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## D.C. APPELLATE COURT REVERSES RULING ON WHOLE FOODS-WILD OATS MERGER

In a split decision handed down July 29, 2008, the United States Court of Appeals for the District of Columbia reversed the decision of the district court that determined that the Federal Trade Commission ("FTC") failed to demonstrate sufficient possibility of anticompetitive effects in a merger between Whole Foods Market, Inc. and Wild Oats Markets, Inc. to justify enjoining the merger. The decision is *FTC v. Whole Foods Market, Inc.*, No. 07-6276 (D.C.Cir. July 29, 2008). The district court opinion, *FTC v. Whole Foods Market, Inc.*, 502 F. Supp.2d 1 (D.D.C. 2007) denied the preliminary injunction, finding that the FTC's characterization of a market for premium, natural, and organic supermarkets (PNOS) was not a proper market definition. The appropriate market was deemed by the district court to be supermarkets as a whole. Consequently, the combination of the 194 Whole Foods stores with the 110 Wild Oats stores would have no anticompetitive effect, because more than 34,000 supermarkets are operated within the United States. In light of this market definition, the district court did not engage in any analysis of the equities of enjoining the merger, because it was unnecessary. The merger was completed August 28, 2007.

Judge Janice Rogers Brown, writing the majority opinion, found that the district court committed an abuse of discretion and an error of law in considering only marginal consumers, and not core consumers, in performing its market analysis. Relying on the *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) definition of markets as including all substitutable products, the majority opinion finds that the core consumers at Whole Foods and Wild Oats are shopping there for the whole package of services offered by these markets and, therefore, respond differently to price increases than marginal consumers who may obtain portions of this total package of services from other retailers. Finding that 68% of Whole Foods customers are core customers, the majority opinion held that while the FTC had not proved a market for PNOS, the district court conclusion that such a market could never be proven was in error. Since the district court did no analysis of the equities, the case is remanded for consideration of both the public and private equities at stake in this already consummated merger to determine the proper remedy.

In a concurring opinion, Judge Tatel extensively reviewed the factual information underlying the majority opinion in order to "clarify the district court's task on remand." The district court need not determine if the antitrust laws have been, or will certainly be, violated. The applicable standard is to consider the FTC's likelihood of success and determine whether, given that likelihood, an injunction would be in the public interest. The concurrence dismissed arguments made by the dissent that there was no evidence that neither entity charged higher prices in markets where the other was absent. Furthermore, that factor is merely one of many practical indicia that may be used by a court to determine if a separate market exists.

Both the majority opinion and the concurrence note that the district court will have to craft "an alternative, fact-bound remedy" sufficient to allow the FTC to review the merger and "reestablish the premerger status quo" if a violation of the antitrust laws is found.

The dissent argues that the majority has been taken in by a product differentiation argument where no distinct product market, that for PNOS, exists. Crediting the district court's prior opinion as well reasoned, the dissent argues that the majority ignores basic antitrust principles, such as finding that the tolerance of a small but significant and non-transitory price demonstrates market power. Judge Kavanaugh distinguishes this case in particular

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from the proposed merger of Staples and Office Max, where the facts showed that Staples charged 13% more in geographic markets where no other office superstore existed. Furthermore, evidence that consumers would shop at Whole Foods in the event the Wild Oats in their city closed once again demonstrates differentiation, that the consumer prefers PNOS, but not a product market, as there was no evidence that a significant price increase by Whole Foods would be tolerated by these consumers.

It now rests with the District of Columbia District Court to hear argument and determine first whether or not an injunction should issue given the opinion of the appellate court and, second, what the remedy should look like in the face of a consummated merger and a necessary balancing of both public and private equities. What is clear is that the majority opinion has determined that loyal consumers seeking a total package of a retail experience are equally relevant in determining the market for a product as are those marginal consumers who seek individual items and are less willing to pay for a packaged experience.

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