UNITED STATES OF AMERICA
BEFORE THE 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 DENYING RESPONDENT'S MOTION TO DISQUALIFY THE COMMISSION

Respondent Whole Foods Market, Inc., moves the Commission to recuse "itself as administrative law judge ("ALJ") and to appoint as presiding official a duly qualified ALJ who is not a Commissioner." See Respondent's Motion to Disqualify the Commission at p. 1 (April 22, 2008) *available at* http://www.ftc.gov/os/adjpro/d9324/080822respmodisqualifycomm.pdf. The Commission denies the motion.

In administrative litigation, a party may seek disqualification by a good faith filing "of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee." 5 U.S.C. §556(b). Whole Foods argues that statements the Commission made in seeking a preliminary injunction and in pursuing its appeal of the denial of a preliminary injunction create bias and prejudgment requiring the Commission to disqualify itself or any individual Commissioner from acting as the presiding officer.

Whole Foods does not challenge the Commission's authority to review the initial decision – a role in which the Commission has all the powers of the presiding officer. Whole Foods, however, argues that where the Commission seeks a preliminary injunction and where the Commission pursues that relief vigorously, it would be inappropriate, or at least appear inappropriate, for the Commission to act as the presiding official. Whole Foods' position is flawed for at least three reasons: (1) Whole Foods' failure to challenge the Commission's ability to hear the appeal of the initial decision refutes its argument, (2) the statements themselves –

taken out of context – do not show prejudgment and do not require disqualification, and (3) Whole Foods' argument, if accepted, would essentially prevent the Commission from ever seeking a preliminary injunction.

First, Whole Foods' claim fails on its own terms. In moving to recuse the Commission as the presiding officer, Whole Foods does not challenge the propriety of the Commission's hearing the appeal of the initial decision. In hearing such an appeal, the Commission exercises "all the powers which it could have exercised if it had made the initial decision." Rule 3.54(a). It reviews the evidence *de novo*, and the Commission – not the presiding officer – is the finder of fact. It follows that the Commission can undertake the subsidiary and derivative responsibility of acting as a presiding officer.

Second, the statements do not indicate any prejudgment or partiality as to the final merits of this action. Whole Foods urges the Commission to disqualify itself because, in Whole Foods' view, the Commission "pressed arguments" in the federal court proceedings "that, on their face, state that the Commission has reached judgments on key issues going to the merits of this administrative proceeding." See Respondent's Motion at p. 3. Whole Foods takes those "arguments" out of context. The question in "this administrative proceeding" is not the same one in the federal court proceeding. The question at the plenary trial (in the administrative proceeding) is whether the evidence adduced during the hearing constitutes a violation of Section 7. That was not the question in the federal court proceedings. As the D.C. Circuit decided, the question in the federal court proceeding was whether the evidence adduced in those proceedings raised "questions going to the merits so serious, substantial, difficult[,] and doubtful as to make them fair ground for thorough investigation." *Fed. Trade Comm'n v. Whole Foods*, 533 F.3d 869, 875 (D.C. Cir. 2008). The statements about the evidence to which Respondent points were statements that the evidence before the federal district court satisfied that standard. The Commission did not express any opinion, and does not express an opinion now, as to whether the evidence adduced at the plenary trial will be sufficient to show a violation of Section 7. Indeed, the only opinion to which Respondent points that even refers to the plenary trial is the Commission's statement that the federal district court did not assess the evidence adduced in the federal court proceedings in a fashion that would be acceptable at a plenary trial. That is a statement about the way the district court decided whether to issue a preliminary injunction, not a statement about whether the evidence at the plenary trial will be sufficient to establish a Section 7 violation.

The burden on the movant seeking recusal here is high. Whole Foods argues that the standard is "whether a disinterested observer may conclude (the agency) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." Mot. at 3 (*Citing Cinderella Career and Finishing Sch. Inc. v. Fed. Trade Comm'n* , 425 F.2d 583, 591). The test for recusal is different where the movant attacks statements made in the course of the agency's official duties. The Supreme Court has rejected disqualification where the Commission had made statements in the course of its designated responsibilities that were factually related to a later adjudication. *Fed. Trade Comm'n v. Cement Institute*, 334 U.S. 683 (1948). There, the

Commission challenged industry-wide base point pricing in the cement industry. *Id.* at 688. Prior to issuing the complaint, the Commission, in reports and testimony to Congress, had stated that "the operation of the multiple basing point system as they had studied it was the equivalent of a price fixing restraint of trade in violation of the Sherman Act." *Id.* at 701.[1] Forming such opinions did not prevent the Commission from deciding the adjudicatory matter:

> "[No] decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involved questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court.

Id. at 702-03.

The analysis would be different if a Commissioner made statements unrelated to the Commission's official duties. Disqualification is appropriate if a Commissioner gives a speech discussing the merits of a pending case. *See Cinderella Career and Finishing School v. Federal Trade Commission*, 425 F.2d 583 (D.C. Cir. 1970). In contrast, the statements Whole Foods relies on were made as part of the Commission's attempts to invoke relief under Section 13(b).

Third, the logic of Whole Foods' argument would destroy the utility of Section 13(b), which allows the Commission to pursue preliminary relief as plaintiff while it adjudicates the ultimate merits in administrative litigation. If Whole Foods' argument were accepted, the Commission would risk disqualification from pursuing administrative litigation – the administrative hearing as well as an appeal of an Initial Decision – each time the Commission decided to pursue preliminary relief under section 13(b) of the FTC Act in federal district court. Under Whole Foods' view, the Commission could not, or should not, participate in administrative proceedings at all if, on appeal from a denial of preliminary injunction under 13(b), it declared that the evidence before the federal district court was sufficient to satisfy the applicable standard. Such a result would nullify Section 13(b). If Whole Foods were correct, every time the Commission sought a preliminary injunction, it could not pursue administrative litigation, so there would be no need for a preliminary injunction pending the outcome of the adjudicative trial.

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[1] In its reports, the Commission also said it "regarded the cement industry in the same category, as far as price fixing was concerned, as steel and other industries." *Marquette Cement Mfg. Co. v. Fed. Trade Comm'n*, 147 F.2d 589, 591 (7th Cir. 1945) *aff'd sub nom. Fed. Trade Comm'n v. Cement Institute*, 334 U.S. 683 (1948).

Respondent cites no authority for the proposition that the Commission, having sought preliminary relief, may not adjudicate the merits, and we are aware of none. To the contrary, the Administrative Procedure Act envisions agencies acting in the dual roles that Whole Foods objects to. The APA generally forbids a person from ruling on an adjudicative matter if that person engaged "in the performance of investigative or prosecuting functions for" the matter or a factually related matter. 5 U.S.C. §554(d)(2). This prohibition "does not apply . . . (C) to the agency or a member or members of the body comprising the agency." *Id*. So, the Commission may adjudicate a case while the agency prosecutes "a factually related case." 5 U.S.C. § 554(d)(2)(C). Because both the FTC Act and the APA contemplate the Commission acting precisely as it has, recusal is inappropriate.

Finally, Whole Foods also makes a number of arguments that relate to whether there is a reason for the Commission to act as a presiding officer. None is relevant to whether the Commission must disqualify itself. At this point, the Commission has not named Commissioner Rosch the presiding officer for all purposes nor has it concluded that the Commission itself will retain jurisdiction during the initial proceedings.[2]

Conclusion

To be clear, the Commission has determined that it has reason to believe Whole Foods' acquisition of Wild Oats may substantially lessen competition. Further, the Commission did argue that the evidence in the preliminary injunction matter established questions so serious, so substantial as to require further study and that the District Court erred in not finding that the Commission had established a likelihood of success on the merits– a position the DC Circuit agreed with. None of that means the Commission has prejudged this case; indeed, the Commission has not made any determination on the ultimate merits of this litigation. Whether it

[2] Whole Foods did not follow the proper procedure for seeking disqualification of the presiding officer. The movant must file "a timely and sufficient affidavit" that shows "personal bias or other disqualification." 5 U.S.C. §556(b)(3). Whole Foods filed no such affidavit. Although not a basis for our decision here, the failure to file such an affidavit would be a sufficient reason to deny a motion to disqualify. *Gibson v. Fed. Trade Comm'n,* 682 F.2d 554, 565 (1982). As the *Gibson* court explained, the affidavit requirement is not a "mere formality;" rather, it "serves not only to focus the facts underlying the charge, but to foster an atmosphere of solemnity commensurate with the gravity of the claim." *Id.*

acts as the presiding official or not, it will decide this matter, like all matters, based on the evidence in the case and the law, in an impartial and fair manner. Accordingly,

IT IS ORDERED THAT Respondent Whole Foods' Motion to Disqualify the Commission is **denied;** and

IT IS FURTHER ORDERED THAT Respondent Whole Foods' Motion for Oral Argument on its Motion to Disqualify the Commission is **denied.**

By the Commission.

Donald S. Clark
Secretary

ISSUED: September 5, 2008