

Whatever doubt the Court may have had last week should have been alleviated today. Just today the procedural posture of the FTC case changed. The court of appeals denied Whole Foods' petition for rehearing en banc. Under the court of appeals' prior order, the mandate will issue in seven days and the case will be back in this Court.

Even absent this change in circumstances, Whole Foods believes that the two cases are related within the meaning of Local Civil Rule 40.5 and that the purposes of the Rule would be furthered by treating the cases as such.

STATEMENT OF FACTS

On June 6, 2007, the FTC filed a complaint assigned to this Court, seeking preliminarily to enjoin Whole Foods' proposed acquisition of Wild Oats, pending completion of an administrative hearing before the FTC on the acquisition's antitrust merits. The FTC argued in this Court that an injunction should issue because it had met its burden, under section 13(b) of the Federal Trade Commission Act, to show the requisite likelihood of success on the merits in proving that the acquisition would be anticompetitive in a relevant market that the FTC defined as "premium natural and organic supermarkets."

This Court declined to issue the injunction, finding that the FTC had not demonstrated a likelihood of success on the merits. *FTC v. Whole Foods Market, Inc. (Whole Foods I)*, 502 F. Supp. 2d 1, 49-50 (D.D.C. 2007). Thereafter, Whole Foods and Wild Oats voluntarily agreed temporarily not to close their transaction while the FTC sought an injunction pending appeal in this Court and in the court of appeals. After both courts denied the FTC's requests for an injunction pending appeal, Whole Foods and Wild Oats consummated the transaction.

The FTC filed a timely Notice of Appeal. (Ex. 1) On July 29, 2008, the Court of Appeals for the District of Columbia Circuit reversed the district court. *FTC v. Whole Foods Market, Inc. (Whole Foods II)*, 533 F.3d 869 (D.C. Cir. 2008). The court of appeals determined, *inter alia*, that further analysis was required on the balance of equities, and ordered the case remanded to this Court. Concurrently with its decision, however, the court of appeals also ordered that the mandate be withheld until seven days after the disposition of a petition for rehearing or rehearing en banc. (Ex. 2) Whole Foods filed a petition for rehearing en banc on August 26, 2008. (Ex. 3) Today, the court of appeals issued an amended opinion and denied the petition for rehearing en banc. (Ex. 4) Under the court's prior order, the mandate will issue in seven days, returning the FTC case to this Court.

The instant class action complaint was filed October 27, 2008. Plaintiff alleges that the acquisition by Whole Foods of Wild Oats violates sections 3 and 7 of the Clayton Act and sections 1 and 2 of the Sherman Act. The Plaintiffs also filed a Notice of Related Case asserting that the present case is related to *Whole Foods I*. This Court *sua sponte* requested briefing on whether the Notice was proper.

ARGUMENT

I. THIS CASE IS RELATED TO *WHOLE FOODS I* BECAUSE *WHOLE FOODS I* IS STILL PENDING ON THE MERITS WITHIN THE MEANING OF THE LOCAL RULES, AND THE CASES RAISE COMMON ISSUES OF FACT AND ARISE OUT OF THE SAME TRANSACTION.

Local Civil Rule 40.5 provides that a newly filed case will be assigned to the same judge as the oldest "related" case. Cases are related "when the earliest is still pending on the merits in the District Court and they (i) relate to common property, or (ii) involve common issues of fact,

or (iii) grow out of the same event or transaction or (iv) involve the validity or infringement of the same patent.” LCvR 40.5(a)(3).

The earliest case here, *Whole Foods I*, is effectively pending on the merits in the district court within the meaning of the Local Rules, since the mandate will issue in just seven days. Indeed, absent this recent development, *Whole Foods I* was effectively pending in this Court within the meaning of the Local Rules due to its unusual procedural posture. That case shares with the present case common issues of fact related to the same transaction, satisfying parts (ii) and (iii) of the Rule.

A. This Case Involves Common Issues of Fact to Those in *Whole Foods I* and Grows Out of the Same Event or Transaction.

This case falls squarely within subsections (ii) and (iii) of the Local Rule 40.5 test for factual relatedness. Both the instant antitrust case and *Whole Foods I* arose out of the same Whole Foods—Wild Oats transaction. Because the legal and factual foundation for both cases is the same, both cases involve many of the same issues of fact.² The common issues of fact include, among others, a determination of the relevant product market and relevant geographic markets, the nature of competition in the relevant markets, the effect of the transaction on various attributes of competition, and the cost savings and other efficiencies that the transaction created.

² Indeed, Plaintiff’s complaint lifts wholesale much of the FTC’s complaint.

B. *Whole Foods I* is Effectively Pending on the Merits in the District Court Within the Meaning of Local Civil Rule 40.5(a).

Whole Foods understands the Court's concern to arise out of the temporal requirements of Local Civil Rule 40.5. *Whole Foods I* is in a procedural posture unlike that of other cases that address the "still pending" clause of Local Civil Rule 40.5(a)(3). As a result of today's events, the court of appeals' mandate will issue in a mere seven days. The case will then be back in this Court. It would be anomalous to allow this slight gap between the filing of the instant class action and the remand of *Whole Foods I* to dictate that the class action be assigned to a new judge who is unfamiliar with the factual and legal background of the acquisition. This is especially true in light of the salutary purpose of the related case rule, which is to enhance judicial economy.

Moreover, while cases on appeal are generally not considered pending on the merits in the district court, this Court has recognized that there are sometimes "unusual circumstances" in which a case on appeal is considered "still pending." See *Keepseagle v. Glickman*, 194 F.R.D. 1, 2-3 (D.D.C. 2000). One such unusual circumstance identified was "where the possibility remained that the parties would be required to litigate the merits of the case at some point." *Stewart v. O'Neill*, 225 F. Supp. 2d 16, 19-20 (D.D.C. 2002).

The current procedural posture of *Whole Foods I* could alone be "unusual" enough to invoke the application of Local Civil Rule 40.5.³ The "unusual circumstance" described in

³ This Court has interpreted Local Civil Rule 40.5 to require that cases be related in the present. *Howard v. Gutierrez*, 405 F. Supp. 2d 13, 16 (D.D.C. 2005). In *Howard*, the court found that cases were not related where the relation depended entirely on the plaintiff's success on a motion to amend her complaint. *Id.* at 15-16. The two cases in *Howard* were factually unrelated absent the amendment; the only commonality was that a plaintiff in one was lead plaintiff in the other against the same defendant. *Id.* at 15.

Stewart even more forcefully applies to *Whole Foods I*. Prior to the court of appeals decision of today, there was certainly a “possibility” that the case would be remanded for further litigation on the merits. Now there is not just a “possibility” that the case will be remanded to this Court. It *will* be remanded in seven days. Because of this peculiar procedural status of the case, *Whole Foods I* is effectively “pending on the merits” in this Court within the meaning of Local Rule 40.5(a)(3).

II. RECOGNIZING THIS CASE AS RELATED TO *WHOLE FOODS I* FURTHERS THE PURPOSES OF THE LOCAL CIVIL RULES.

Cases in the district court are generally assigned randomly to judges. This random assignment is designed to promote public confidence in the integrity of the court system and to prevent judge-shopping. *Tripp v. Executive Office of the President*, 196 F.R.D. 201, 202 (D.D.C. 2000). Local Civil Rule 40.5(a) creates an exception to this general rule because of the strong interest in judicial economy. “The exception to the general rule . . . rests primarily on considerations of judicial economy. It will often prove wasteful of time and resources for two judges to be handling cases that are so related that they involve common factual issues or grow out of the same event or transaction.” *Id.* at 202. *See also Assiniboine & Sioux Tribe of the Fort Peck Indian Reservation v. Norton*, 211 F. Supp. 2d 157, 159 (D.D.C. 2002) (“It would waste judicial resources and be nonsensical to have another court address these same factual issues, particularly in light of the fact that this Court has already heard weeks of testimony regarding these computer systems.”).

Unlike *Howard*, this case on its facts already substantially overlaps with *Whole Foods I* and remand in *Whole Foods I* has already been ordered.

This Court spent many hours hearing testimony and listening to arguments, and likely many days reviewing transcripts, declarations, expert reports, briefs, and exhibits in *Whole Foods I*. As this Court noted, the factual record in that case was “voluminous.” *Whole Foods I*, 502 F. Supp. 2d at 49. Because the present case has so much factual overlap with *Whole Foods I* and arises out of the same transaction, it would substantially promote judicial economy for the instant case to remain before Your Honor rather than be transferred to another judge for consideration of substantially the same material.

The court hearing this case will be confronted with motions that will entail an evaluation of the same facts that were presented in the FTC case. Most immediately, Plaintiff’s motion for class certification will require an analysis of the way in which consumers shop, the geographic scope of the relevant markets, and how the grocery industry operates—all issues to which this Court has had extended exposure. Similarly, any motions to compel or motions for summary judgment will require an analysis of evidence with which this Court is already familiar. The principle of judicial economy would be served by recognizing this case as related to *Whole Foods I*.

CONCLUSION

For the foregoing reasons, this Court should recognize *Kottaras v. Whole Foods Market, Inc.* as related to *Whole Foods I.*

Respectfully submitted,

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November 21, 2008

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Memorandum of Law in Response to Court's Inquiry on Case Relation was served this 21st day of November, 2008, by operation of the Court's Electronic Filing System on counsel for plaintiff:

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