request investigation, and had only two weeks in which to conduct fact discovery in the district court proceeding."

d. "Here in advance of the only plenary trial on the merits, [Whole Foods] needs an opportunity to obtain evidence from third parties in each of the markets contested by the Commission. This will require issuing subpoenas to third parties throughout the land, negotiating the scope of the subpoenas, potentially litigating

motions to enforce or to quash, collecting, reviewing and analyzing documents, and subpoenaing third party witnesses for deposition throughout the nation."

e. "Whole Foods expects to depose a number of third party witnesses from each alleged geographic market. Third party depositions alone in this matter likely will exceed 75. Complaint Counsel's proposed schedule for fact discovery – 42 business days (excluding federal holidays) – is not sufficient for Whole Foods to conduct all of the necessary fact witness depositions in the proposed time period, especially when many third party witnesses require substantial advance notice prior to a deposition in a matter in which they are not a party. In addition, counsel for Whole Foods will be required to defend or attend depositions initiated by Complaint Counsel."

47. Accordingly, Whole Foods proposed that, from the date of service of the amended administrative complaint, fact discovery should close after 233 days (i.e., roughly May 2009) and trial should commence after 372 days (i.e., roughly October 2009).

48. Commissioner Rosch stated at the Scheduling Conference that "Whole Foods' proposed schedule [was] far too leisurely." Commissioner Rosch stated that an order would issue closing fact discovery on December 19, 2008 (i.e., four weeks later than Complaint Counsel's request) and requiring trial to commence on February 16, 2009 (i.e., three weeks later than Complaint Counsel's request).

49. Whole Foods reiterated on the record at the Scheduling Conference that Commissioner Rosch's deadlines "circumscribed" the ability of Whole Foods to "marshal the evidence and present the evidence" from potentially over 100 third-party witnesses in a complex antitrust case involving 29 separate markets.

50. Commissioner Rosch rationalized the deadlines by stating during the Scheduling Conference that among other things, "the Commission has been severely criticized for protracting Part 3 proceedings," parties had abandoned potential mergers due to the potentially protracted proceedings, and thus, "the Commission is determined to move Part 3 proceedings along expeditiously." However, the foregoing rational has *no* applicability to a Whole Foods/Wild Oats merger that closed more than 15 months ago and where Whole Foods (the respondent) explicitly requests *more* time to reasonably and adequately prepare for the administrative trial.

51. After Commissioner Rosch stated his views on the discovery and trial schedule at the Scheduling Conference, the Commission (including Commissioner Rosch) issued on September 10, 2008, a Scheduling Order that adopted Commissioner Rosch's timetables. The Scheduling Order provided that amendments could be made only by the Commission as a whole, thus depriving Whole Foods of any recourse to an independent ALJ.

52. Only after locking in the Scheduling Order did the Commission on October 20, 2008, appoint Chief Administrative Law Judge D. Michael Chappell as the ALJ for the trial. Bound by the Scheduling Order, Judge Chappell lacks the authority and discretion to set a reasonable schedule based on the specific needs of the party-litigants and unique circumstances of the Whole Foods case involving a consummated merger.

I. The Commission Continues to Permit Commissioner Rosch to Participate in the Whole Foods' Administrative Case.

53. In the Commission's October 20, 2008 order appointing Judge Chappell, the Commission expressly stated that the full Commission, including Commissioner Rosch, will participate in the appeal, if any, of Judge Chappell's Initial Decision.

54. In the *Inova Health/Prince William Hospital* merger case (FTC Docket No. 9326) — the only other merger case in recent years where a Commissioner served as a presiding official or ALJ — Commissioner Rosch, who had been appointed the ALJ, did not vote on the issuance of the administrative complaint and was recused from participating as a member of the Commission in reviewing the ALJ's Initial Decision.

55. In this case, Commissioner Rosch (a) voted to issue the administrative complaint against Whole Foods, (b) was a member of the Commission that submitted legal briefs to the D.C. Circuit containing statements evidencing prejudgment of key facts and legal issues pertaining to the Whole Foods/Wild Oats merger, (c) served as the Presiding Official for scheduling of the administrative action, (d) was a member of the Commission that issued the Scheduling Order prohibiting any modifications except by the full Commission, and (e) has not recused himself from participating as a member of the Commission in any review of the ALJ's Initial Decision in the case.

J. The Aftermath of the Commission's Scheduling Order Evidences the Denial of Whole Foods' Due Process Rights to Reasonably and Adequately Prepare Its Defense At Trial.

56. As Whole Foods argued in its JCMS, and at the September 8, 2008 Scheduling Conference, it is not possible under the Commission's Scheduling Order for Whole Foods to reasonably and adequately conduct the appropriate third-party discovery that is necessary to defend the merger in 29 markets.

57. Compounding the untenable situation created by the Scheduling Order, the FTC's Complaint Counsel issued very broad and burdensome discovery requests, notwithstanding the fact that, among other things, Whole Foods and Wild Oats collectively had already produced to the Commission more than 20 million pages of documents and more than 2400 MB of data in connection with the Second Request and investigation.

58. As of November 21, 2008, Whole Foods had made more than 10 additional rolling productions of documents and interrogatories pursuant to the administrative case, and still more remains to be produced. Whole Foods has produced more than 91,000 documents, exceeding 1.6 million pages. Whole Foods has also submitted interrogatory responses amounting to more than 53 gigabytes of data, and that respond to more than 25 discrete sub-parts. In total, the data includes approximately 300 million records of weekly transaction prices and more than 280 spreadsheets providing detailed statistics on store characteristics, operations, sales, costs and customer demographics for each of Whole Foods' stores in or near the 29 alleged geographic markets that are being challenged in the administrative trial.

59. Complying with the document requests and interrogatories has already caused Whole Foods to incur over $2 million dollars in vendors' fees and costs alone — not including outside counsel's fees and costs. In order to respond to these discovery requests, Whole Foods, with the assistance of another outside law firm and three electronic discovery vendors, collected paper and electronic records from 12 physical locations and multiple custodians. Whole Foods retained scores of contract attorneys to review the collected material for responsiveness and privilege. Substantial resources at Whole Foods have been devoted to Whole Foods' attempt to comply with Complaint Counsel's discovery requests.

60. As Circuit Judge Brown noted, "if . . . it remains possible to reopen or preserve a Wild Oats store in *just one* of these markets, such a result would at least give the FTC a chance to prevent a [Clayton Act] § 7 violation *in that market.*" *Whole Foods Market, Inc.*, 2008 WL 510226, at *3 (emphasis added). Thus, Whole Foods must affirmatively conduct detailed factual discovery and expert analyses regarding the competitive dynamics (e.g., products, prices, competitors, re-positioning, entry barriers, and efficiencies, etc.) that exist *in each of the 29*

geographic markets at issue. This is equivalent to litigating 29 cases in 29 separate markets across the country.

61. To successfully defend the Merger, the evidence must support Whole Foods' contention that each of the 29 relevant market is not limited to "premium natural and organic supermarkets," as alleged by the Commission. Critical evidence regarding this relevant-market inquiry will come from the documents and testimony of *third-party* competitors and suppliers in each of the alleged 29 markets.

62. To date, Whole Foods has served third-party subpoenas duces tecum on 96 third parties which either compete with Whole Foods in some of the 29 alleged geographical markets or supply Whole Foods and competing firms. These 96 competitors and suppliers are only a *subset* of the total number of competitors and suppliers in the 29 alleged geographic markets.

63. Given the limited number of days for third-party discovery under the Scheduling Order and the need to enforce third-party subpoenas, it is not reasonably possible for Whole Foods to complete appropriate discovery prior to the January 30, 2009 deadline for depositions or the February 16, 2009 scheduled date for the start of the administrative trial. Although Whole Foods has devoted substantial time and resources to secure compliance by the subpoenaed third parties, as of November 21, 2008 only 37 (out of 96) subpoenaed parties have even partially responded by producing the requested documents. Most of these responses and documents were received only recently. Moreover, the Scheduling Order prohibits the taking of any third-party deposition until after all parties have had an opportunity to first review the documents produced by the third-party witness. Thus, Whole Foods has been unable to notice, much less take, a *single* third-party deposition, and it is unlikely it will be able to do so until after the holiday season. Under the Scheduling Order, the deadline for third-party depositions is January 30, 2009, a deadline that Whole Foods will not be able to meet.

64. The difficulty of taking the necessary third-party discovery is compounded by Complaint Counsel's voluminous discovery requests noted above. At the same time, Whole Foods is pursing third-party discovery it must continue to produce documents, answer interrogatories, defend depositions, work with economic and industry experts, take expert depositions, and otherwise prepare for trial.

65. On December 3, 2008, Whole Foods filed a motion requesting a stay on the Commission's administrative proceeding until after the remand proceeding in the District Court. In support of its motion, Whole Foods explained that, even before the remand, it had insufficient time to, among other things, respond to Complaint Counsel's discovery and conduct the third-party discovery in the 29 relevant markets that is necessary for Whole Foods' defense at trial. The motion also noted that the District Court's remand findings on prices and services post-merger — i.e., the "public equities" — would be relevant to the pending administrative proceedings to unwind the merger.

66. On December 8, 2008, the FTC Complaint Counsel filed an opposition to Whole Foods' motion even though Complaint Counsel agreed with Whole Foods that the District Court's post-merger findings on remand would "overlap" and "be relevant" to the administrative proceedings.

K. The Commission's New Proposed Rulemaking Evidences that the Scheduling Order Not Only Denies Due Process, But It Was Predetermined and Has No Rational Application to the Facts and Circumstances of This Case.

67. On October 7, 2008, the Commission published a Notice of Proposed Rule in the Federal Register (the "Proposed Rule"), proposing fundamental changes to the Commission's administrative proceedings for reviewing merger cases. *See* 73 Fed. Reg. 58832 (Oct. 7, 2008).

68. The Proposed Rule, which virtually mirrors the Scheduling Order in the Whole Foods case, marks such a fundamental change to existing Commission procedures that the Commission saw fit to seek public comment on it before applying it to any future cases.

69. Among other things, the Commission asked for public comment on changes suggested by the Proposed Rule, which the Commission already had cemented in the Whole Foods case without any pubic comment. For example, the Proposed Rule provides:

a. "[T]he commission or one of its members may preside over discovery and other prehearing proceedings and then transfer the matter to an Administrative Law Judge." That is precisely what already had happened in the *Whole Foods* case.

b. The administrative trial must commence within five months of the complaint, unless the Commission, not the ALJ, finds exceptional circumstances and grants an extension. Here, Whole Foods was given just over five months from the September 8, 2008 Scheduling Conference after the stay was lifted to the commencement of the administrative hearing.

c. The Commission proposes to give itself responsibility to decide discovery motions and other motions previously within the purview of the ALJ. This is exactly what has occurred in the *Whole Foods* case, where the ALJ cannot modify the Scheduling Order to accommodate Whole Foods' inability to conduct discovery and fairly prepare for trial absent leave of the entire Commission.

d. "[T]he Commission believes the norm should be that the Part 3 case [the administrative case] can proceed even if a court denies preliminary relief." This is in stark contrast to the Commission's prior policy and practice of discontinuing cases when a federal court denies the Commission's motion for a preliminary

injunction. *See* Administrative Litigation Following the Denial of a Preliminary Injunction: Federal Trade Commission Policy Statement, 50 Fed. Reg. 39741 (Aug. 3, 1995). It also directly conflicts with the recommendations of the Congressionally-appointed Antitrust Modernization Commission. *See* ANTITRUST MODERNIZATION COMM'N., REPORT AND RECOMMENDATIONS OF THE ANTITRUST MODERNIZATION COMM'N 130-32 (Apr. 2007).

e. The Commission proposes to allow hearsay testimony in administrative proceedings, including the scheduled Whole Foods' administrative trial set to commence in February 2009.

70. While the accelerated schedule imposed on Whole Foods is virtually identical to what the Proposed Rule seeks to codify, there is *no* rational connection between the stated justifications for the Proposed Rule and this case. Here, Whole Foods already has consummated its acquisition, and there is no danger that the transaction will be abandoned before consummation.

71. Consistent with the Commission's rush to adopt the Proposed Rule before the administrative trial against Whole Foods commences on February 16, 2009, the Proposed Rule provides only a 30-day window for public comments. By way of comparison, the Commission provided 180 days for public comment on its proposed amendment to the platinum section of the Guides for Jewelry, Precious Metals and Pewter Industries, 73 Fed. Reg. 22848 (Apr. 28, 2008) and 75 days for comments respect to energy labeling requirements for ceiling fans, 71 Fed. Reg. 35584 (June 21, 2006).

72. Notwithstanding the shortened comment period, the Proposed Rule has drawn negative criticism from such organizations as the American Bar Association's Antitrust Section

and the U.S. Chamber of Commerce, and a former Chairman and General Counsel of the FTC — all of which flagged potential due process concerns.

a. The ABA Antitrust Section expressed concern that the Rule could "compromise respondents' rights and ability to mount an effective defense." The ABA noted that "where [FTC] complaint counsel typically have engaged in months or years of fact development, . . . respondents need to have an adequate opportunity to conduct their own discovery." In addition, the proposed changes "relating to timing do not provide adequate flexibility to account for the fundamental differences between Part 3 cases involving unconsummated mergers, consummated mergers, and conduct challenges." The ABA also commented that the proposed rules "limit substantially the effect of an adverse district court decision" which historically the Commission has respected.

b. The U.S. Chamber of Commerce expressed concern "that while the additional changes may speed up certain parts of the process in certain circumstances, they should not be undertaken at the expense of companies' due process rights." The Chamber observed that "it appears that the proposed changes are being rushed into place and for the purpose of giving the FTC material, tactical, and procedural advantage . . . ." Further, the Chamber noted that "[t]he proposed regulations work to effectively eliminate the role of the independent [ALJ] to manage and prepare an initial decision of the case" and thus eliminates "a vital check on potential unfairness inherent in the FTC's administrative procedure." On this point, the Chamber added that "the ALJs should be truly independent with full power and authority to oversee and initially decide all aspects of the

administrative litigation. Otherwise, the appearance of independent fact finding is illusory."

c. Former FTC Chairman Robert Pitofsky and former General Counsel Michael Sohn cautioned the Commission to "review carefully those comments that raise questions as to whether respondents may be unfairly limited in their pretrial rights" by the shortened time periods. They further cautioned that "[t]he more the Commission invades what has heretofore been the province of an independent ALJ, the more it lends credence to concerns regarding the fairness of the Part 3 adjudicative process." They added that "the Commission's interest in preserving its role as a fair minded expert administrative adjudicator is best served if it abstains from exploring the outer limits of what is statutorily and constitutionally permissible."

d. Linda Blumkin, former Assistant Director for General Litigation in the FTC's Bureau of Competition, observed that "[o]ne of the mainstays of FTC practice was the existence of the administrative law judge who managed the administrative hearing process" and noted that an independent ALJ provides "both the appearance and reality of impartiality."

L. The Scheduling Order Forces Whole Foods to Defend the Administrative Trial Prior to the Conclusion of the District Court's Remand Proceedings.

73. As the Commission at least implicitly recognized when it originally stayed its administrative proceeding on August 7, 2007 pending its preliminary-injunction action, the District Court's decision on remand is relevant to the parties' presentations of their cases in the administrative action. Indeed, the ABA's comments to the FTC's new Proposed Rule noted that

federal court rulings on preliminary injunction motions are of "central" importance to the administrative proceedings.

74. The District Court's remand, consistent with Circuit Judge Tatel's instructions, would illuminate, if not determine, many of the issues that will be addressed at the administrative proceeding. A remand before the District Court will consider the benefits to consumers and the public in general arising from the Whole Foods/Wild Oats combination. A finding that such benefits resulted from the merger would gut the Commission's case.

75. The Commission's accelerated schedule deprives Whole Foods of the opportunity to frame its administrative case in a manner that takes into consideration and is consistent with the opinions of the District Court. Indeed, the Commission's Scheduling Order appears to be intended to marginalize the District Court's remand proceedings.

76. In a November 24, 2008 press release, Mr. David Wales (Acting Director of the FTC's Bureau of Competition) stated that his team is looking forward to presenting evidence "as to why [the Whole Foods/Wild Oats] merger is unlawful and should be undone at the plenary trial in a few months" and is also "ready to address the public equities in further proceedings before the district court *with the goal of preserving competition in the interim* and *ensuring that a meaningful remedy can be obtained.*" (Emphasis added.) If the Commission wishes to preserve competition "in the interim," it should respect the District Court's remand proceeding and not seek to preempt it with an accelerated administrative schedule.

COUNT I

(Violation of Due Process Clause Based on Commission's Prejudgments and Biases)

77. Plaintiff restates and incorporates by reference each and every allegation of the preceding paragraphs.

78. Whole Foods has a significant property interest at stake in the administrative proceeding before the Commission; Whole Foods has already spent well in excess of $700 million to consummate its merger with Wild Oats, and has incurred millions of dollars in legal and vendor fees to defend the merger in administrative and federal court proceedings.

79. The Due Process Clause of the Fifth Amendment to the U.S. Constitution requires that the Commission, as an administrative agency, provide Whole Foods a fair and impartial adjudicatory proceeding — both in appearance and in reality — that is free of any prejudgment or bias on the key factual and legal merits of the Whole Foods/Wild Oats merger.

80. The Commission has violated Whole Foods' due process rights to a fair and impartial proceeding by having concluded, in appearance if not in reality — before the administrative trial commenced or any evidence or witnesses were presented — that it had already:

a. "*established* that premium natural and organic supermarkets constitute a distinct market for antitrust purposes,"

b. "*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,"

c. reached the "*conclusion* that the relevant product market is premium natural and organic supermarkets is supported by extensive evidence presented to the district court,"

d. concluded that "the combination of Whole Foods and Wild Oats *will* substantially lessen competition,"

e. concluded that Whole Foods' expert economic analysis is "*garbage*," a "sheer guess" and lacks "any" empirical foundation and that the pricing study of Whole Foods' expert, Dr. Scheffman, "must be given *little weight in a Section 7 case*,"

f. Whole Foods' witnesses are "*exceptionally unreliable*" and "*subject to manipulation*." (Emphasis added.)

81. The above statements, which were made in the Commission's public briefs to the D.C. Circuit, further demonstrate that the Commission developed an impermissible "will to win" against Whole Foods before the administrative trial had commenced.

82. Although the Commission is authorized to recommend an administrative complaint, seek a preliminary injunction in federal court, pursue administrative proceedings and later review the decision of an ALJ, it cannot lawfully make up its mind (privately, much less publicly) until such time as it ultimately reviews the record. Moreover, during the pendency of administrative proceedings, the Commissioners are prohibited from even communicating with the FTC Complaint Counsel or any other FTC staff involved in the prosecution of the case.

83. As a result of the foregoing, the Commission's administrative proceedings against Whole Foods are fundamentally flawed under the Due Process Clause; no valid order can result from administrative proceedings; and immediate review by this Court for injunctive relief is proper.

84. The Commission's conduct has caused and will continue to cause Whole Foods to suffer immediate and irreparable harm to its constitutional rights to Due Process. No money damages can remedy this harm, and Whole Foods has no legal avenue by which to recover any money damages against the Commission.

COUNT II

(Violation of Due Process Clause Based on Commission's Unreasonable Scheduling Order)

85. Plaintiff restates and incorporates by reference each and every allegation of the preceding paragraphs.

86. The Due Process Clause of the Fifth Amendment to the U.S. Constitution requires that the Commission, as an administrative agency, provide Whole Foods a fair opportunity to reasonably and adequately prepare its defenses to the Commission's charges, including the opportunity to take appropriate discovery to collect necessary evidence to support such defenses at trial.

87. The Commission has violated Whole Foods' due process rights to a fair and impartial proceeding by unreasonably truncating the discovery and trial schedule over Whole Foods' objections, and thereby depriving Whole Foods of the ability to take appropriate discovery in time to reasonably and adequately defend itself at trial. The Commission's September 10, 2008 Scheduling Order, provides that fact discovery will close on December 19, 2008, depositions will be completed by January 30, 2009, and trial will commence on February 16, 2009. As Whole Foods has repeatedly informed the Commission, it is impossible for Whole Foods to conduct necessary third-party discovery, respond to Complaint Counsel's discovery, and prepare for a trial involving 29 separate geographical markets across the United States, within the Commission's compressed schedule. None of the Commission's stated justifications for an expeditious proceeding (*e.g.*, a pending merger, a danger that the parties will abandon a merger due to protracted proceedings, a request by the respondents to accelerate the proceedings, etc.) applies in Whole Foods' case.

88. As a result of the foregoing, the Commission's administrative proceedings against Whole Foods are fundamentally flawed under the Due Process Clause; no valid order can result

from the administrative proceedings; and immediate review by this Court for injunctive relief is proper.

89. The Commission's conduct has caused and will continue to cause Whole Foods to suffer immediate and irreparable harm to its constitutional rights to Due Process. No money damages can remedy this harm, and Whole Foods has no legal avenue by which to recover any money damages against the Commission.

COUNT III

(Violation of Due Process Clause Based on Commission's Failure to Disqualify Itself)

90. Plaintiff restates and incorporates by reference each and every allegation of the preceding paragraphs.

91. For the reasons set forth in Counts I and II above, the Commission has violated the Due Process Clause of the Fifth Amendment to the U.S. Constitution by depriving Whole Foods of a fair and impartial adjudicatory proceeding.

92. Accordingly, Due Process requires that the Commission disqualify itself from adjudicating the ultimate merits of the Whole Foods/Wild Oats merger. However, the Commission, in this case, voted to issue the initial and amended administrative complaints against Whole Foods; made public statements of prejudgment and bias regarding the merits of Whole Foods' case; appointed a Commissioner as Presiding Official for scheduling purposes; ordered a truncated discovery and trial schedule that denies Whole Foods the ability to prepare its defense; removed the independence of the ALJ over scheduling matters; and retained the full Commission's jurisdiction to hear any appeal from the ALJ's Initial Decision.

93. As a result of the Commission's failure to disqualify itself from deciding the ultimate merits of the Whole Foods/Wild Oats merger, the administrative proceedings against Whole Foods are fundamentally flawed under the Due Process Clause; no valid order can result

from the administrative proceedings; and immediate review by this Court for injunctive relief is proper.

94. The Commission's conduct has caused and will continue to cause Whole Foods to suffer immediate and irreparable harm to its constitutional rights to Due Process. No money damages can remedy this harm, and Whole Foods has no legal avenue by which to recover any money damages against the Commission.

COUNT IV

(Violation of Due Process Clause Based on Counts I-III)

95. Plaintiff restates and incorporates by reference each and every allegation of the preceding paragraphs.

96. Alternatively, even if Counts I, II, or II do not individually rise to a violation of the Due Process Clause of the Fifth Amendment to the U.S. Constitution, the conduct at issue in Counts I-III together constitutes a violation of Due Process.

97. As a result of the foregoing, the Commission's administrative proceedings against Whole Foods are fundamentally flawed under the Due Process Clause; no valid order can result from the administrative proceedings; and immediate review by this Court for injunctive relief is proper.

98. The Commission's conduct has caused and will continue to cause Whole Foods to suffer immediate and irreparable harm to its constitutional rights to Due Process. No money damages can remedy this harm, and Whole Foods has no legal avenue by which to recover any money damages against the Commission.

COUNT V

(Violation of APA Based on Commission's Arbitrary and Capricious Scheduling Order)

99. Plaintiff restates and incorporates by reference each and every allegation of the preceding paragraphs.

100. The Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*, requires that the Commission refrain from engaging in "arbitrary and capricious" conduct that bears no rational connection to the facts and circumstances of a particular case.

101. The Commission has violated the Administrative Procedure Act by acting in an arbitrary and capricious manner by unilaterally subjecting Whole Foods to an unreasonably truncated Scheduling Order that has no rational connection to the facts and circumstances of the Whole Foods/Wild Oats merger case — which involves a merger that was consummated over 15 months ago, which had been the subject to extended administrative stay by the FTC, and which requires Whole Foods to develop defenses in 29 separate geographical markets across the country. Moreover, none of the Commission's stated justifications for accelerating its adjudicatory proceedings — including the justifications stated in the Commission's new Proposed Rule that it seeks to apply in all future FTC merger trials — applies in Whole Foods' case.

102. The Commission's aforementioned conduct constitutes arbitrary and capricious agency action in violation of the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*; the Commission's proceedings against Whole Foods are fundamentally flawed such that no valid order can result from the administrative proceedings; and immediate review by this Court for injunctive relief is proper.

103. The Commission's conduct has caused and will continue to cause Whole Foods to suffer immediate and irreparable harm. No money damages can remedy this harm, and Whole Foods has no legal avenue by which to recover any money damages against the Commission.

COUNT VI

(Declaratory Judgment Based on Violations of Due Process Clause and the APA)

104. Plaintiff restates and incorporates by reference each and every allegation of the preceding paragraphs.

105. Based on the conduct alleged in Counts I-V both individually or collectively, the Commission has violated the Due Process Clause and the Administrative Procedure Act.

106. Whole Foods has a vital and significant interest in vindicating its rights to a fair proceedings pursuant to the Due Process Clause and the Administrative Procedure Act. Whole Foods has a significant property interest at stake in the administrative proceeding before the Commission; Whole Foods has already spent well in excess of $700 million to consummate its merger with Wild Oats, and has incurred millions of dollars in legal and vendor fees to defend the merger in administrative and federal court proceedings. The Commission is pursuing its administrative proceeding to unwind the Whole Foods/Wild Oats merger, which was consummated over 15 months ago.

107. The Commission's conduct has thus caused and will continue to cause Whole Foods to suffer immediate and irreparable harm. No money damages can remedy this harm, and Whole Foods has no legal avenue by which to recover money damages against the Commission.

108. There is a present justiciable controversy between the parties as to whether the Commission's administrative proceedings comply with the strictures of Due Process and the APA, and have been fundamentally flawed such that no valid order can issue therefrom. Declaratory relief is appropriate in helping to resolve this controversy.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests the Court to:

a. Declare that Defendant Federal Trade Commission violated the Due Process Clause and the Administrative Procedure Act by (i) impermissibly reaching and giving the appearance of reaching, prejudgments on the merits of Whole Foods' case prior to the commencement of the administrative proceedings, (ii) impermissibly setting a truncated trial schedule that deprives Whole Foods of an opportunity to reasonably and adequately prepare for the administrative trial, (iii) acting in an arbitrary and capricious manner in imposing a discovery and trial schedule that bears no rational connection to the facts and circumstances of Whole Foods' case, and (iii) failing to disqualify itself from adjudicating the case;

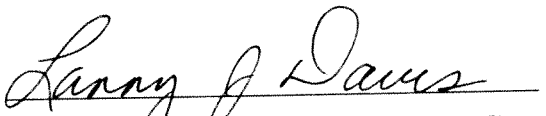
b. Order Defendant Federal Trade Commission (i) to terminate the administrative proceedings as fundamentally flawed under the Due Process Clause and arbitrary and capricious under the Administrative Procedure Act, and (ii) to proceed, if at all, in challenging the Whole Foods/Wild Oats merger pursuant to Section 13(b) of the Federal Trade Commission Act in an action for a permanent injunction in U.S. District Court;

c. Award Plaintiff its reasonable costs incurred in bringing this action; and

d. Award such other and further relief as the Court deems just and proper.

Dated: December 8, 2008

Respectfully submitted,



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