

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WHOLE FOODS MARKETS, INC.,)	
550 Bowie Street)	
Austin, TX 78703)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 08-2121 PLF
)	
FEDERAL TRADE COMMISSION,)	
600 Pennsylvania Avenue, N.W.)	
Washington, D.C. 20580)	
)	
Defendant.)	
)	

**DEFENDANT FEDERAL TRADE COMMISSION’S MOTION TO DISMISS OR, IN
THE ALTERNATIVE, TO TRANSFER**

Defendant, Federal Trade Commission (“FTC” or “Commission”), moves, pursuant to Fed. R. Civ. P. 12(b)(1), (4) and (5),¹ to dismiss the complaint filed by Whole Foods Markets, Inc. (“Whole Foods”). Only if the Court declines to dismiss the action, Defendant moves, pursuant to Fed. R. Civ. P. 7 and 28 U.S.C. § 1631, to transfer this action to the United States Court of Appeals for the District of Columbia Circuit.² The complaint challenges certain procedural steps taken during an administrative proceeding now being conducted before the Commission, and asserts that any final Commission order in that proceeding will be the result of prejudgment. Even if there were

¹ Dismissal pursuant to Rule 12(4) and (5) is premised on Plaintiff’s failure to effect proper service in this action. Defendant recognizes that Fed. R. Civ. P. 4(m) permits 120 days to effect service, but nevertheless raises this issue in order that the issue is not deemed waived. See Fed. R. Civ. P. 12(h)(1).

² Defendant submits that the action is premature in any event and as such, would not support jurisdiction in the Court of Appeals. For this reason, dismissal rather than transfer is warranted. Nevertheless, the Court of Appeals would be the proper forum to make such a determination. See *Jamison v. FTC*, 628 F. Supp. 1548, 1552 n.4 (D.D.C. 1986).

any merit to Whole Foods' hodgepodge of complaints about the ongoing administrative proceedings -- and there is not -- the only conceivable forum for pursuing such claims is in the Court of Appeals, which has exclusive jurisdiction over final Commission orders. This Court therefore lacks subject matter jurisdiction, and must dismiss this action or, if not, transfer it to the Court of Appeals.

Dated: December 12, 2008

Respectfully submitted,

JEFFREY A. TAYLOR, DC Bar #498610
United States Attorney

RUDOLPH CONTRERAS, DC Bar #434122
Assistant United States Attorney

/s/
W. MARK NEBEKER, DC Bar #396739
Assistant United States Attorney

WILLIAM BLUMENTHAL
General Counsel (D.C. Bar No. 339283)

JOHN F. DALY
Deputy General Counsel for Litigation
(D.C. Bar No. 250217)

LAWRENCE DeMILLE-WAGMAN
Assistant General Counsel for Litigation (D.C. Bar No.
929950)
FEDERAL TRADE COMMISSION
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580
(202) 326-2448
Email: lwagman@ftc.gov

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WHOLE FOODS MARKETS, INC.,)
550 Bowie Street)
Austin, TX 78703)
)
Plaintiff,)
)
v.)
)
	Civil Action No. 08-2121 PLF
FEDERAL TRADE COMMISSION,)
600 Pennsylvania Avenue, N.W.)
Washington, D.C. 20580)
)
Defendant.)
)

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
DEFENDANT FEDERAL TRADE COMMISSION'S MOTION TO DISMISS OR, IN
THE ALTERNATIVE, TO TRANSFER**

BACKGROUND

On June 6, 2007, the Commission sought a preliminary injunction (pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b)) to prevent Whole Foods from acquiring Wild Oats Markets, Inc. ("Wild Oats"). The Commission sought this injunction so that the parties would not consummate the acquisition pending an administrative proceeding that the Commission initiated to determine whether the acquisition would violate either Section 7 of the Clayton Act, 15 U.S.C. § 18, or Section 5 of the FTC Act, 15 U.S.C. § 45. On August 16, 2007, this Court denied the Commission's request for the injunction, *FTC v. Whole Foods Market, Inc.*, 502 F. Supp.2d 1 (D.D.C. 2007). Whole Foods consummated the acquisition on August 28, 2007. Subsequently, the D.C. Circuit reversed this Court's conclusion that the Commission failed to show a likelihood of success, 533 F.3d 869 (D.C. Cir. 2008), *amended and reissued*, ___ F.3d ___, 2008 WL 5101226 (D.C. Cir. November 21, 2008). As a result of the Court of Appeals'

decision, the Commission's request for an injunction is once again before this Court on remand in Civil Action No. 07-1021 PLF. However, Whole Foods' Complaint in the instant action does not involve the preliminary injunction proceedings; it involves instead the Commission's administrative proceeding.

The Commission issued its administrative complaint on June 27, 2007, alleging that Whole Foods' acquisition of Wild Oats violated both Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45.¹ *In the Matter of Whole Foods Market, Inc.*, D-9324. During this Court's consideration of the Commission's request for a preliminary injunction, the Commission *sua sponte* stayed its administrative proceedings. D-9324, Order of August 7, 2007. After the decision by the D.C. Circuit, the Commission rescinded that stay, D-9324, Order of August 8, 2008, and proceedings, which are conducted pursuant to Part 3 of the Commission's Rules of Practice and Procedure, 16 C.F.R. Part 3, have resumed.

Whole Foods filed its Complaint in this case on December 8, 2008, but has not yet effected service of the Complaint as required by Fed. R. Civ. P. 4(i). See Docket in Civil Action No. 08-2121. The first four counts of the complaint allege that, in connection with the administrative proceeding, the Commission has violated Whole Foods' due process rights, as set forth in the Fifth Amendment of the Constitution, because:

1. The Commission is not impartial (Whole Foods bases this allegation on statements made in the briefs that the Commission filed before the D.C. Circuit in its appeal of this Court's denial of the preliminary injunction);
2. The scheduling order entered in the administrative proceeding, D-9324, Order

¹ Section 7 of the Clayton Act prohibits, *inter alia*, any acquisition of stock where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." Section 5 of the FTC Act prohibits, *inter alia*, "unfair methods of competition in or affecting commerce."

of September 10, 2008, which provides that fact discovery must be completed by December 19, and depositions must be completed by January 30, 2009, does not allow Whole Foods sufficient time to prepare its defense; and

3. The Commission failed to recuse itself *sua sponte* (Whole Foods never sought recusal).²

Count 5 of the complaint alleges that the discovery schedule set forth in the scheduling order is arbitrary and capricious, and that it violates Whole Foods' rights under the Administrative Procedure Act. Count 6 seeks declaratory relief, reiterating the theories of the prior counts.

In its Prayer for Relief, Whole Foods requests that this Court order the Commission to terminate its ongoing administrative proceeding. It also requests an order providing that, if the Commission chooses to challenge Whole Foods' acquisition of Wild Oats, the Commission be required to do so in an action brought in a United States District Court pursuant to 15 U.S.C. § 53(b).

ARGUMENT

This Court should dismiss Whole Foods' complaint because the Court of Appeals has exclusive jurisdiction over the issues raised in the Complaint. In *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 78-79 (D.C. Cir. 1984) ("TRAC"), the D.C. Circuit held that "where a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the exclusive review of

² On August 8, 2008, when it resumed its administrative proceeding, the Commission designated Commissioner Thomas Rosch to preside over the administrative pretrial scheduling conference. D-9324, Order of August 8, 2008. Whole Foods moved that "the Commission" recuse itself from serving as the administrative law judge in the administrative proceeding. D-9324, Motion filed August 22, 2008. The Commission denied that motion on September 5. However, on October 20, the Commission designated administrative law judge D. Michael Chappell to preside over the adjudication of the Commission's administrative complaint. Whole Foods never requested that the Commission recuse itself from all aspects of the administrative proceeding.

the Court of Appeals”;³ *see Daniels v. Union Pacific Railroad Co.*, 530 F.3d 936, 942 (D.C. Cir. 2008) (same). That is precisely the situation that exists here.

First, the FTC Act provides for exclusive review of administrative decisions (such as any decision that the Commission might issue at the conclusion of the proceeding against Whole Foods) in a court of appeals. In particular, Section 5(c) of the FTC Act, 15 U.S.C. § 45(c), provides:

Any person, partnership, or corporation required by an order of the commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service or such order, a written petition praying that the order of the Commission be set aside.

Further, the jurisdiction of the courts of appeals to review Commission administrative decisions is exclusive because, as the court explained in *TRAC*, “[i]t is well settled that even where Congress has not expressly stated that statutory jurisdiction is ‘exclusive,’ . . . a statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute.” *Id.* at 77.

Second, the relief Whole Foods seeks in its complaint would, most certainly, affect the future jurisdiction of the courts of appeals. In particular, Whole Foods asks this Court to order the Commission to dismiss its administrative action. If that relief were granted, there would be nothing for a court of appeals to review. *A fortiori*, this affects the future jurisdiction of the

³ With respect to this jurisdictional holding, the court stated, “[b]ecause this holding resolves inconsistencies among our prior decisions, this part of our decision has been considered separately and approved by the whole court, and thus constitutes the law of the circuit.” *TRAC*, 750 F.2d at 75 n.24.

courts of appeals. *See Marchiano v. National Assoc. of Securities Dealers, Inc.*, 134 F. Supp.2d 90, 93 (D.D.C. 2001) (*TRAC* applies because request to enjoin NASD disciplinary proceeding would prevent NASD from issuing a final order, and there would be no review by a court of appeals); *Jamison v. FTC*, 628 F. Supp. 1548, 1551 (D.D.C. 1986) (holding that the district court lacked jurisdiction under *TRAC* because plaintiff sought an injunction of the Commission's administrative proceedings, and this would eliminate the possibility of review by a court of appeals); *see also Ohio Edison Co. v. Zech*, 701 F. Supp. 4, 6-7 (D.D.C. 1988) (*TRAC* applied where plaintiff sought order requiring NRC to repeal certain regulations).

Indeed, district courts have granted motions to dismiss for lack of subject matter jurisdiction based on *TRAC* in cases involving every issue that plaintiff has raised here: bias, *Zech*, 701 F. Supp. at 6 (“it is now well recognized that *TRAC* applies to cases in which there are allegations of bias within an agency”); *Marchiano*, 134 F. Supp.2d at 94; *Jamison*, 628 F. Supp. at 1551;⁴ violation of constitutional rights, *Jamison*, 628 F. Supp. at 1551; *Marchiano*, 134 F. Supp. 2d at 94; *Daniels v. Union Pacific Railroad Co.*, 530 F.3d at 942-43; violation of rights under the Administrative Procedure Act, *TRAC*, 750 F.2d at 78 (“[n]or is district court review permissible under section 703 of the APA”); *Marchiano, supra*; *Chiron Corp. v. NTSB*, 27 F. Supp.2d 257, 260 (D.D.C. 1998).

In its complaint, Whole Foods alleges that this Court has jurisdiction pursuant to the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, pursuant to 28 U.S.C. § 1331, and

⁴ In *Association of Nat'l Advertisers v. FTC*, 627 F.2d 1151 (D.C. Cir. 1979), decided five years before *TRAC*, the panel held that the district court did have jurisdiction to consider an interlocutory claim of bias by the Commission's chairman. However, in *TRAC*, the court held that the *ANA* panel's conclusion was erroneous. 750 F.2d at 77 n.30. Because that portion of *TRAC* was considered by the whole court, *id.* at 75 n.24, it constitutes the law of the circuit.

pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201. As explained above, *TRAC* makes clear that the Administrative Procedure Act does not provide district courts with jurisdiction where, by statute, review of any final action by the agency must be sought in a court of appeals. *TRAC* reached the same conclusion with respect to 28 U.S.C. § 1331. 750 F.2d at 77. And the Declaratory Judgment Act is not an independent grant of jurisdiction. *C&E Services, Inc. of Washington v. District of Columbia Water and Sewer Authority*, 310 F.3d 197, 201 (D.C. Cir. 2002) (“we begin with the well-established rule that the Declaratory Judgment Act is not an independent source of federal jurisdiction” (quotation marks omitted)). Accordingly, there is no basis for this Court to assert jurisdiction over Whole Foods’ Complaint.⁵

⁵ Although Whole Foods’ complaint describes no final agency action, and this would be an independent basis for dismissing its complaint, this Court need not address that issue because, as a result of *TRAC*, it lacks subject matter jurisdiction over the complaint. *Zech*, 701 F. Supp. at 7 (“[b]ecause *TRAC* divests this Court of jurisdiction over interlocutory review of NRC proceedings, this Court, as a Court of limited jurisdiction ‘lack[s] the power to presume the existence of jurisdiction in order to dispose of [this] case on any other grounds,’” quoting *Tuck v. Pan American Health Org.*, 668 F.2d 547, 549 (D.C. Cir. 1981)).

CONCLUSION

For the reasons set forth above, this Court should dismiss Whole Foods' Complaint, or in the alternative, it should transfer the matter to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

JEFFREY A. TAYLOR, DC Bar #498610
United States Attorney

RUDOLPH CONTRERAS, DC Bar #434122
Assistant United States Attorney

/s/
W. MARK NEBEKER, DC Bar #396739
Assistant United States Attorney

WILLIAM BLUMENTHAL
General Counsel (D.C. Bar No. 339283)

JOHN F. DALY
Deputy General Counsel for Litigation
(D.C. Bar No. 250217)

LAWRENCE DeMILLE-WAGMAN
Assistant General Counsel for Litigation (D.C. Bar No.
929950)
FEDERAL TRADE COMMISSION
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580
(202) 326-2448
Email: lwagman@ftc.gov

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Defendant Federal Trade Commission's Motion To Dismiss Or, In The Alternative, To Transfer, supporting memorandum and a proposed order has been made through the Court's electronic transmission facilities on this 12th day of December, 2008.

/s/
W. MARK NEBEKER, DC Bar #396739
Assistant United States Attorney
Civil Division
555 4th Street, N.W.
Washington, DC 20530
(202) 514-7230