

UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA

EKATERINI KOTTARAS, Individually On Behalf of Herself )  
And On Behalf Of All Others Similarly Situated, )

Plaintiff, )

No. 08cv1832-PLF

v. )

WHOLE FOODS MARKET, INC. )

Defendant. )

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**PLAINTIFF'S MEMORANDUM IN RESPONSE TO THE COURT'S SPONTE ORDER  
REQUESTING BRIEFING TO EXPLAIN WHY THE INSTANT CASE SHOULD BE  
RELATED TO *FTC V. WHOLE FOODS MARKETS, INC.*, NO. 07-1021-PLF**

Pursuant to the Court's *sua sponte* Minute Order of November 14, 2008, Plaintiff Ekaterini Kottaras ("Plaintiff" or "Kottaras"), by and through her undersigned counsel, hereby files the instant memorandum of law addressing why this case should be treated as being "related to" *Federal Trade Commission v. Whole Food Market, Inc.*, No. 07-1021-PLF, currently pending before this Court. For the reasons detailed below, Plaintiff respectfully submits that, under Local Civil Rule 40.5(a)(3)(ii) and (iii), the two cases should be treated as related to one another and be assigned to the same presiding judge.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

**A. The Filing Of The Underlying FTC Case Against Whole Foods.**

On June 6, 2007, the Federal Trade Commission ("FTC") filed a complaint before this Court against defendants Whole Foods Market, Inc. and Wild Oats Markets, Inc. [hereinafter "FTC Complaint"]. The FTC Complaint challenged the announced merger between the Whole Foods and Wild Oats supermarket chains as anticompetitive and violating the antitrust laws. *See generally* FTC Complaint, at pp. 1-2. The FTC brought suit under, *inter alia*, Section 7 of the Clayton Act, seeking to enjoin the merger. *See id.* at ¶ 16.

Thus, the focus of the allegations pleaded in the FTC Complaint centered on allegations as to the definition of the relevant market that would allegedly be affected by the announced merger, as well as the anticompetitive effects that the FTC maintained would result should the merger be consummated. *See generally id.*, at ¶¶ 17-35; 43-45. The FTC Complaint pleaded that the proper antitrust market definition should be the market for the operation of premium, natural, and organic supermarkets. *Id.* at ¶ 34. Further, a significant portion of the allegations pleaded in the FTC were devoted to explaining why the premium, natural, and organic

supermarkets (“PNOS”) comprised a legally cognizable antitrust product market. *Id.* at ¶¶ 17-35.

To bolster its contention that the merger would be anticompetitive and violate Section 7 of the Clayton Act, the FTC Complaint quoted repeatedly from statements purportedly made by Whole Foods’ Chief Executive Officer, John Mackey. *See id.*, at ¶¶ 21, 22, 27, 28, 30, 31, and 41 (all quoting statements of John Mackey). Given that the FTC lacks jurisdiction or authority to seek monetary recovery for violations of the antitrust laws, its complaint was limited to seeking injunctive relief to enjoin Whole Foods and Wild Oats from consummating their merger. *Id.* at Prayer for Relief ¶¶ 1-3.

**B. The FTC’s Motion For A Temporary Restraining Order and Preliminary Injunction, And This Court’s Decision.**

Simultaneously with the filing of its complaint, the FTC also moved for a temporary restraining order (“TRO”) and a preliminary injunction to enjoin and restrain the consummation of the Whole Foods-Wild Oats merger. *See generally*, FTC Mtn. for TRO and Prelim. Inj. (filed Jun 6, 2007). The parties agreed to a Consent Order for the entry of a TRO holding the merger in abeyance until the Court adjudicated the FTC’s then pending motion for a preliminary injunction. *See* FTC Consent Motion for Entry of a TRO (filed Jun. 7, 2007).

On August 1, 2007, the FTC filed its memorandum in support of its motion for a preliminary injunction. Therein, the FTC gave detailed arguments, citing to voluminous exhibits and other evidence it had obtained throughout its investigation of the proposed merger. Likewise, the FTC’s memorandum relied upon the report of its expert economist, Kevin M. Murphy, Ph.D. *See* FTC’s Corrected Mem. in Support of Prelim. Injunction (public version filed Aug. 1, 2007). Dr. Murphy’s expert report contained a detailed analysis of the market definition, and the anticompetitive effects that would reportedly arise should the merger be

consummated. Its analysis referenced numerous exhibits, transcripts of testimony given by key actors during the FTC's investigation of the merger, as well as analytical data gathered from third parties who had been subpoenaed or otherwise provided documentation as part of the FTC's pending case.

Whole Foods and Wild Oats jointly opposed the FTC's motion for preliminary injunction, citing expert economic testimony of their own. *See* Whole Foods and Wild Oats Joint Mem. In Opp. to Mtn for Prelim. Injunction (public redacted version filed Jul. 27, 2007), at 23, 36-40 (citing and quoting expert economic report of David T. Scheffman, Ph.D). The defendants' opposition memorandum focused on the market definition alleged by the FTC, and referenced in voluminous fashion exhibits, and testimony obtained during the pending case. *See* Whole Foods and Wild Oats Joint Mem. In Opp. to Mtn for Prelim. Injunction (public redacted version filed Jul. 27, 2007), at 14-39.

After full briefing and a hearing on the matter, on August 16, 2007, the Court issued its Order denying the FTC's motion for preliminary injunction.

**C. The FTC Appeal To The District of Columbia Circuit, The Appellate Decisions, and The Denial of Whole Foods' Petition For Rehearing *En Banc*.**

The FTC timely appealed this Court's denial of the FTC's motion for a preliminary injunction to the United States Court of Appeals for the District of Columbia Circuit this. After full briefing on the matter, the D.C. Circuit reversed this Court's denial and remanded the case back to this Court for further proceedings consistent with the appellate decision. *See FTC v. Whole Foods Markets, Inc.*, 533 F.3d 869 (D.C. Cir. 2008). The D.C. Circuit held that this Court erred in its determination that the FTC failed to show that it was likely to succeed on the merits of its case because the Court "analyzed the product market incorrectly." *Id.* at 876. Further explaining its holding that this Court erred in rejecting the FTC's proffered market definition

(and hence in denying, on that basis, the injunction sought by the FTC), the D.C. Circuit elaborated:

[T]he district court believed the antitrust laws are addressed only to marginal consumers. This was an error of law, because in some situations core consumers, demanding exclusively a particular product or package of products, distinguish a submarket. The FTC described the core PNOS customers, explained how PNOS cater to these customers, and showed these customers provided the bulk of PNOS's business. The FTC put forward economic evidence-which the district court ignored-showing directly how PNOS discriminate on price between their core and marginal customers, thus treating the former as a distinct market. Therefore, we cannot agree with the district court that the FTC would never be able to prove a PNOS submarket.

*Id.* at 881.

As a result of the D.C. Circuit's order reversing this Court's denial of the preliminary injunction sought by the FTC, and remanding the case back to this Court, the case remained for all practical purposes a pending case before this Court once again. In the meantime, Whole Foods filed a petition seeking rehearing *en banc* before entire panel of the Court of Appeals. *See* Whole Foods Petition for Rehearing *En Banc* (filed Aug. 26, 2008). That petition was ultimately denied by the D.C. Circuit, but the appellate court did issue an amended and reissued opinion of its prior appellate order. *See* Amended and Reissued Op., *FTC v. Whole Foods*, No. 07-5276 (D.C. Cir. Nov. 21, 2008). The amended opinion still remands the case back to this Court for further proceedings, thereby making the case a pending case before this Court. Further litigation before this Court of the FTC action is now effectively assured in light of the denial of the *en banc* rehearing petition.

**D. The Filing of The Instant Class Action by Plaintiff Kottaras.**

On October 27, 2008, following the D.C. Circuit's issuance of its original opinion reversing this Court's denial of the FTC's motion for a preliminary injunction, and remanding

the case back to this Court, Plaintiff Ekaterini Kottaras filed the instant action before this Court. Kottaras' complaint, was styled as a Class Action Complaint on behalf of all similarly situated consumers of Whole Foods and, like the FTC Complaint, sought to challenge the merger between Whole Foods and Wild Oats as being anticompetitive and violating the antitrust laws. The Kottaras Complaint, like the FTC Complaint, pleads as its principal count against Whole Foods, a claim for violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. *See* Kottaras Compl., at Count I. Similarly, like the FTC Complaint, Kottaras' Complaint seeks injunctive relief to enjoin the consummation of the merger (or at least to impose conditions on its continuation). *See generally* Kottaras Complaint, at ¶ 2. Kottaras also seeks recovery of monetary damages in the form of treble damages, as allowed by the Clayton Act to private individuals suing under the antitrust laws. Further, Kottaras also pleads a second count for unlawful monopolization in violation of Section 2 of the Sherman Act, as well as counts under Section 1 of the Sherman Act and Section 3 of the Clayton Act, alleging an unlawful agreement in restraint of trade on the part of Whole Foods and Wild Oats. *Id.* at Counts III-IV. The unlawful agreement in restraint of trade referenced in these counts, however, is the very same merger agreement forming part of the principal count brought by both Kottaras and the FTC under Section 7 of the Clayton Act.

Like the allegations of the FTC Complaint, Kottaras' Complaint relied on quotations from Whole Foods' Chief Executive Officer John Mackey to bolster its allegations of market definition and the anticompetitive effects of the merger. *See* Kottaras Compl., at ¶¶ 42, 43 (quoting John Mackey). Because Kottaras sued the same entity as the named defendant in the FTC Complaint, and because both complaints challenged the same transaction and arose out of the same operative facts; namely, the merger between Whole Foods and Wild Oats, Kottaras

designated her complaint as a “related case” within the meaning of Local Civil Rule 40.5. The case was, therefore, initially assigned to the Honorable Paul L. Friedman, the judge presiding over the FTC Complaint against Whole Foods. On November 14, 2008, Judge Friedman issued a *sua sponte* Order directing the parties to explain why the two cases should or should not be deemed related.

**II. THE TWO CASES SHOULD BE DEEMED “RELATED CASES” WITHIN THE MEANING OF LOCAL CIVIL RULE 40.5.**

Although random assignment of cases to presiding judicial officers is the norm, this Court’s Local Rules, like those of most courts across the country, recognize the enhanced judicial efficiency that is to be gained by assigning so-called “related cases” to the same judicial officer. The standard for such “related case” designation in this Court is articulated in Local Civil Rule 40.5(a), which provides in pertinent part that:

A related case for purpose of this Rule means as follows:

...  
(3) Civil, including miscellaneous, cases are deemed related when the earliest is still pending on the merits in the District of Court and they relate to: (i) common property, or (ii) involve common issues of fact, or (iii) grow out of the same transaction or occurrence.

Local Civ. Rule 40.5(a)(3).

**A. Both Cases Grow Out of The Same Transaction or Occurrence—The Whole Foods-Wild Oats Merger.**

As the foregoing factual and procedural history makes clear, there is little doubt that the two cases arise out of the same transaction or controversy and, therefore, satisfy the criteria of Local Civil Rule 40.5(a)(3)(iii). Both actions challenge the merger between Whole Foods and Wild Oats. That same transaction, in fact, forms the sole basis of both cases. Without it, neither the FTC nor Kottaras would be a plaintiff. *See Collins v. Pension Benefits Guarantee Corp.*, 126 F.R.D. 3, 7 (D.D.C. 1989) (holding two cases were “related” within meaning of local rule as they

met “[t]he same event or transaction requirement” where the plaintiff in the second filed case involves “the same rule challenged in [the first filed case]. This is sufficient to conclude that the two cases grow out of the same event or transaction.”).

The identity of the transaction or event giving rise to the litigation in both cases is even more acute in this situation than was the case in *Collins*. Further, precisely because the two cases arise out of the same transaction and challenge the same (i.e. the merger), failure to relate the two cases could lead to anomalous results. For example, were the two cases assigned to different judges, one judge could conclude that the challenged Whole Foods-Wild Oats merger is likely to violate Section 7 of the Clayton Act, while the other presiding judge hearing the second-filed case may conclude that the exact same challenged transaction is not likely to violate Section 7 of the Clayton Act. Under these circumstances, one judge could issue a preliminary injunction, attaching conditions to the continued consummation of the merger, while the second judge would deny the preliminary injunction and thereby allow the merger to go forward without further conditions. Only assignment of both cases to the same presiding judicial officer by resort to the “related case” designation can avoid these potentially problematic results.

**B. Both Cases Involve Common Issues Of Fact.**

The two cases against Whole Foods also independently satisfy the criteria for a “related case” designation because they both “involve common issues of fact.” Local Civ. Rule 40.5(a)(3)(ii). To prevail in their cases, both the FTC and Kottaras must ultimately prove that their proffered antitrust relevant market definition is correct on the merits. Notably, both cases plead the same antitrust relevant product market—the market for “premium, natural, and organic supermarkets” or so-called PNOS market. *Compare* FTC Complaint at ¶ 34 (alleging PNOS is the relevant antitrust product market) *with* Kottaras Complaint, at ¶ 39 (same).

Without question, the definition of the relevant market is a question of fact. *See Neumann v. Vidal*, 1981 WL 2219, at \*1 (D.D.C. Nov. 9, 1981) (“Determination of the relevant market is predominantly a question of fact.”). As a result, in any antitrust case, “therefore, the plaintiff must plead facts sufficient to establish the existence of a relevant market.” *Dial A Car, Inc. v. Transportation, Inc.*, 884 F. Supp. 584, 590 (D.D.C. 1995). Here, because the relevant antitrust product market pleaded against the same defendant is the same, the same underlying facts will be relevant and common to both cases in establishing whether, in fact, the pleaded market definition is correct.

That resolution of this inquiry “involves common issues of fact” within the meaning of Civil Local Rule 40.5(a)(3)(ii) is readily confirmed by even a cursory review of the two complaints in both cases. Both: plead many of the same facts; quote many of the same individuals, and rely on the same expert report findings to substantiate their allegations as to the relevant market definition. *Compare* FTC Complaint, at ¶¶ 17-35 *with* Kottaras Complaint, at ¶¶ 39-43. This assuredly satisfies the “involve common issues of fact” criteria for the related case designation under Local Civil Rule 40.5(a)(3)(ii). *See Tripp v. Executive Office of the President*, 194 F.R.D. 340, 343 (D.D.C. 2000) (upholding “related case” designation because both cases involved common issues of fact where “the very facts alleged in this case are at issue and remain contested in [the first filed case].”).

**C. That The Appellate Mandate In The FTC Case Had Not Issued When Kottaras Was Filed Does Not Undermine The “Related Case” Designation.**

Kottaras’ complaint was filed before this Court after the D.C. Circuit reversed this Court’s denial of the preliminary injunction and remanded the case back to this Court. Thus, as of that time, it was fair to conclude that the case was still pending before this Court, so as to satisfy the “related case” designation criteria. Nevertheless, as a technical matter, the D.C.

Circuit's mandate had not yet issued, and Whole Foods had filed a petition for rehearing *en banc*. That technicality raises the question whether, as a result of the appellate mandate not having been issued as of the time that *Kottaras* was filed, the "related case" designation should be denied. It should not.

In *Collins*, this Court faced the same question: whether a subsequently filed case should be deemed "related" to the prior case when it arose out of the same transaction, but where a settlement agreement had already disposed of the first-filed case when the second action was filed. *Collins*, 126 F.R.D. at 6. Declining to turn its decision on what it termed a "technical answer" as to whether the settlement agreement had acted to no longer make the first-filed case "pending" within the meaning of Civil Local Rule 40.5, this Court instead construed the two cases as still meriting "related case" designation because, despite the execution of a settlement agreement in the first action, its "parties may very well need to litigate issues that must be considered 'merits' issues." *Id.* at 7. The mere *prospect* of future merits-based litigation in the first, already settled, case still sufficed to have that case considered "pending" for purposes of satisfying the related case designation criteria.

Here, the argument for considering the FTC case still "pending" for purposes of a "related case" designation is exponentially stronger than in *Collins*. While in *Collins*, future merits-based litigation in the first-filed (and settled) action was a *mere possibility* in the event that future disputes arose about implementation of the settlement, here future litigation of the FTC case is virtually inevitable. Whatever doubts remained before, were resolved today when the D.C. Circuit denied Whole Foods' petition for rehearing *en banc* and again remanded the action to this Court for further proceedings. Moreover, it is telling that Whole Foods does not

oppose the “related case” designation, and agrees that it presents the most efficient administration of both cases in which it is a defendant.

An equally pragmatic reason to consider the two cases “related,” despite the fact that a mandate had not issued from the D.C. Circuit at the time of Kottaras’ filing is that doing otherwise would simply encourage litigants to defer their “related case” designation requests. Had Kottaras filed her complaint at the same time, but not sought “related case” designation right then at the earliest opportunity, she could have merely waited until the FTC case was formally before this case on remand and then sought to designate the two cases as being “related.” Civil Local Rules 40.5(b)(3) and 40.5(c)(2) explicitly provide that “related case” designations may be noted and cases assigned as “related” even after the original filing of the complaint of the purportedly related second case. It would be an anomalous result and an empty exercise to say the least, to hold that Kottaras’ complaint would be deemed related to the FTC’s case had she merely delayed in seeking that designation.

The common factual and transactional nexus between the two cases—the lawfulness of the Whole Foods-Wild Oats merger—is the same regardless of when the “related case” designation is sought. Treating the two cases as “related” best comports with the purpose of the Civil Local Rules and would enhance judicial efficiency. The two cases should be deemed “related.”

### **CONCLUSION**

For the foregoing reasons, the Court should find the instant action to be a “related case” within the meaning of Local Civil Rule 40.5 to *Federal Trade Commission v. Whole Food Market, Inc.*, No. 07-1021-PLF, and both should be assigned to the same presiding judge.

Dated: November 21, 2008

Respectfully submitted,

/s/ Roy A. Katriel

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