

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **William E. Kovacic, Chairman**
 Pamela Jones Harbour
 Jon Leibowitz
 J. Thomas Rosch

)	
In the Matter of)	
)	Docket No. 9324
WHOLE FOODS MARKET, INC.,)	
a corporation.)	PUBLIC
)	

SCHEDULING ORDER

In accordance with Federal Trade Commission rule 16 C.F.R. § 3.21(b) a Scheduling Conference with Complaint Counsel and counsel for Respondents was held September 8, 2008 at 10:00 a.m.¹ The schedule imposed by this order shall not be altered absent leave of the Commission.

1. Initial Disclosures: Complaint Counsel and Respondent have agreed that the parties will not produce any further material than what was exchanged in the federal court proceedings for the purposes of satisfying 16 C.F.R. § 3.31(b). Ten (10) days following Respondent’s Answer to

¹ The parties’ positions on the discovery schedule and other matters were described in a Joint Case Management Statement on August 28, 2008. See Joint Case Management Statement (Aug. 28, 2008).

- b. Respondent disputes the allegations in the Complaint and contends that the merger has not and does not violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act in any respect. Other principal legal issues include whether: (1) the complaint fails to state a claim upon which relief can be granted; (2) granting the relief sought is contrary to the public interest; (3) efficiencies and other procompetitive benefits resulting from the merger outweigh

Amended Complaint on September 8, 2008. Respondent will file its Answer on September 26, 2008 or otherwise move with respect to the Amended Complaint.

6. Evidence Preservation. The Parties shall take steps necessary to preserve evidence relevant to the issues reasonably evident in this action, including the interdiction of any document-destruction program or ongoing erasures of emails and other electronically-recorded materials.

7. Discovery.

a. Interrogatories and Requests for Admissions. There is no limit to the number of sets of interrogatories the parties may issue, as long as the total number of interrogatories, including all discrete subparts, does not exceed twenty-five (25) to Complaint Counsel from Respondent and does not exceed twenty-five (25) to Respondent from Complaint Counsel. Only fifteen (15) of the twenty-five (25) interrogatories may be contention interrogatories. The interrogatories in separate sets shall be numbered sequentially. The number of requests for admissions, including all discrete subparts, shall not exceed twenty-five (25) to Complaint Counsel from Respondent and shall not exceed twenty-five (25) to Respondent from Complaint Counsel, except that the limit on requests for admissions shall not apply to requests relating to the authenticity or admissibility of exhibits. Additional interrogatories and requests for admissions will be permitted only for good cause.

b. Document Requests. There shall be no limit on the number of document requests. Respondent represented that it produced more than 20 million documents during

the Second Request investigation. There was also three weeks of discovery during the preliminary injunction proceedings in federal district court. In an effort to reduce duplicative and burdensome discovery on the parties, the Commission imposes the following limits on document requests:

- i. Documents created prior to April 1, 2007: party propounding discovery seeking documents created prior to April 1, 2007 shall make a showing of good cause. The burden then shifts to the responding party to either produce the documents or demonstrate that the relevant documents have already been produced.
- ii. Documents created after April 1, 2007: There is no requirement to make a showing of good cause for discovery seeking documents created after April 1, 2007.
- 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 relevant discovery cut-off date.
- d. Timing of Responses. For interrogatories, requests for production, and requests

- 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.
 - i) Timing. Service of a notice of deposition five (5) business days in

8. Related Cases. On June 5, 2007, the Commission filed a Complaint for Temporary Restraining Order and Preliminary Injunction in the United States District Court for the District of Columbia. On June 7, 2007, United States District Court Judge Paul L. Friedman issued an Order granting the Commission's motion for temporary restraining order. On August 16, 2007, Judge Friedman denied the Commission's request for a preliminary injunction and, on August 23, 2007, the United States Courts of Appeals for the District of Columbia Circuit denied the Commission's emergency motion for an injunction pending appeal. As a result, Whole Foods' acquisition of Wild Oats was consummated on August 28, 2007. On July 9, 2008, the United States Court of Appeals for 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 a 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. The following is the pre-hearing schedule:

September 19, 2008	Exchange Preliminary Witness List (not including experts) with description of proposed testimony.
September 19, 2008	Non-expert depositions can begin.
September 26, 2008	Respondent files response to Amended Complaint.
October 6, 2008	Exchange revised witness lists (not including experts), including preliminary rebuttal fact witnesses, with description of proposed testimony.

- February 4, 2009 Exchange and file with the presiding official objections to final proposed witness lists and exhibits lists.
Exchange objections to the designated testimony to be presented by deposition and counter designations.
- Exchange proposed stipulations of law, facts, and authenticity.
Parties file pretrial briefs, not to exceed fifty (50) pages.
- Deadline for filing oppositions to motions for summary decision, motions *in limine*, motions to strike, and motions for in camera treatment of proposed trial exhibits.
- February 11, 2009 Deadline for filing reply to responses to motions for summary decision motions *in limine*, motions to strike, and motions for in camera treatment of proposed trial exhibits.
- Date TBD Final prehearing conference to be held at 10:00 a.m. in Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW Washington D.C. The parties are to meet and confer prior to the conference regarding trial logistics, any designated deposition testimony, and proposed stipulations of law, facts, and authenticity. Stipulations of law, facts, and authenticity shall be prepared as a Joint Exhibit and offered at the final prehearing conference. Counsel may present any objections to the final proposed witness lists and exhibits, including the designated testimony to be presented by deposition. All trial exhibits must be offered at the final prehearing conference. The offered exhibits will be admitted or excluded at this conference to the extent practicable.
- February 16, 2009 Commencement of Hearing, to begin at 10:00 a.m. in Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW Washington, D.C.

10. Hearing. The hearing will take no more than thirty full trial days (i.e., 210 hours). Each side shall be allotted no more than half of the trial time within whicherh

- b. Closing Statements. Each side shall be permitted to make a closing argument no later than five days after the last filed proposed findings. The closing arguments shall last no longer than 2 hours.

11. Other Matters.

- a. Service on the parties shall be deemed effective on the date of delivery by electronic mail (formatted in Adobe Acrobat) except in those instances where service by electronic mail is not technically possible, and three days shall be added to the time for any responsive action, consistent with the provisions of Fed. R. Civ. P. 6(e) regarding service by electronic mail. Absent leave of the Administrative Law Judge, this provision does not modify any of the dates set forth in Paragraph 9.
- b. Memoranda in support of, or in opposition to, any 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 camera* or confidential material omitted shall be filed pursuant to 16 C.F.R. § 3.45(e).
- d. The parties shall serve upon one another, at the time of service, copies of all subpoenas *duces tecum* and subpoenas *ad testificandum*. For subpoenas *duces*

tecum, the party issuing the non-party subpoena shall provide copies of the subpoenaed documents and materials to the opposing party within five (5) business days of service. For subpoenas *ad testificandum*, the party seeking the non-party deposition shall consult with the other parties before the deposition date is scheduled. Additionally, the deposition of any person may be recorded by any means permitted by Fed. R. Civ. P. 30. Depositions shall be taken by stenographic means unless the party seeking the deposition notifies the deponent and the other party of its intention to record the deposition by other than stenographic means at least two (2) days in advance of the deposition.

- 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 produced at 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. for purposes other than strictly rebuttal, authenticity or evidentiary foundation) 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.
- g. The parties shall provide for each testifying expert witness a written report containing the information required by the FTC Rules of Practice § 3.31(b)(3).

official, upon a showing of good cause; (b) by agreement of the parties, with notice to the Commission or the presiding official; or (c) where necessary for purposes of rebuttal or impeachment.

- j. Applications for the issuance of subpoena.

Respondent's exhibits shall bear the designation "RX", joint exhibits shall bear the designation "JX", and demonstrative exhibits shall bear the designation "DX"; and (b) the parties shall number the first page of each exhibit with a single series of consecutive 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 they should bring them promptly to the attention of the presiding official and arrange for a telephonic hearing with the presiding official on the dispute.

By the Commission.

Donald S. Clark
Secretary

ISSUED: September 10, 2008