



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 or to the defenses of 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 Wild Oats violates the antitrust laws. The proposed Amended Complaint alleges that the relevant product market is the operation of premium natural and organic supermarkets and that the relevant geographic market is an area as small as approximately five or six miles in radius from premium natural and organic supermarkets or as large as a metropolitan statistical area, and that Whole Foods and Wild Oats were each other’s closest competitors in approximately 22 geographic markets. On July 17, 2007, Whole Foods and Wild Oats each filed their Answers to Complaint Counsel’s original Complaint. On August 17, 2007, the Commission ordered a stay of the administrative proceeding pending the proceedings in the collateral federal district court case. On August 8, 2008, the Commission issued its Order Rescinding Stay of Administrative Proceeding, Setting Scheduling Conference, and Designating Presiding Official.

**[Respondent'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"). On March 13, 2007, the FTC issued a Request for Additional Information and Documentary Material (e.g., "Second Request") to Whole Foods and Wild Oats. During its investigation of the proposed merger, staff of the Federal Trade Commission conducted 13 investigational hearings and obtained approximately 20 million documents from Whole Foods and Wild Oats. On June 6, 2007, the FTC filed a complaint and motion for a preliminary injunction in the United States District Court for the District of Columbia. During the expedited discovery period for the preliminary injunction matter, Respondent Whole Foods had approximately three weeks in which to conduct fact discovery. See no. 8 below (related cases).

The Commission issued an administrative complaint on June 27, 2007 alleging that Whole Foods' acquisition of Wild Oats violates the antitrust laws. On July 17, 2007, Whole Foods and Wild Oats each filed their Answers to the Commission's original Complaint. On August 7, 2007, the Commission ordered a stay of the administrative proceeding pending the proceedings in the collateral federal district court case. On August 28, 2007, Whole Foods completed its acquisition of Wild Oats, promptly after which Whole Foods began to integrate Wild Oats into Whole Foods and operated the company as a single entity.

On August 8, 2008, the Commission issued its Order Rescinding Stay of Administrative

Proceeding, Setting, Scheduling Conference, and Designating Presiding Official. On August 26, 2008, Complaint Counsel moved for leave to file an Amended Complaint. The proposed Amended Complaint alleges that the relevant product market is the operation of premium natural and organic supermarkets and that the relevant geographic market is an area as small as approximately five or six miles in radius from premium natural and organic supermarkets or as large as a metropolitan statistical area, and that Whole Foods and Wild Oats were each other's closest competitors in approximately 22 geographic markets and in an additional 7 geographic markets, either Whole Foods or Wild Oats was present and the other planned, but for the acquisition, to enter.

3. Legal Issues. The principal legal issues in this case are as follows:

- a. **Per Complaint Counsel:** Complaint Counsel alleges that the acquisition of Wild Oats by Whole Foods is likely to have substantially lessened competition and continues to substantially lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.
- b. **Per Respondent:** 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 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 Wild Oats' business into its own. Whole Foods reserves the right to assert any other defenses as they become known to Whole Foods.

4. Motions. On August 11, 2008, Respondent filed its Motion to Extend the Deadline for Submitting a Joint Case Management Statement and the Scheduling Order seeking to extend the deadline for submitting a joint case management statement to August 28, 2008, and move the date of the Scheduling Conference to either September 2, 2008 or such later date as may be necessary to accommodate the schedule of the Presiding Official. On August 12, 2008, the Commission ordered that the Scheduling Conference be held on September 8, 2008 and that the joint case management statement be filed on or before August 28, 2008. On August 22, 2008, Respondent Whole Foods filed a motion to disqualify the Commission as the Administrative Law Judge and to appoint a presiding official other than a Commissioner. At this time, the Commission has not issued a ruling on this motion.

5. Amendment of the Pleadings.

On August 26, 2008, Complaint Counsel moved to file a proposed Amended Complaint. Respondent will file its Answer within 20 days of service of the Amended Complaint pursuant to FTC Rule 3.12(a) or otherwise move with respect to the Amended Complaint.

6. Evidence Preservation.

**[Complaint Counsel's proposal]**

Complaint Counsel represents to the Commission that they have taken 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, voice mails, and other electronically-recorded materials.

**[Respondent's proposal]**

Respondent represents to the Commission that they have taken reasonable steps necessary to preserve evidence relevant to the issues reasonably evident in this action, including issuing litigation hold notices and taking reasonable steps to preserve potentially relevant emails.

7. Discovery.

a. Interrogatories and Requests for Admissions.

**[Complaint Counsel's proposal]**

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 sub-parts, does not exceed forty (40) to Complaint Counsel from Respondent and does not exceed forty (40) to all Respondents from Complaint Counsel. The interrogatories in separate sets shall be numbered sequentially. The number of requests for admissions, including all discrete sub-parts, 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.

**[Respondent's proposal]**

Interrogatories can be most useful either to identify persons with discoverable information or, as contention interrogatories, to narrow the issues. Here, the Parties have agreed to provide in their Initial Disclosures the identity of persons with discoverable information. The parties have also agreed that initial disclosures regarding documents are unnecessary in this matter. In Respondent's view, Interrogatories can still be useful at the end of discovery as contention interrogatories to narrow the matters in dispute that require resolution at the Hearing. Moreover, Respondent believes that 15 well-crafted Contention Interrogatories per side ought to be all that is necessary. For these reasons, Respondent believes there should be a limit on the number of Interrogatories and they should only be available for use at the end of fact discovery. Respondent makes the following proposal: Each party shall be limited to no more than fifteen (15) interrogatories, including subparts. Interrogatories may not be served earlier than 60 days before the final prehearing conference or later than 45 days before the final prehearing conference. Only contention interrogatories may be propounded to narrow the issues in dispute. Respondent agrees that the number of requests for admissions, including all subparts shall not exceed twenty-five (25). Requests for admissions shall be served within the same time period as the

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 Second Request and in its document requests during the preliminary injunction proceeding in the United States District Court for the District of Columbia. These documents were produced in response to very broad and far-reaching requests that covered all or virtually all issues that are likely to be joined in this proceeding. It would be unreasonable and unduly burdensome to require Whole Foods to search the same files and the same custodians for the same time period (or a larger time period that encompasses some or all of the period covered in prior searches in relation to this matter) and there is no reason why Complaint Counsel should request or require such a search. Accordingly, it is Respondent's view that no party shall be entitled to further document discovery from the opposing party with respect to documents created before June 6, 2007 absent good cause shown. Any further request for documents covered in the same or similar requests during this



time period would be repetitive and unduly burdensome on Whole Foods. This is not to say that there are no circumstances in which documents created prior to 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.
- d. **Timing of Responses.**

**[Complaint Counsel's proposal]**

For interrogatories, requests for production and requests for admissions served after the issuance of the Scheduling Order, objections shall be due within ten (10) days of service of the discovery request, and responses, documents and materials shall be produced within fifteen (15) days of service of the discovery request.

**[Respondent's proposal]**

For interrogatories, requests for production and requests for admissions served after the Scheduling Order, objections shall be due thirty (30) days from the date of service of the discovery request, and response, documents and materials shall be produced thirty (30) days from the date of service of the discovery request.

The thirty day request for responses and objections to interrogatories is consistent with FTC Rule 3.35(a)(2), which provides a party upon whom interrogatories have been served thirty days to provide answers and objections, if any. Complaint

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 testimony taken both in investigational hearings and in pretrial depositions. Respondent proposes that investigational hearing materials obtained in the course of the FTC's investigation of Whole Foods' proposed acquisition of Wild Oats and deposition materials obtained in the course of discovery in the district court proceeding for a preliminary injunction may be used as if they were taken in this proceeding. No person who was previously examined under oath through investigational hearing or deposition may be subjected to deposition by the party who previously initiated the examination

on subject matters that were previously the subject of examination. Interrogating 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 unreasonably burdensome on both the witness and on Respondent, and serves no legitimate purpose in this proceeding, which will be conducted under tight time constraints even under Respondent's proposed schedule.

ii) Timing of notice of deposition. 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, provided, however, that notwithstanding the date stated on any deposition notice, the parties reasonably cooperate with each other in setting deposition dates that accommodate the schedules of the deponent and the deponent's primary counsel.

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 of the United States Court for the District of Columbia 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 Court 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 29, 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.

**[Complaint Counsel's proposed prehearing schedule]**

Complaint Counsel's proposed hearing schedule will provide full, comprehensive discovery for both parties in a reasonable time frame and a four week trial will provide ample opportunity for Complaint Counsel to present evidence to meet its burden and for Respondent to present evidence for its defense. The schedule proposed by Respondent requests a trial starting more than 12 months after the filing of the Amended Complaint and lasting approximately two months. Respondent proposes this lengthy discovery schedule notwithstanding the fact that Section 3.51 of the FTC's Rules of Practice requires the presiding official to issue an initial opinion 12 months after the filing of the Complaint.

- September 19, 2008 - Exchange preliminary witness list (not including experts) with description of proposed testimony.
- September 19, 2008 - Non-expert depositions can begin.
- October 6, 2008 - Exchange revised witness lists (not including experts), including preliminary rebuttal fact witnesses, with description of proposed testimony.

- October 6, 2008 - Deadline for serving document requests, requests for admission, interrogatories, and subpoenas, except for discovery for purposes of authenticity and admissibility of exhibits.
- November 20, 2008 - 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 exhibits.
- November 24, 2008 - Complaint Counsel serves expert witness list and expert witness reports other than rebuttal expert reports (if any).
- November 25, 2008 - Status report due and, if requested by either party, conference with the Commission or presiding official.
- December 2, 2008 - Respondents serve expert witness list and expert witness reports.
- December 9, 2008 - Complaint Counsel serves rebuttal expert witness list and rebuttal expert reports. Any such report is to be limited to rebuttal of matters set forth in Respondent's expert reports. If material outside the scope of fair rebuttal is presented, Respondent will have the right to seek appropriate relief (such as striking part or all of Complaint Counsel's rebuttal expert report(s) or seeking leave to submit sur-rebuttal expert reports).
- December 19, 2008 - Deadline for completion of depositions of all experts.
- December 19, 2008 - Exchange final proposed witness and exhibit lists, including designated testimony to be presented by deposition, copies of all exhibits (except for demonstrative, illustrative, or summary exhibits), and a brief summary of the expected testimony of each witness. No witness not previously disclosed on a witness list may be added except for good cause shown. If a new witness is allowed, an opportunity for deposition must be afforded.
- File final proposed witness and exhibit lists, including designated testimony to be presented by deposition, and a brief summary of the testimony of each witness.
- For parties that intend to offer into evidence at the hearing confidential materials of an opposing party or non-party, provide notice to the opposing party or non-party, pursuant to FTC Rules of Practice § 3.45(b).

- January 6, 2009 - Exchange and file with the Commission or presiding official objections to final proposed witness lists and exhibit 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.
- January 14, 2009 - Deadline for filing responses to motions for summary disposition, motions *in limine*, motions to strike, and motions for *in camera* treatment of proposed trial exhibits.
- January 21, 2009 - Deadline for filing reply to response to motions for summary disposition, motions *in limine*, motions to strike, and motions for *in camera* treatment of proposed trial exhibits.
- Date to be determined by trier of fact - Final prehearing conference to be held at 10:00 a.m. in Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC. 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.
- January 26, 2009 - Commencement of Hearing, to begin at 10:00 a.m. in Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC.

**[Respondent's proposed prehearing schedule]**

The discovery schedule proposed by Complaint Counsel is woefully inadequate. Prior cases with discovery schedules comparable to that suggested by Complaint Counsel, such as *Inova*, involved only a single relevant geographic market in nearby Northern Virginia, easily accessible by all counsel in less than an hour's driving time. In contrast, this case involves 29 alleged relevant geographic markets located throughout the country. Complaint Counsel's proposed schedule – 2

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 party witnesses from each alleged geographic market. Third party depositions alone in this matter likely will exceed 75. Complaint Counsel's proposed schedule for fact discovery -- 42 business days (excluding federal holidays) -- is not sufficient for Whole Foods to conduct all of the necessary fact witness depositions in the proposed time period, especially when many third party witnesses require substantial advance

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 may have to be amended depending on holiday dates.

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 30: Initial Disclosures.

Day 34: Scheduling Conference. See FTC Rule 3.21(b).

Day 36: Scheduling Order issued by ALJ. See FTC Rule 3.21(c).

Day 46: Exchange preliminary witness list (not including experts) with description of proposed testimony.

Day 53: Fact discovery begins.

Day 143: Status report and status conference.

Day 203: Exchange revised witness lists (not including experts), including preliminary rebuttal fact witnesses, with description of proposed testimony.

Day 203: Deadline for serving document requests, requests for admissions, interrogatories, and subpoenas, except for discovery for purposes of authenticity and admissibility of exhibits.



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 exhibits.

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

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

Day 259: Complaint Counsel serves rebuttal report expert witness list and rebuttal expert reports. Any such report shall be limited to rebuttal of matters set forth in Respondent's expert reports.

Day 270: Respondents serve rebuttal reports.

Day 291: Deadline for completion of depositions of all experts.

Day 305: Motions for summary disposition.

Day 321: Response to motions for summary disposition.

Day 331: Reply and support of motions for summary dispositions.

Day 335: - Exchange final proposed witness and exhibit lists, including designated testimony to be presented by deposition, copies of all exhibits (except for demonstrative, illustrative, or summary exhibits), and a brief summary of the expected testimony of each witness. No witness not previously disclosed on a witness list may be added except for good cause shown. If a new witness is allowed, an opportunity for deposition must be afforded.

- File final proposed witness and exhibit lists, including designated testimony to be presented by deposition, and a brief summary of the testimony of each witness.

- For parties that intend to offer into evidence at the hearing confidential materials of an opposing party or non-party, provide notice to the opposing party or non-party, pursuant to FTC Rules of Practice § 3.45(b).

Day 341: Exchange and file with the ALJ, objections to final proposed witness lists and exhibit lists. Exchange objections to the designated testimony to be presented by deposition and counter designations. Exchange proposed stipulations of law, facts, and authenticity.

Day 341: Parties file pretrial briefs, not to exceed fifty (50) pages.

Day 351: Deadline for filing responses to objections to exhibits, witnesses, and deposition designations.

Day 365 (or later date to be determined by trier of fact): Final prehearing conference to be held at 10:00 a.m. in Room 532, Federal Trade Commission Building, 600 Pennsylvania, 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.

Day 372: Commencement of Hearing, to begin at 10:00 a.m., in Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC.

#### 10. Hearing.

##### **[Complaint Counsel's proposal]**

The hearing is estimated to take approximately four weeks (twenty trial days).

##### **[Respondent's proposal]**

The hearing is estimated to take approximately eight weeks (forty trial days).

#### 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 (3) 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

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 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 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., 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 16 C.F.R. § 3.31(b)(3). Drafts of expert reports and notes taken by expert witnesses need not be produced and are not discoverable unless relied upon. Communications (oral, written and by e-mail) between expert witnesses and counsel, other expert witnesses, or consultants need not be produced and are not discoverable unless relied upon.
- h. **[Complaint Counsel's proposal]** The preliminary and revised witness lists shall represent the parties' good faith designation of all potential witnesses the parties reasonably expect may be called at the hearing. A party shall notify the other parties promptly of changes in preliminary and revised witness lists to facilitate

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: (a) by order of the Commission or the presiding official, upon a showing for good cause; (b) by agreement of the parties, with notice to the Commission or the presiding official; (c) for rebuttal purposes; or (d) if needed to authenticate, or provide the evidentiary foundation for, documents in dispute, with notice to the other parties and the Commission or the presiding official. Opposing counsel shall have a reasonable amount of time to subpoena documents for and to take the deposition of any witness added to the witness list pursuant to this paragraph, even if the discovery takes place during the course of the hearing.

**[Respondent's proposal]** The second sentence in Complaint Counsel's description of subpart h. should be amended to say: "A party shall notify the other party of changes in anticipated witnesses in sufficient time to facilitate completion of discovery within the dates specified by the scheduling order."

- i. The final exhibit lists shall represent the parties' good faith designations of all exhibits the parties reasonably expect may be used in the hearing, other than demonstrative, illustrative, or summary exhibits. Additional exhibits other than demonstrative, illustrative, or summary exhibits may be added after the submission of the final lists only: (a) by order of the Commission or the presiding 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.

**[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 subpoenas shall be due within three (3) business days after the service of the 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 (48) hours in advance of the start of the defense case, a schedule by day showing the best estimate of the expected witnesses to be called. At least forty-eight (48) hours prior to Complaint Counsel's rebuttal case, Complaint Counsel shall provide Respondent with a schedule of witnesses expected to be called each day during the rebuttal case. The parties further shall provide one another with copies of any demonstrative exhibits forty-eight (48) hours before they are used with a witness.
- l. The procedure for marking of exhibits used in the adjudicative proceedings shall be as follows: (a) Complaint Counsel's exhibits shall bear the designation "CX" and Respondents' exhibits shall bear the designation "RX"; and (b) the parties shall number the first page of each exhibit with a single series of consecutive

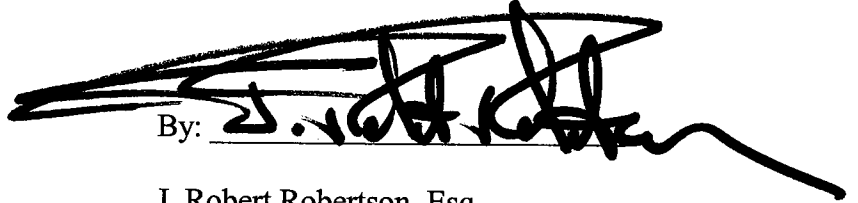
numbers. For example, Complaint Counsel's first exhibit shall be marked "CX0001." When an exhibit consists of more than one page, each page of the exhibit must bear a consecutive control number. Additionally, all exhibit numbers must be accounted for, even if a particular number is not actually used 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 Commission's attention by calling the offices of the presiding official and arranging for a telephonic hearing on the dispute.

**[Respondent's proposal]** All discovery disputes shall be brought to the Administrative Law Judge.

Dated: August 28, 2008

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to be "J. Robert Robertson".

By:

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

Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580  
Telephone: (202) 326-2008  
Facsimile: (202) 326-2884  
[Rrobertson@ftc.gov](mailto:Rrobertson@ftc.gov)

Complaint Counsel



**CERTIFICATE OF SERVICE**

I hereby certify that on August 28, 2008, I filed via hand and electronic mail delivery an original and two copies of the foregoing Joint Case Management Statement with:

Donald S. Clark, Secretary  
Office of the Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W., Rm. H-159  
Washington, D.C. 20580

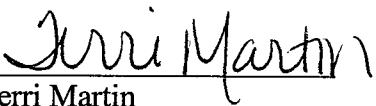
I also certify that on August 28, 2008, I delivered via hand delivery two copies of the foregoing Joint Case Management Statement to:

The Honorable J. Thomas Rosch  
Commissioner  
via Office of the Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W., Rm. H-524  
Washington, D.C. 20580

I also certify that on August 28, 2008, I delivered via electronic mail one copy of the foregoing Joint Case Management Statement to:

Paul T. Denis, Esq.  
1775 I Street, N.W.  
Washington, D.C. 20006  
[paul.denis@dechert.com](mailto:paul.denis@dechert.com)

Alden L. Atkins, Esq.  
Vinson & Elkins  
The Willard Office Building  
1455 Pennsylvania Avenue, N.W., Ste. 600  
Washington, D.C. 20004  
[aatkins@velaw.com](mailto:aatkins@velaw.com)

By:   
Terri Martin  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580  
Telephone: (202) 326-3488  
[tmartin@ftc.gov](mailto:tmartin@ftc.gov)