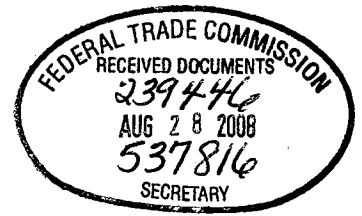


ORIGINAL



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)
)
)

WHOLE FOODS MARKET, INC.,)
a corporation,)
)

and)
)

WILD OATS MARKETS, INC.,)
a corporation.)
)

Docket No. 9324

PUBLIC

JOINT CASE MANAGEMENT STATEMENT

Pursuant to the Order Rescinding Stay of Administration No. 11-011-0111

court proceeding (see "Related Cases" below). Ten days following Respondent's Answer to the Amended Complaint, the parties shall exchange the name, and if known, the address and telephone number of each individual likely to have discoverable information relevant to the allegations in the Commission's Amended Complaint to the proposed relief as to the Respondent.

the Respondent.

2. Statement of Facts.

[Complaint Counsel's proposal]

On February 21, 2007, Whole Foods and Wild Oats executed an agreement whereby Whole Foods would acquire all the voting securities of Wild Oats through WFMI Merger Co., a wholly-owned subsidiary of Whole Foods (the "Acquisition"). The Commission issued an administrative complaint on June 27, 2007 alleging that Whole Foods' acquisition of WFMI Co.

[Respondent's proposal]

On February 21, 2007, the [redacted] [redacted] [redacted]

Feeds would comprise all the [redacted] [redacted] [redacted]

Amended Complaint alleges that the relevant product market is the operation of premium natural

and organic supermarkets and that the

the merger outweigh any and all proffered anticompetitive effects; and (4) the Commission is entitled to relief if it prevails, having stayed this proceeding for a year while Respondent consummated the merger and successfully integrated it with

[REDACTED]

6. Evidence Preservation.

[Complaint Counsel's proposal]

preserve evidence relevant to the issues reasonably evident in this action, including the

interdiction of any document-destruction program or ongoing process of similar nature

admissions shall not apply to requests relating to the authenticity of exhibits.

of exhibits. Additional interrogatories and requests for admissions will be

permitted only for need to

[Respondent's proposal]

Interrogatories can be most useful either to identify persons with discoverable

information or as contention interrogatories to narrow the issues.

contention interrogatories.

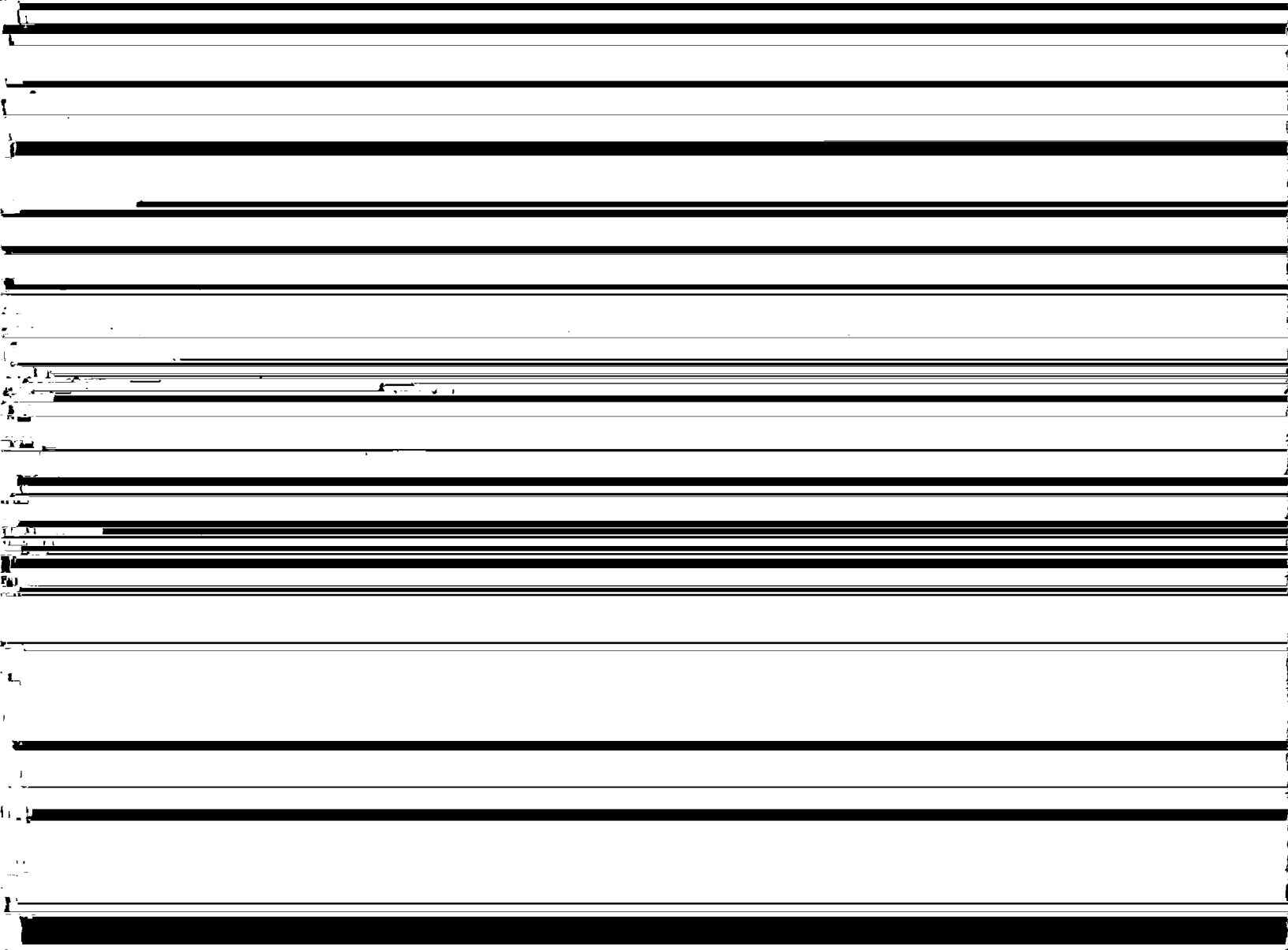
b. Document Requests.

[Complaint Counsel's proposal]

There shall be no limit on the number of document requests.

[Respondent's proposal]

The Commission obtained extensive discovery from Whole Foods and Wild Oats during its Second Request investigation – a point in time when neither Whole Foods nor Wild Oats was able to obtain any discovery. Indeed, Complaint Counsel has already requested and received more than 20 million documents covering the time period prior to June 6, 2007 in response to the Commission's



time period would be repetitive and unduly burdensome on Whole Foods. This is

June 6, 2007 might need to be produced in this proceeding. But the exceptions should be rare indeed and only upon good cause shown.

- c. **Timing of Requests.** Document requests, requests for admission, interrogatories, and subpoenas, except for discovery for purposes of authenticity and admissibility of exhibits, shall be served so that the time for a response to the discovery request shall be on or before the discovery cut-off date.

counsel's proposed fifteen day deadline for document responses covering 29 relevant geographic markets simply does not reflect real world constraints, especially when electronic documents must be produced.

e. Electronically-Stored Information. Except as otherwise provided herein, disclosure and discovery of electronically-stored information shall be governed by the Federal Rules of Civil Procedure, as amended on December 1, 2006.

f. Deposition Notices.

[Complaint Counsel's proposal]

Service of a notice of deposition five (5) business days in advance of the date set for the taking of the deposition shall constitute reasonable notice.

[Respondent's proposal]

i) Avoidance of Duplication. Significant resources have been devoted both by the Commission and by Respondents in developing the facts from the parties to

the transaction. Witnesses have had to

the same person for a second, or in some cases a third time, on the same subjects

well after the events have occurred is unfair to the witness and is unnecessary.

the District of Columbia Circuit reversed the district court's conclusion that the Commission

failed to show a likelihood of success in this proceeding and remanded the matter back to the district court to address the equities. On August 26, 2008, Whole Foods filed a petition for

rehearing en banc. The United States Court of Appeals for the District of Columbia Circuit at this time has not decided whether to grant the petition for a rehearing en banc.

9. Scheduling.

[Complaint Counsel's proposed prehearing schedule]

Complaint Counsel's proposed hearing schedule will provide full, comprehensive discovery for

both parties. The proposed schedule is as follows:

October 6, 2008

Deadline for serving document requests

interrogatories, and subpoenas, except for discovery for purposes of authenticity and admissibility of exhibits.

November 20, 2008

Close of discovery other than

January 6, 2009

Exchange and file with the Commission as provided in Rule 101

objections to final proposed witness lists and exhibit lists.
Exchange objections to the designated testimony to be presented by

months of fact discovery beginning 11 days after the scheduling conference - does not provide sufficient time for third party discovery, which is critical to the defense in this matter. Unlike Complaint Counsel, Respondent obtained no discovery during the Commission's Second Request investigation, and had only two weeks in which to conduct fact discovery in the district court proceeding. Here, in advance of the only plenary trial on the merits, Respondent needs an opportunity to obtain evidence from third parties in each of the markets contested by the Commission. This will require issuing subpoenas to third parties throughout the land, negotiating the scope of the subpoenas, potentially litigation motions to enforce or to quash, collecting, reviewing and analyzing documents, and subpoenaing third party witnesses for deposition throughout the nation. This will take time. Moreover, of the 29 separate relevant geographic markets alleged in the proposed Amended Complaint four were not contested by the Commission during its preliminary injunction case: Colorado Springs, CO; Santa Fe, NM; Columbus, OH; and Phoenix, AZ. Complaint Counsel also did not offer evidence during its preliminary injunction case regarding the seven markets where either Whole Foods or Wild Oats was present, but the other firm was not: Palo Alto, CA; Fairfield County, CT; Miami Beach, FL; Naples, FL; Nashville; TN; Reno, NV; and Salt Lake City, UT.

Whole Foods expects to depose a number of third parties in the coming weeks.

notice prior to a deposition in a matter in which they are not a party. In addition, counsel for Whole Foods will be required to defend or attend depositions initiated by Complaint Counsel. In total, this proceeding may require 100 or more fact witness depositions. As a result, Whole Foods is requesting 180 days in which to conduct all fact witness depositions. Even this is a very aggressive and ambitious schedule. This matter is simply not analogous to *Inova*, which involved one geographic market in the Washington, D.C. area with a limited number of likely third party fact witnesses.

Whole Foods proposes the following discovery schedule to commence after service of an

~~Amended Complaint. This schedule commences on 1-1-11.~~

Day 1: The Commission serves the Amended Complaint.

Day 20: Whole Foods answers or otherwise moves with respect to the Amended Complaint. See FTC Rule 3.12(a).

Day 203: Complaint Counsel serves expert witness list and expert witness disclosure, reports other than rebuttal expert reports (if any), all disclosure materials, including computer programs and data in a form that will enable Respondent's experts to retrace and replicate all analysis.

Day 233: Close of discovery, other than discovery permitted under FTC Rules of Practice § 3.24(a)(4) depositions of experts and discovery for purposes of authenticity and admissibility of

Day 233: Status report due and status conference with the ALJ.

Day 248: Respondents serve expert witness list and expert witness reports.

Day 341: Parties file mutual briefs. 150 (50)

Day 351: Deadline for filing responses to objections to exhibit. 150 (50)

Commission or presiding official, this provision does not modify any of the dates set forth in Paragraph 9.

- b. Memoranda in support of, or in opposition to, any non-dispositive motion shall not exceed ten (10) pages, exclusive of attachments.
- c. If papers filed with the Office of the Secretary contain *in camera* or confidential material, the filing party shall mark any such material in the complete version of their submission with {bold font and brackets}. 16 C.F.R. § 3.45. Parties shall act in accordance with the rules for filings containing such information, including FTC Rules of Practice, 16 C.F.R. § 4.2. Public versions of the papers with the *in*

3.45(e).

- d. The parties shall serve upon one another, at the time of service, copies of all

- e. No 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 not produced until the time of the deposition, or as agreed to by all parties involved.
- f. Any declaration obtained by a party that the party intends to use affirmatively in the proceeding (e.g., a declaration of a party's intent to produce documents in response to a subpoena) must be produced to the opposing party sufficiently before the close of fact discovery such that opposing counsel shall have a reasonable amount of time to subpoena documents for and to take the deposition of any such declarant.

completion of discovery within the dates specified by the scheduling order. After the submission of the final witness lists, additional witnesses may be added only:

[Respondent's proposal] Delete "by order of the commission or" from subpart (a).

- j. Applications for the issuance of subpoenas commanding a person to attend and give testimony at the hearing must comply with FTC Rules of Practice § 3.34, must demonstrate that the subject is located in the United States, and must be served on opposing counsel. Oppositions to applications for issuance of

application.

- k. Complaint Counsel shall serve no later than forty-eight (48) hours in advance of the start of the case-in chief, a schedule by day showing the best estimate of the expected witnesses to be called. Respondent shall serve, no later than forty-eight

numbers. For example, Complaint Counsel's first exhibit shall be marked

"CX0001." When an exhibit consists of more than one page, each page of the exhibit must bear a consecutive control number. Additionally, all exhibit numbers must be accounted for, even if a particular number is not actually used at the hearing.

- m. At the final pre-hearing conference, the parties shall introduce all exhibits they intend to introduce at the hearing. The parties further shall give the originals of exhibits to the court reporter, which the court reporter will maintain as part of the record.
- n. The parties shall endeavor to resolve any discovery disputes quickly and efficiently. If the parties are unable to reach an agreement resolving the disputes

Dated: August 28, 2008

Respectfully submitted,

A handwritten signature in black ink, appearing to be "J. Robertson", is written over a horizontal line.

J. Robert Robertson, Esq.
Matthew J. Reilly, Esq.
Catharine M. Moscatelli, Esq.

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Complaint Counsel

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2008, I filed this document with the Court.

original and two copies of the foregoing Joint Case Management Statement with