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REPORT FROM WASHINGTON

Whole Foods/Wild Oats: D.C. Circuit Reverses and Remands on Motion to Preliminarily Enjoin Already Consummated Merger

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TO VIEW THE DECISION FROM THE U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA IN *FEDERAL TRADE COMMISSION V. WHOLE FOODS MARKET, INC., ET AL.*, PLEASE CLICK HERE.

In a 2-1 decision handed down on July 29th, the U.S. Court of Appeals for the District of Columbia reversed the district court's denial of the Federal Trade Commission's ("FTC") request for a preliminary injunction to block the merger of grocery chains Whole Foods and Wild Oats. Quite notably, this decision comes almost a year after the D.C. Circuit denied the FTC's emergency motion for an injunction pending appeal, shortly after which the parties closed the merger in August 2007. As such, the decision may have significant implications for FTC merger enforcement in the future. In addition, the decision sets important substantive antitrust law precedent regarding product market definition analysis.

On appeal of the district court's denial of the FTC's preliminary injunction motion, the FTC argued that the district court abused its discretion by treating market definition as a threshold question and by failing to credit the FTC's main evidence in support of its relevant product market definition of "premium, natural and organic supermarkets" ("PNOS"). In the majority opinion, the Court rejected the FTC's argument that the district court erred by focusing on product market definition. However, the Court found that the district court had incorrectly analyzed the relevant product market and, therefore, erred in concluding that the FTC did not establish a likelihood of success on the merits.

As an initial matter, the Court addressed the question of whether it had jurisdiction to hear the FTC's appeal, given the fact that, as the Court put it, the "merger is a *fait accompli* and Whole Foods has already closed some Wild Oats stores and sold others." For that reason, Whole Foods argued that the FTC's request for a preliminary injunction was now moot.

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"Thus, the courts have the power to grant relief on the FTC's complaint, despite the merger's having taken place, and this case is therefore not moot."

(Opinion of the Court)

"If, as appears to be the case, it remains possible to reopen or preserve a Wild Oats store in just one . . . market[], such a result would at least give the FTC a chance to prevent a §7 violation in that market."

(Opinion of the Court)

"[T]he markets no doubt will be confused if not bewildered by this apparent judicial about-face."

(Dissenting Opinion)

Relying on precedent holding that courts have discretion to order remedies for antitrust violations resulting from a merger, even after the merger has closed, the Court concluded that a preliminary injunction, albeit at this very late stage, may give the FTC the opportunity to mitigate the alleged anticompetitive effects of the merger if there is still the possibility of reopening or preserving a Wild Oats store in at least one local market.

Having concluded that it has jurisdiction, the Court turned to the merits of whether the district court erred in its analysis of the relevant product market. To begin, the Court noted that the FTC's position on appeal, that a market definition is not necessary in a §7 case, was squarely inconsistent with its own statements to the district court and was contrary to established case law. Thus, the Court concluded that the district court did not err when focusing on the question of market definition—especially given that the FTC itself had placed market definition front and center in its case.

However, where the Court departed from the district court is in the substantive analysis of the relevant product market in this case. After hearing conflicting theories from the FTC's and defendants' experts regarding the proper methodology for determining a relevant product market, the district court sided with the defendants' expert, who applied "critical loss analysis" to conclude that the relevant product market should be broader than PNOS and include other, conventional grocery stores. Defendants' expert predicted that a small price increase by the merged entity would result in enough marginal customers shifting purchases to conventional grocery stores so as to render the small price increase unprofitable. As such, the relevant product market would have to be expanded to include conventional grocery stores, because a hypothetical monopolist in a market defined as PNOS could not profitably impose a small price increase, which is the long accepted method of defining a relevant product market. The D.C. Circuit rejected the use of critical loss methodology, holding that it was error for the district court to focus on the effect of a hypothetical price increase on marginal consumers, "because in some situations core consumers, demanding exclusively a particular product or package of products, distinguish a submarket."

Barring *en banc* review by the D.C. Circuit, this decision may have significant implications for merging parties and antitrust law in the future. First, the decision serves to remind parties that, even if a court has given an apparent green light to a merger, it is still possible for structural remedies to be ordered regardless of whether the transaction has closed already and merger integration is well on its way. Second, the decision may effect substantive antitrust law in defining relevant product markets. "Critical loss analysis" is a method that has been relatively widely accepted in the economics profession and by the courts. The D.C. Circuit's rejection of this method, in favor of a focus on core customers that would not switch to other supply sources in the face of a small price increase, represents a departure from the current state of thinking in antitrust law and economics. Whether courts in other

circuits will follow the D.C. Circuit's approach in this case remains to be seen.

"In short, a core group of particularly dedicated, 'distinct customers,' paying 'distinct prices,' may constitute a recognizable submarket."

(Opinion of the Court)

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