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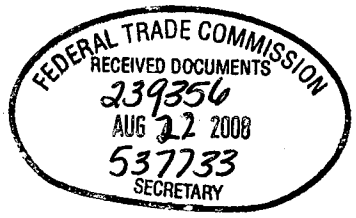

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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(g)(2) of the Commission's Rules of Practice, respectfully moves the Commission to remove itself as administrative law judge ("ALJ") and to appoint as presiding official a duly qualified ALJ who is not a Commissioner, with all requisite powers and duties as set forth in Rule 3.42(c).[1]

The Commission's prior public statements show that, without having seen or heard a single witness in the Part III proceeding, the Commission has prejudged (i) the legality of the WFM/Wild Oats merger under Section 7 of the Clayton Act, (ii) essential elements of the Section 7 claim, and (iii) the quality and character of WFM's evidence and likely trial witnesses. In making these statements, the Commission went well beyond zealous advocacy in pursuit of a

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1 Rule 3.42(g)(2) states that motions to disqualify should be "supported by affidavits." The entire factual predicate for this motion rests on statements by the Commission in public court pleadings, however, such that no affidavits are necessary.

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 over the trial of this matter.

BACKGROUND FACTS

On June 5, 2007, pursuant to section 13(b) of the FTC Act, the Commission voted unanimously to file a complaint in U.S. District Court for the District of Columbia, seeking a preliminary injunction to block WFM's acquisition of Wild Oats Markets, Inc. All four current Commissioners joined in the decision to sue.

On June 28, 2007, the same Commissioners voted unanimously to issue the complaint that initiated this administrative proceeding. On August 7, 2007, on its own initiative, the Commission stayed the administrative case, "pending the proceedings" in federal court. *Order Staying Administrative Proceedings* (Aug. 7, 2007) at 2. The administrative case remained stayed for one year and one day. On August 8, 2008, the Commission *sua sponte* rescinded the stay. The same day, the Commission set a date for a scheduling conference, and appointed Commissioner Rosch as presiding official over that scheduling conference. The Commission has not appointed an independent ALJ but instead has retained adjudicative responsibility for this matter.

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 be "impartial." 5 U.S.C. § 556(b) (2008). "[A]n administrative hearing 'must be attended, not only with every element of fairness but with the very appearance of complete fairness.'" *Cinderella Career and Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (citing *Texaco, Inc. v. FTC*, 336 F.2d 754, 760 (D.C. Cir. 1964) quoting *Amos Treat & Co. v. SEC*, 306 F.2d 260, 267 (D.C. Cir. 1962)). The denial of such a hearing violates "the basic requirement of due process." *Amos Treat*, 306 F.2d at 267.

The "test for disqualification has been succinctly stated as whether 'a disinterested observer may conclude that (the agency) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.'" *Cinderella Career*, 425 F.2d at 591 (quoting *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469, *cert. denied*, 361 U.S. 896 (1959)).

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 Co.*, 96 F.T.C. 91 (1980) (quoting *Rice v. McKenzie*, 581 F.2d 1114, 1116-17 (4th Cir. 1978)). *See also Order Certifying Respondents' Motion to Recuse to the Commission and Accompanying Statement by J. Thomas Rosch*, Docket No. 9326 (May 29, 2008) at 7-8 (citations omitted) ("[t]o be sure, disqualification would be warranted if there were a demonstration of bias, prejudgment or apparent unfairness on the part of the decision-maker be he an ALJ or Commissioner."). Under any articulation of this standard, it is plain, as shown below, that neither the Commission as a whole nor any of its Commissioners should serve as ALJ in this matter.

The Commission's conclusions, in advance of an administrative trial, jeopardize fairness in the plenary trial on the merits before an impartial trier of fact. As the Court of Appeals has said: "The procedures which have been established [under the FTC Act] are designed to provide for proceedings in which both the Commission and the responding party have a *fair and equal opportunity* to present exhibits and witnesses designed to establish the legitimacy of their argument." *Cinderella Career*, 425 F.2d at 587 (emphasis added).

A. Relevant Product Market

The Commission's product market conclusions raise serious questions about the fundamental fairness of the forthcoming administrative proceeding and the Commission's ability objectively to assess evidence that does not square with the narrow "premium natural and organic supermarkets" line of commerce that the Commission asserts it has already proven in federal court.

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 36. The Commission argued that Judge Friedman espoused "a 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, reflects a "standard appropriate for a final adjudication on the merits." In its August 17, 2007, *Emergency Motion of the Federal Trade Commission for an Injunction Pending Appeal* ("*8/17/07 Br.*") at 6-7, after stating that it "need not prove" a Section 7 case, the Commission asserted that it *had* "proved" the relevant market in the district court hearing: "Product market was a key issue in this case. *The Commission 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." (emphasis added).

The Commission further stated that its "*conclusion* that the relevant product market is premium natural and organic supermarkets is supported by extensive evidence presented to the district court." *Id.* at 8 (emphasis added). In a later brief, the Commission again did not assert only that it raised "serious, substantial questions" under § 13(b), but said "[i]n the present case,

such evidence *established* that premium natural and organic supermarkets *constitute a distinct 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." *8/17/07* Br. at 5 (emphasis added). This is a straightforward assertion that the merger is illegal, not that the plaintiff should prevail under § 13(b) because it raised "serious, substantial questions" about effects.

Again before the Court of Appeals, the Commission concluded that the evidence it offered before Judge Friedman "directly showed the *likelihood of harm* to competition and consumers." *1/14/08 Br.* at 37 (emphasis added). This is the very standard that the ALJ will be applying to the evidence presented to it in this proceeding. The Commission later concluded that it made a direct showing "of the anticompetitive effects *likely to ensue* from this acquisition." *2/27/08 Br.* at 16 (emphasis added). These statements reflect a judgment under the standard "appropriate for a final adjudication on the merits" of Section 7 of the Clayton Act. *See 1/14/08 Br.* at 36.

C. WFM Fact Witnesses

Several of the WFM declarants are likely to testify in the administrative hearing, and one can reasonably anticipate that their testimony will be consistent with their declaration and

deposition testimony. But the Commission has already concluded that none of this testimony should be credited. This is precisely the kind of defect in an ALJ that is disqualifying.

In the District Court, WFM offered into evidence sworn declaration testimony from a number of company executives. Embedded within the declarations were citations to numerous trial exhibits (business records) upon which the declarations were based. FTC counsel cross-examined every WFM declarant at deposition, and had the opportunity, which counsel elected not to exercise, to depose each declarant specifically with respect to his/her declaration. The district court had all this evidence before it.

The Commission excoriated Judge Friedman for having placed *any* reliance on *any* of the declarations or cross-examination testimony: "Insofar as the district court relied on post-challenge testimony and declarations from the merger parties' employees, that was clear error." *2/27/08 Br.* at 10 n.7. The Commission concluded that these employees gave "exceptionally unreliable" testimony (*1/14/08 Br.* at 24) and allowed themselves, under oath, to be "subject to manipulation." *2/27/08 Br.* at 10 n.7. Having belittled, in its entirety, the sworn declaration and cross-examination deposition testimony of all these witnesses, the Commission has created a reasonable basis for doubting that WFM will have "a fair and equal opportunity to present exhibits and witnesses designed to establish the legitimacy" of its defenses to the § 7 charges. *See Cinderella Career*, 425 F.2d at 587.

D. Expert Witnesses

The Commission's prior conclusions about expert testimony in the District Court proceeding also reflect disqualifying prejudgment of issues that will be litigated in the administrative proceeding.

The Commission prejudged the economic analysis submitted by the economic expert 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 particularly disturbing when one contemplates the prospect that this same Commission proposes to now sit as trier of fact in the Section 7 case. The Commission did not argue only that this evidence was insufficient to defeat the FTC's claim under § 13(b); rather, it explicitly revealed its determination that Dr. Scheffman's pricing study "must be given little weight *in a Section 7 case*." *2/27/08 Br.* at 15 n.10 (emphasis added).

With regard to Dr. Stanton, whom WFM called as an expert in the District Court proceeding, the Commission repeatedly passed him off as a "paid industry expert" whose testimony "carried no weight." *See 2/27/08 Br.* at 12 n.8. This suggests that, as trier-of-fact, the Commission already is predisposed to accord Dr. Stanton's testimony no weight should he take the stand before the ALJ.

* * * * *

The Commission describes this case, in effect, as an FTC slam dunk – but not merely for purposes of § 13(b). The Commission told the Court of Appeals that "the district court's evaluation of the evidence would not pass muster *even under the 'clear error' standard that*

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 determine the substantiality of the evidence on the record including the examiner's report." This principle applies to appellate review, under the "substantial evidence" standard, to FTC adjudicatory actions. *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1063 (11th Cir. 2005) *cert. denied*, 548 U.S. 919 (2006) ("Although *Universal Camera* involved the NLRB, and not the FTC, the results are applicable here.").

Appointment of an independent ALJ would ensure that the initial decision that is part of any later judicial review does not embrace conclusions drawn prior to this administrative proceeding.

The Commission has offered no rationale for abandoning an independent ALJ in this case, and cannot offer here even the minimal procedural protections that were afforded to respondents in the only recent case in which a Commissioner was appointed the ALJ.

In his recent interview in *The Antitrust Source*, Chairman Kovacic said that "[t]he central objective" in naming Commissioner Rosch as ALJ for the *Inova* proceeding "was to ensure that the Commission would expedite its administrative process." "Interview with William E. Kovacic, Chairman, Federal Trade Commission," *The Antitrust Source*, Aug. 2008, at 6. The Commission has not publicly explained its rationale for refraining from appointing an

independent ALJ in the instant case, but, if the "central objective" here is to "expedite" the 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 about witness credibility were rendered.

As the foregoing facts demonstrate, the Commission evidently holds strong views about this case. The Commission was direct and no-holds-barred in the Court of Appeals in advocating these views. This is not to suggest that the Commission should pull punches in litigation or refrain from zealous advocacy. In light of its dual role under the FTC Act as "prosecutor and

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.

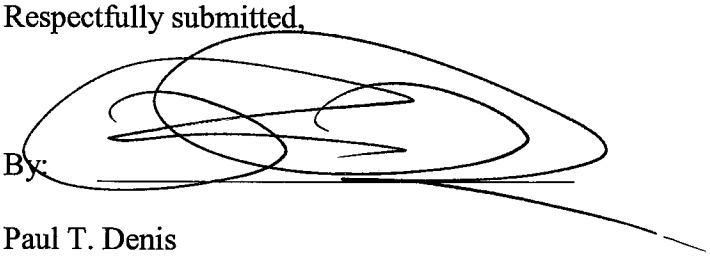
CONCLUSION

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 any hesitation, therefore, in appointing for this case an ALJ who is not a Commissioner and who is not the Commission.

So as to avoid the appearance that the trier-of-fact in the instant proceeding may lack requisite indicia of impartiality regarding the legality of the WFM/Wild Oats merger under Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, and regarding the admissibility and weight of evidence offered into the administrative hearing record, the Commission should appoint as the presiding official a duly qualified ALJ who is neither the Commission nor a Commissioner.

Dated: August 22, 2008

Respectfully submitted,

By: 

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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 Presiding Official other than a Commissioner. In response to this Motion, Complaint Counsel have [_____].

The Commission has determined to grant the Motion. Accordingly,

IT IS ORDERED THAT the Commission, pursuant to Rule 3.42(b) of the Commission's Rules of Practice, appoints Administrative Law Judge [_____] as the Presiding Official in this proceeding.

By the Commission.

Donald S. Clark
Secretary

ISSUED: _____, 2008

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:

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