IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,	)	
Plaintiff,	)	**Case No.: 1:07-cv-01021-PLF**
v.	)	
WHOLE FOODS MARKET, INC.,	)	
Defendant.	)	

FEDERAL TRADE COMMISSION'S MEMORANDUM REGARDING THE SCOPE OF THIS REMAND PROCEEDING

Pursuant to this Court's December 22, 2008 Order, Plaintiff Federal Trade Commission ("FTC") submits this memorandum regarding the scope of this remand proceeding as mandated by the Court of Appeals' decision in *FTC v. Whole Foods Market, Inc.*, No. 07-5276 (D.C. Cir. July 29, 2008), *amended and reissued* (D.C. Cir. Nov. 21, 2008). As explained below, all three of the judges' opinions on their face state that the remand is limited to the evaluation of the equities. The Court of Appeals has determined that the FTC has demonstrated a likelihood of success on the merits, and this judgment precludes further consideration of this issue.

INTRODUCTION

Although there are three individual opinions, the judgment of the Court of Appeals is clear: the FTC has demonstrated a likelihood of success, and the only remaining task on remand is to balance the equities.[1] Indeed, Judge Tatel concludes, **"Because we have decided that the**

[1]Although there is no majority opinion, the Court of Appeals has issued a binding judgment. Under the *Marks* principle, the common ground between the two concurring opinions constitute binding precedent. *See Marks v. United States*, 430 U.S. 188, 193 (1977); *see also* Kavanaugh Op. at 21-22 n.8 (discussing *Marks*). Judges Brown and Tatel agree on several critical issues. Most notably, both agree that the FTC demonstrated a likelihood of success on the merits, Brown Op. at 20; Tatel Op. at 16, and that the case is not moot. Brown Op. at 6;

FTC showed the requisite likelihood of success . . . , all that remains is to 'weigh the equities . . . .'" Tatel Op. at 16. Judge Brown notes that **"[i]t remains [for the district court] to address the equities . . . ."** Brown Op. at 20. Even Judge Kavanaugh in dissent acknowledges that **"the same central question has been before the Court in determining whether to approve an injunction: whether the FTC demonstrated the necessary 'likelihood of success' . . . . Now, the Court says yes."** Kavanaugh Op. at 2.

This central conclusion also flows as a matter of course from the fact that the D.C. Circuit is *reversing* this Court's decision. In its earlier opinion, this Court determined that the FTC failed in demonstrating a likelihood of success, and thus, this Court did not consider the equities and public interest. *FTC v. Whole Foods Market, Inc.*, 502 F. Supp. 2d 1, 49 (D.D.C. 2007). The Court of Appeals has now reversed this decision, determining that the FTC proved likelihood of success, and has remanded the case for consideration of the equities. To argue, as the Defendant now does, that the issue of likelihood of success remains undecided renders the D.C. Circuit's judgment meaningless, and ignores the clear guidance from the Court of Appeals regarding the proper scope of this remand proceeding.

I. All Three Judges Make Clear that the Only Open Issue for Remand is the Equities

A. Judge Tatel

Judge Tatel concurred in the judgment with Judge Brown. Although some of his reasons for arriving at the judgment differ from those of Judge Brown, his opinion makes crystal clear what *both* he and Judge Brown are directing this Court to do in the remand proceeding:

Tatel Op. at 17. They also agree that the existence of limited competition from conventional supermarkets over a narrow range of products is not inconsistent with a narrower product market consisting of premium natural and organic supermarkets. Brown Op. at 17, 19-20; Tatel Op. at 15-16.

> Because *we have decided* that the FTC showed the requisite likelihood of success by raising serious and substantial questions about the merger's legality, *all* that remains is to 'weigh the equities in order to decide whether enjoining the merger would be in the public interest.' [*FTC v. H.J. Heinz Co.*, 246 F.3d 708, 726 (D.C. Cir. 2001)]. Although in some cases we have conducted this weighing ourselves, *see, e.g., id.* at 726-27, three factors lead me to *agree with Judge Brown* that the better course here is to remand to the district court for it to undertake *this task*. Tatel Op. at 16 (emphasis added).

The Court of Appeals has now decided the question of the likelihood of success in favor of the FTC. The weighing of the equities is the only "task" remaining on remand.

Throughout his opinion, Judge Tatel reinforces the point that balancing the equities is the only issue on the table. Judge Tatel notes that the Court of Appeals has at times balanced the equities itself, but because the district court did not consider nor did the parties brief the issue, the Court of Appeals is left "without the evidence needed to decide this question." Tatel Op. at 17. Judge Tatel also sets forth a number of "principles that should guide [this Court's] weighing of the equities." *Id.* Revisiting the question of likelihood of success would be contrary to the clear directives set forth in Judge Tatel's opinion.

Indeed, one of Judge Tatel's principles guiding the remand proceeding clearly demarcates the limits of this Court's scope of consideration. Citing D.C. Circuit precedent, Judge Tatel directs that "[i]n conducting this weighing, if Whole Foods can show no public equities in favor of allowing the merger to proceed immediately . . . *the district court should go no further*, for '[w]hen the Commission demonstrates a likelihood of ultimate success, a countershowing of private equities alone [does] not suffice to justify denial of a preliminary injunction barring the merger.'" Tatel Op. at 18 (quoting *FTC v. Weyerhaeuser Co.*, 665 F.2d

1072, 1083 (D.C. Cir. 1981)) (emphasis added).[2]

B. Judge Brown

Judge Brown also establishes that the FTC has shown a likelihood of success on the merits. Along with Judge Tatel, Judge Brown now has reversed this Court's decision to the contrary, stating, "[T]he district court's conclusion that the FTC showed no likelihood of success in an eventual § 7 case must be reversed . . . ." Brown Op. at 20-21.

Judge Brown makes clear that the only issue that this Court should consider at this stage of the remand proceedings is the equities. Brown Op. at 20 ("It remains to address the equities, which the district court did not reach, and see whether for some reason there is a balance against the FTC that would require a greater likelihood of success."). The Defendant may argue that, by describing a "sliding scale" balancing between likelihood of success and the equities, Judge Brown has reopened for detailed consideration the likelihood of success prong in the equities analysis. Brown Op. at 7-8. The Court of Appeals' judgment and Judge Brown's opinion cannot support this overreaching contention.

First, even if Judge Brown's opinion is interpreted completely in the Defendant's favor to require a second reckoning (between likelihood of success and the equities) after the initial balancing of the equities, she is not stating that this will be necessary here. She unambiguously directs this Court "to address the equities" first as the Court of Appeals has now determined that

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[2]Judge Tatel acknowledges that this Court is confronted with a "novel and significant task" in balancing the equities. Tatel Op. at 17. Nevertheless, he emphasizes that, in assessing the equities, "'[t]he principal public equity weighing in favor of issuance of preliminary injunctive relief is the public interest in effective enforcement of the antitrust laws.'" *Id.* at 18 (quoting *Heinz*, 246 F.3d at 726). In other words, "the court must place great weight on the public interest in blocking a possibly anticompetitive merger before it is complete." Tatel Op. at 18.

the FTC has met its burden in demonstrating likelihood of success. Brown Op. at 20. Only after this Court balances the equities *and* determines that the scales tip in favor of the Defendant would this Court even be permitted to address the question of "whether for some reason there is a balance against the FTC that would require a greater likelihood of success." *Id.* Thus, even when reading Judge Brown's opinion in the light most favorable to the Defendant, this Court need not revisit the issue of likelihood of success at this stage.

Second, as explained above, Judge Tatel's opinion clarifies that he and Judge Brown are in agreement that the FTC has demonstrated the "requisite likelihood of success," leaving only the weighing of the equities to this Court. Tatel Op. at 16. The Court of Appeals initially issued its decision on July 29, 2008. In that decision, Judge Tatel utilized the exact same language setting forth his and Judge Brown's agreement that "we have decided that the FTC showed the requisite likelihood of success . . . [and] all that remains is to 'weigh the equities . . . .'" *Compare* Tatel Initial Op. at 16 (D.C. Cir. July 29, 2008) *with* Tatel Op. at 16 (D.C. Cir. Nov. 21, 2008) (internal citation omitted). If Judge Brown disagreed with Judge Tatel's characterization of this critical area of agreement, she had the opportunity to voice such a disagreement in her amended and reissued opinion almost four months later. She did not.

C. Judge Kavanaugh

Although Judge Kavanaugh disagrees with the Court of Appeals' ultimate judgment, he defines without ambiguity what that judgment is. As Judge Kavanaugh sets forth, "[T]he same central question has been before the Court in determining whether to approve an injunction: whether the FTC demonstrated the necessary 'likelihood of success' on its § 7 case. A year ago, the Court said no. Now, the Court says yes." Kavanaugh Op. at 2. According to Judge Kavanaugh, the Court of Appeals has now answered the "central question" of likelihood of

success in favor of the FTC. Thus, it follows from his opinion as well that only the balancing of the equities remains for the remand proceeding.

II. The Remand is a Narrow, Focused Proceeding

As detailed above, the Court of Appeals has determined that the FTC demonstrated likelihood of success and directed this Court to weigh the equities to determine whether it should impose preliminary injunctive relief.[3] This is typically a narrowly tailored inquiry that occurs after the FTC has established the likelihood of success on the merits.[4] Tatel Op. at 16-17. The unusual posture of this case (post-consummation reversal of an injunction denial) does not alter several important principles.

First, the Defendant faces an extraordinarily high burden in avoiding injunctive relief. In fact, in the history of injunction cases under the Section 13(b) standard, 15 U.S.C. § 53(b), once the FTC has shown likelihood of success, it has never been deprived of meaningful injunctive relief.[5] This Court now has the opportunity to consider post-consummation evidence,

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[3]The Defendant appeared to argue at the status conference that the Court's discretion to consider or order injunctive relief is affected by whether the relief is characterized as prohibitory or mandatory. To the extent the Defendant clarifies this argument, and if the Court so desires, we are prepared to brief this issue at a later time. At this point, however, we note that at least one District Court case from this Circuit that has addressed the scope of equitable relief under Section 13(b) determined that "'unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction.'" *FTC v. Mylan Lab., Inc.*, 62 F. Supp. 2d 25, 36 (D.D.C. 1999) (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)).

[4]This Court has already reviewed a significant amount of evidence from Whole Foods regarding public equities from the acquisition. Whole Foods submitted several employee declarations, as well as an economic expert report, that described many of the purported public benefits that would arise from the acquisition. This Court correctly gave no weight to that testimony. 502 F. Supp. 2d at 48-49.

[5]To our knowledge, the only case in which the FTC has been denied a full-stop injunction after meeting its likelihood of success burden under Section 13(b) is the district court's decision

but the approach to analyzing the equities, and the high burden facing the Defendant, does not change.[6]

Second, despite the closing of the transaction, interim injunctive relief would still be meaningful to maintain competition and to ensure the FTC has the ability to fashion an effective remedy if such an outcome is warranted.[7] Indeed, interim relief may be even more important in this case as the Defendant continues to close and weaken the acquired stores.[8]

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in *FTC v. Weyerhaeuser*, 1981 U.S. Dist. LEXIS 12029 (D.D.C. 1981). Even in *Weyerhaeuser*, however, the district court issued a substantial hold separate order to prevent interim competitive harm during the FTC's administrative proceedings and to ensure that the relevant assets could be divested to restore competition, if necessary, pursuant to a subsequent FTC order. This is precisely the type of more-limited relief the FTC seeks here.

[6]In evaluating the equities, this Court must first analyze the public equities and may only consider private equities if the Defendant can first show public equities favoring the merger. Tatel Op. at 18-19. The Defendant will not be able to carry its burden of showing public equities. After the acquisition, Whole Foods has closed, and will continue to close, many Wild Oats stores. In addition to closing many Wild Oats stores, Whole Foods has mismanaged and under-invested in the Wild Oats stores that remained open, causing a dramatic increase in the number of unprofitable Wild Oats stores. Finally, with respect to pricing, the Defendant correctly points out that it has lowered prices for many Wild Oats products to bring them in line with Whole Foods' prices for the same products. What the Defendant attempts to obscure, however, is that for thousands of products, it actually *increased* prices at the former Wild Oats stores to bring them in line with the *higher* prices Whole Foods offers for the same products. In addition, and perhaps more troubling, Whole Foods has eliminated several discount programs that applied to *every product at every Wild Oats store* – namely the Senior Citizen Discounts and Student Discounts, as well as significant other discounts such as buy-one-get-one-free and dollar savings from entire purchases.

[7]Although the procedural stance of this Section 13(b) case is atypical, the FTC previously has challenged consummated mergers and fashioned remedies upon successful challenges. *See, e.g., Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 441-42 (5th Cir. 2008) (in post-consummation challenge, ordering divestiture to create a new competitor is within FTC's discretion). Creating an effective remedy in such instances may be more difficult compared to enjoining a non-consummated transaction, but doing so is neither impossible nor unprecedented.

[8]Judge Tatel underscores the importance of maintaining remedial flexibility through injunctive relief, noting that "the district court must consider the extent to which any of the remedial options mentioned above would make it easier for the FTC to separate Wild Oats and

Finally, should this Court conclude that interim injunctive relief is justified, it has a range of options from which to choose. Judge Tatel proposes several alternatives, including a hold separate order, stopping further integration, partial rescission or total rescission of the transaction. Tatel Op. at 17. Judge Brown notes that "[a]t a minimum, the courts retain the power to preserve the *status quo nunc*, for example by means of a hold separate order, [*Weyerhaeuser*, 665 F.2d at 1084], and perhaps also to restore the *status quo ante*." Brown Op. at 6. The consummation of the acquisition does not preclude this Court from imposing effective injunctive relief as the FTC continues to evaluate whether permanent relief is warranted.

CONCLUSION

Plaintiff respectfully submits that the Court of Appeals' instructions to this Court are clear. The FTC has established a likelihood of success on the merits, and the remand proceeding should be limited to a balancing of the equities.

Dated: December 30, 2008

Respectfully submitted,

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Whole Foods after the Commission's administrative proceeding (should it find a Section 7 violation) than it would be if the court did nothing." Tatel Op. at 18.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 30, 2008, I filed the attached document via CM/ECF with the clerk of the court.

I FURTHER CERTIFY that on such date I served the attached on the following counsel by electronic mail:

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