Dissenting Statement of Commissioner J. Thomas Rosch
With Respect To December 19, 2008 Order
In the Matter of Whole Foods Market, Inc. Docket No. 9324

I respectfully dissent from this ruling. Respondent's motion is based on three premises that are unsupported and unsound.

The first premise of the motion is that the remand proceeding "will result in findings of fact regarding the actual effects of the . . . merger and other important issues that necessarily will affect the conduct of the administrative proceeding." Memorandum in Support of Motion at 1, 4. That is incorrect. The first prong of this premise – that the remand proceeding "will result in findings of fact regarding the actual effects of the merger"– is apparently based on the assertion that "there was no opinion of the court" in the D.C. Circuit Court of Appeals proceeding because there were multiple panel opinions. Memorandum in Support of Motion at p.3. That assertion is in turn apparently based on the concurring opinions of two of the nine judges who participated in denying Respondent's motion for en banc review of the panel decision. *See* attached rehearing en banc order. However, the other seven participating judges did not adopt that view of the law. *Id.* To the contrary, as Judge Kavanaugh pointed out in footnote 8 of his dissent to the panel decision, the Marks principle, which is operative in both the jurisprudence of the Supreme Court and the Circuit Court, treats as binding precedent all explicit and implicit agreements between the authors of the multiple opinions. *Federal Trade Commission v. Whole Foods Market, Inc.,* 2008 U.S. App. LEXIS 24092 at *91, n.8 (Kavanaugh, J.). Judge Kavanaugh's dissenting opinion further pointed out that a majority of the panel (Judge Brown and Judge Tatel) agreed that the remand court is not to "make findings of fact regarding the actual effects of the merger." *Id.* at *85 (Kavanaugh, J.). That is confirmed by the opinions of Judge Brown and Judge Tatel themselves. *Id.* at *29 (Brown, J.), *54 (Tatel, J.) Thus, as was pointed out in our denial of Respondent's motion to recuse the Commission (p.2), insofar as the remand court considers the merits at all, it cannot make "findings of fact regarding the actual effects of the merger" that will affect the conduct of the plenary trial.

The motion also fails to support the second prong of the premise – that the remand proceeding will result in "findings of fact regarding . . . other important issues that necessarily will affect the conduct of the administrative proceeding." Apparently, those "other important issues" have to do with the "balancing of equities mandated by the D.C. Circuit." Memorandum in Support of Motion at p.4. Again, however, that is a function to be performed by the remand court in the preliminary injunction proceeding; whatever "findings of fact" the remand court may make on that score will not necessarily affect the conduct of the plenary trial.

The second premise of the motion is that "staying the Commission's challenge to this transaction, which was consummated over 15 months ago, will have no adverse effect on the public interest." Memorandum in Support of Motion at pp. 1, 2, 4-5. That premise is based on the same contentions Respondent made in claiming in the Circuit Court of Appeals proceeding that the matter was moot. Specifically, there, as here, Respondent argued that the fact that it had closed the transaction and that the Commission had stayed the plenary trial made it impossible for the Commission to order any meaningful relief after a plenary trial. Mootness Motion at pp. 2-4; Reply at pp. 1-3, 9. In this instance too, the majority of the panel (Judge Brown and Judge

Tatel) agreed that the mootness motion and its premises were without merit. The motion does not demonstrate otherwise. Indeed, the threat that Respondent may take steps to moot the matter underscores the public interest in moving this matter to a conclusion expeditiously.

Finally, the third premise of Respondent's motion is that it needs until September 14, 2009 to prepare adequately for the plenary trial. Memorandum in Support of Motion at pp. 1, 2. This premise is supported by Respondent's assertions that in order to defend claims pertaining to the 29 separate geographic markets at issue in this case, it needs compliance with 96 third party subpoenas it has issued, and it cannot take the depositions of any third party until that compliance has occurred. Memorandum in Support of Motion at pp.2, 5-6.

Respondent's motion does correctly assert that the scheduling order requires compliance with third party subpoenas before third party depositions are taken. More specifically, paragraph 11e. of the order provides that:

> [n]o deposition of a non-party shall be scheduled between the time of production in response to a subpoena duces tecum and three (3) days after copies of the production are provided to the non-issuing party, unless a shorter time is required by unforeseen logistical issues in scheduling the deposition, the documents are produced at the time of the deposition, or as agreed to by all parties involved.

This is a standard provision in federal district court scheduling orders. It is designed to make third party depositions more useful by providing that the third party's documents will be produced first. A party who encounters a problem in this respect is expected promptly to call the problem to the court's attention, and the court normally either orders prompt compliance with the subpoena, or, if the subpoena is overly broad or unduly burdensome, modifies it and sets a date for the deposition.

Respondent's motion makes no showing that any of this occurred. Specifically there is no showing that Respondent needed to issue 96 third party subpoenas to begin with, or if it did, that Respondent promptly called any problem created by paragraph 11e. in those circumstances to the attention of the administrative law judge or the Commission. Indeed, there is no showing that a problem even exists with any of the 96 subpoenas, much less with all of them. There is no showing with respect to the status of compliance respecting any of the 96 subpoenas. To the contrary, it appears Respondent has not yet taken a single third party deposition to date, and it has failed to show good cause for not having done so.

Under these circumstances, most, if not all, federal judges would simply deny the motion. Certainly they would not grant a 45 day extension of time to complete discovery or continue the hearing date for 49 days, as this ruling does. At most, the ruling should be limited to deleting paragraph 11e (as the majority has done), extending the discovery deadline for 15 days and continuing the hearing date for the same amount of time. Moreover, the ruling should make it clear that no further extensions or continuances will be granted.

For these reasons, I respectfully dissent.