IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, Plaintiff, v. WHOLE FOODS MARKET, INC., and WILD OATS MARKETS, INC., Defendants.	)	Civ. No. 1:07-cv-01021 – PLF

MEMORANDUM OF WHOLE FOODS MARKET, INC.
REGARDING THE SCOPE OF THE REMAND PROCEEDING

Paul T. Denis (DC Bar No. 437040)
Paul H. Friedman (DC Bar No. 290635)
Jeffrey W. Brennan (DC Bar No. 447438)
James A. Fishkin (DC Bar No. 478958)
Michael D. Farber (DC Bar No. 449215)

DECHERT LLP
1775 I Street, N.W.
Washington, DC 20006
Telephone: (202) 261-3300
Facsimile: (202) 261-3333

Attorneys for Whole Foods Market, Inc.

December 30, 2008

Whole Foods Market, Inc. ("Whole Foods Market") respectfully submits this memorandum pursuant to the Court's request for guidance on the import for the remand proceeding of the opinions (as amended and reissued) in *Federal Trade Commission v. Whole Foods Market, Inc.*, __ F.3d __, 2008 U.S. App. LEXIS 24092 (D.C. Cir. 2008).

There is no opinion of the Court of Appeals. Judges Brown and Tatel joined in the judgment but they traveled different paths to get there, and neither concurred in the other's opinion.

Judges Brown and Tatel did agree that:

- this Court may appropriately agree that NO preliminary relief is warranted;
- this Court likely will need to receive additional evidence with regard to the equities; and
- this Court must make findings of fact with regard to the balance of equities.

There is little, if anything else, on which Judges Brown and Tatel agreed. They did agree that the Federal Trade Commission ("FTC") established some likelihood of success on the merits, but they disagreed as to the standard the FTC was required to meet. Moreover, Judges Brown and Tatel based their findings on likelihood of success on different legal theories and different factual foundations. Judge Brown plainly contemplated the possibility of additional evidence on likelihood of success under her sliding scale approach. Judge Tatel did not foreclose consideration on remand of additional evidence relating to likelihood of success. Neither judge considered that market circumstances might have changed since the record before this Court closed nearly seventeen months ago. Nor did either judge consider the illogic of making a likelihood of success determination on stale evidence and making a balance of the equities determination on current market evidence particularly in a dynamic, rapidly evolving industry

such as the retail grocery industry.

For these reasons, and as set forth below, the FTC should be required to state with particularity the preliminary relief it seeks from this Court. Further, the Court should receive evidence addressing both the FTC's likelihood of success on the merits and the balance of the equities. New evidence related to likelihood of success should be limited to developments since the record closed in 2007, and should be considered together with the earlier evidence. Evidence related to the balance of the equities, at a minimum, should include evidence post-dating Whole Foods Market's acquisition of Wild Oats Markets, particularly evidence of consumer and team member benefits resulting from the combination such as lower prices, improved product quality, enhanced service, safer and more efficient store operations, and increased employment. In evaluating the evidence, both old and new, the Court may be informed, but not bound, by the views of the D.C. Circuit panel members.

Argument

1. There is No Opinion of the Court.

The amended and reissued decision of the D.C. Circuit provides the judgment of the appellate court and the separate opinions of the three judges comprising the panel. But there is no opinion of the Court. Judge Brown filed the "Judgment of the Court" and her own individual opinion. *Federal Trade Commission v. Whole Foods Market, Inc.*, __ F.3d __, 2008 U.S. App. LEXIS 24092, *1 (D.C. Cir. 2008) ("Amended Decision"). Judge Tatel's opinion concurred only in "the judgment." Amended Decision at [2]. By contrast, in the initial decision of the D.C. Circuit, Judge Brown authored the "Opinion of the court" with Judge Tatel authoring a "Concurring Opinion." *Federal Trade Commission v. Whole Foods Market, Inc.*, 533 F.3d 869,

871 (D.C. Cir. 2008), *amended and reissued*, __ F.3d __, 2008 U.S. App. LEXIS 24092 (D.C. Cir. 2008) ("Initial Decision"). *See also* Exhibit A hereto (comparing the Amended Decision to the Initial Decision).[1] In addition, references found in the Initial Decision to the "majority opinion" and the "concurrence" were revised in the Amended Decision to "Judge Brown's opinion and "Judge Tatel's opinion" respectively. *See* Exhibit A, *passim*. Therefore, neither Judge Brown nor Judge Tatel's opinion is binding precedent in this Court, except where those opinions agree.

2. This Court May Determine that No Preliminary Relief is Appropriate.

Importantly, Judges Brown and Tatel agreed that this Court on remand properly could rule that the FTC is not entitled to any preliminary relief. Amended Decision at *29 (Brown, J.) and *55 (Tatel, J). Judge Brown in particular noted that the FTC's minimal showing on likelihood of success might be insufficient to outweigh a "balance [of the equities] against the FTC" and such a balance could "require a greater likelihood of success" than the FTC had been able to demonstrate. *Id.* at *29 (Brown, J.). Judge Tatel noted that it remained to be determined whether, at this late stage, some seventeen months after consummation of the transaction, "weigh[ing] the public and the private equities" could lead to the conclusion that a preliminary injunction would be "in the public interest." *Id.* at *54 (Tatel, J.). Were the result preordained by some aspect of the appellate opinions, there would have been no need for the remand proceeding.

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[1] Exhibit A was created using DeltaView, a computer program that can compare and show the differences between two Microsoft Word documents. Here Microsoft Word versions of the Initial and Amended decisions were created from the original Adobe Acrobat versions before running the comparison in DeltaView.

3. Additional Evidence is Required to Balance the Equities.

Judges Brown and Tatel also agreed that this Court must take additional evidence in order to balance the equities, an issue this Court did not reach in the 2007 decision. *Id.* at *29 (Brown, J.); Brown at 20; *55 (Tatel, J.). This evidence must relate to both the public and private equities favoring and opposing the relief sought.

The balance of the equities must "[consider] the circumstances of this case, including the fact that the merger has taken place." *Id.* at *29 (Brown, J.). See also *id.* at *55 (Tatel, J.) (consummation of the merger "may well affect the balance of the equities, likely requiring the district court to take additional evidence"). The circumstances of this case include the extent of integration that has occurred and the significant consumer and employee team member benefits from this procompetitive transaction – including lower prices, improved product quality, enhanced service, safer and more efficient store operations, and increased employment -- benefits that could be lost from the imposition of preliminary injunctive relief. See *id.* at *58 (Tatel, J.) (suggesting that relevant public equities could include "increased employment or reduced prices"). Upon any showing of public equities, this Court is also directed to consider private equities, although both Judges Brown and Tatel cautioned that private equities alone cannot defeat the preliminary injunction. *Id.* at *29 (Brown, J.) and *58 (Tatel, J.).

A hearing at which live testimony is received is necessary to add this evidence to the record and to permit the Court to make appropriate credibility determinations in light of the FTC's contentions regarding the truthfulness of Whole Foods Market's claims. The hearing should also include evidence showing whether there is any public equity in favor of the requested relief. As Judge Tatel noted, the public equity most often cited in favor of preliminary

injunctions against mergers before their consummation – "the public interest in effective enforcement of the antitrust laws" -- may not be applicable in a consummated merger. Given that the FTC recently has been able to obtain permanent relief in consummated mergers without the imposition of extraordinary preliminary relief post-consummation, see *In re Chicago Bridge & Iron Co. N.V.*, 138 F.T.C. 1024 (2005), *petition for review denied*, 534 F.3d 410 (5th Cir. 2008) and *In re Evanston Northwestern Healthcare Corp.*, Docket No. 9315, 2007 FTC LEXIS 210 (F.T.C. Aug. 6, 2007), the FTC should be required to make a showing of precisely what public equities favor the relief sought. Because prevention of interim consumer harm is likely to be one of those public equities asserted by the FTC, the Court should hear evidence regarding repositioning by supermarket rivals and the increased competition faced by Whole Foods Market since the Wild Oats merger was completed. These actual marketplace developments negate any speculative concerns the FTC might raise regarding interim consumer harm. *See FTC v. Freeman Hospital*, 69 F.3d 260, 272 (8th Cir. 1995) (public equities advanced by the FTC were substantially weakened when it could not show a substantial threat to competition).

Since the balancing of the equities contemplated by the D.C. Circuit necessarily is specific to the relief sought, the FTC should be required to state in advance and with particularity the relief that it seeks. Only after that statement can Whole Foods Market adequately and fairly demonstrate the public equities that might be lost if the requested relief were granted.

4. There is No Agreement between Judges Brown and Tatel as to the FTC's Likelihood of Success.

There is no agreement between Judges Brown and Tatel as to the FTC's likelihood of success on the merits. While both found that the FTC had shown some likelihood of success, they differed as to the standard under which the FTC's evidence should be judged and even as to the substantive legal theory to apply.

Judge Brown found that, because this Court did not consider the balance of the equities, this Court committed reversible error unless the FTC "entirely failed to show a likelihood of success." Amended Decision at *12 (Brown, J.). Applying this unprecedented standard, Judge Brown determined that this Court's 2007 decision should be reversed. In her view of the evidence, the FTC had some prospect for establishing a submarket of premium natural and organic supermarkets "catering to a core group of customers who have decided that natural and organic is important, lifestyle of health and ecological sustainability is important." *Id.* at *23 (Brown, J.). This Court's "legal error," she concluded, was "in assuming market definition must depend on marginal customers." *Id.* at *2 (Brown, J.). But even as to her novel submarket, which was not argued by the FTC either to this Court or on appeal, Judge Brown conceded that the evidence was, "at best, poorly explained." *Id.*

Judge Tatel did not adopt Judge Brown's unprecedented "entirely failed" standard, did not adopt her novel construct of a submarket of premium natural and organic supermarkets catering to a vaguely defined group of customers, and did not adopt her conclusion that this Court's focus on the role of marginal customers in market definition was legal error. Indeed, Judge Tatel's amended opinion dropped the passage from his initial opinion in which he agreed "with Judge Brown that the district court erred in focusing only on marginal customers." Initial

Decision at 882 (Tatel, J.). Instead, Judge Tatel, following the D.C. Circuit decision in *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001), found "at this preliminary stage" that the FTC had a "reasonable probability" that it could prove its asserted product market at trial. Amended Decision at *54 (Tatel, J.). But, at the same time, he cautioned that "this is not to say that the FTC will necessarily be able to prove its product market" at trial and that "Whole Foods has a great deal of evidence on its side, evidence that may ultimately convince the commission that no separate market exists." *Id.*

5. Additional Evidence is Required to Assess Likelihood of Success and Resolve Any Motion for Preliminary Relief.

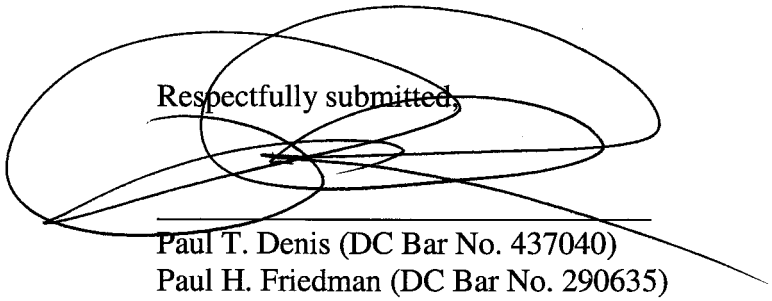
Given the very different approaches taken by Judges Brown and Tatel on the issue of the FTC's likelihood of success, there is no binding determination as to what likelihood of success has been established by the FTC in this case. If, as Judge Brown suggests, this Court employs a sliding scale and weighs likelihood of success against the balance of the equities, *id.* at *10, it will be necessary for the Court to again make an independent determination of the FTC's likelihood of success.

Such a determination will require this Court to consider additional evidence. As discussed above, this is a dynamic industry and circumstances have changed considerably since the record closed seventeen months ago. On remand, Whole Foods Market should be allowed to show rival repositioning and the increased competition it faces in the alleged relevant markets since it acquired Wild Oats seventeen months ago. This Court necessarily will receive and consider post-consummation evidence as part of its balance of the equities determination. It would be unprecedented, illogical and inequitable to weigh a balance of the equities established on current market evidence against a likelihood of success determination established on evidence

that is now seventeen months old. Nothing in any of the D.C. Circuit opinions compels such an outcome. An injunction issued today should be supported by current marketplace realities.

Just as the Court's equitable powers and Fed. R. Civ. P. 60(b)(5) compel the Court to consider whether changed circumstances warrant the continuation of any preliminary injunctive relief the court might order, *Agostini v. Felton*, 521 U.S. 203, 215 (1997); *United States v. Western Electric Co.*, 46 F. 3d. 1198 (D.C. Cir. 1995), justice requires that changed circumstances likewise should be considered before any preliminary injunctive relief is ordered. The Court's 2009 determination of whether preliminary injunctive relief is warranted in should not be determined based on a record that closed in 2007.

The need for this Court to take additional evidence on likelihood of success is underscored by the extraordinary relief that the FTC has suggested it may seek on remand, including potentially a "hold separate" order. The merger, has been completed and the business and operations of Wild Oats have been fully integrated into the Whole Foods Market family of entities. A hold separate would require affirmative relief dismembering the combined company, an unprecedented undertaking that would require extensive court involvement and supervision. Where, as here, affirmative relief is sought necessitating ongoing Court supervision, the moving party is held to a higher threshold on likelihood of success. *Columbia Hospital for Women Foundation v. Bank of Tokyo-Mitsubishi, Ltd.*, 15 F. Supp. 2d 1 (D.D.C 1997), *aff'd on other grounds*, 1998 U.S. App. LEXIS 7871 (D.C. Cir. Apr. 17, 1998). See also *Schreier v. University of Colorado*, 427 F.3d 1253 (10th Cir. 2005). Given marketplace changes since the record closed, it is all the more important for this Court to take additional evidence to determine whether the FTC has met this heightened standard.



Respectfully submitted,

Paul T. Denis (DC Bar No. 437040)
Paul H. Friedman (DC Bar No. 290635)
Jeffrey W. Brennan (DC Bar No. 447438)
James A. Fishkin (DC Bar No. 478958)
Michael D. Farber (DC Bar No. 449215)

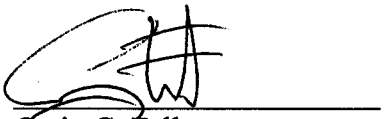
DECHERT LLP
1775 I Street, N.W.
Washington, DC 20006
Telephone: (202) 261-3430
Facsimile: (202) 261-3333

CERTIFICATE OF SERVICE

I, Craig G. Falls, hereby certify that on December 30, 2008, I caused to be served via first class mail a true and correct copy of the foregoing Memorandum of Whole Foods Market, Inc. Regarding the Scope of the Remand Proceeding on the following:

J. Robert Robertson, Esq.
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Matthew J. Reilly, Esq.
Catharine M. Moscatelli, Esq.
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, DC 20001



Craig G. Falls
(D.C. Bar No. 502368)
DECHERT LLP
1775 I Street, N.W.
Washington, D.C. 20006
Telephone: (202) 261-3300
Facsimile: (202) 261-3333