ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO STAY THE PROCEEDING, TO AMEND THE SCHEDULING ORDER, AND TO CERTIFY THE QUESTIONS TO THE COMMISSION FOR DETERMINATION

Complaint Counsel submits this opposition to Respondent's motion to stay the Part III administrative proceedings, to amend the Part III scheduling order, and to certify both questions to the Commission for determination ("Respondent's Motion"). For the reasons set forth below, Complaint Counsel respectfully requests that Respondent's motion be denied.

I. The Part III Proceeding Should Not Be Stayed

It is in the public's and Respondent's interests to resolve this matter as expeditiously as possible, and the administrative proceeding provides the only avenue to such resolution. In contrast, the limited purpose of the remand proceedings before the district court will be to evaluate the public equities and to take appropriate action to preserve the Commission's ability to obtain effective permanent relief, if warranted, after the administrative proceeding. Any injunctive relief issued by the district court will be temporary, in place only until the Commission has issued its final decision and all appeals are completed. It would defy logic to delay the full trial on the merits, and thus delay final resolution to this matter, to give preference

to a preliminary, narrowly-tailored proceeding on the equities that will consider only temporary relief.

Respondent correctly points out that the evidence Complaint Counsel will present in the full, plenary trial will overlap with the issues on remand. Post-acquisition evidence is relevant to both proceedings, and, as Respondent notes, Complaint Counsel has sought discovery in the Part III litigation on post-merger issues. Precisely for this reason, and contrary to Respondent's assertions, there will be no "wasteful duplication" of discovery because the evidence presented on remand will be only a small subset of the evidence presented in the comprehensive Part III proceeding.[1] Indeed, the ongoing Part III discovery will facilitate and expedite the remand proceedings.

Although post-acquisition evidence is relevant to the administrative proceedings, Complaint Counsel is not required to demonstrate actual anticompetitive effects. It is well-established that "[p]ost-acquisition evidence that is subject to manipulation by the party seeking to use it is entitled to little or no weight." *Hospital Corp. of Am. v. FTC*, 807 F.2d 1381, 1384 (7th Cir. 1986) (Posner, J.). *See also United States v. General Dynamics Corp.*, 415 U.S. 486, 504-05 (1974); *In re Chicago Bridge & Iron Co.*, 2003 FTC Lexis 96, at *192-94, *226-28 (June 18, 2003). The Commission appealed the district court decision soon after Whole Foods'

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[1] Respondent also mischaracterizes the Court of Appeals opinions reversing the District Court's denial of the FTC's motion for preliminary injunction. Respondent claims incorrectly that, "no two [circuit court judges] could agree on anything more than the result." Respondent's Motion at 3. In fact, Judges Brown and Tatel agree on several critical issues. Most notably, both agree that the FTC demonstrated a likelihood of success on the merits. Brown Op. at 20; Tatel Op. at 16. Judges Brown and Tatel also agree that the existence of limited competition from conventional supermarkets over a narrow range of products is not inconsistent with a narrower product market consisting of premium natural and organic supermarkets. Brown Op. at 17, 19-20; Tatel Op. at 15-16.

acquisition of Wild Oats closed, and thus, Respondent was put on notice that all of its post-acquisition conduct, including any decisions to implement price increases, could be placed under scrutiny in ongoing litigation.

II. The Part III Proceeding Should Not Be Delayed

As it did in the Part III Scheduling Conference, Respondent once again requests a September 2009 trial date based on the need for additional discovery. The Commission already has rejected the earlier scheduling proposal by the Respondent, and Respondent's latest attempt based on the same reasoning should likewise be rejected.

There is no doubt that the current discovery schedule is rigorous and demanding on all involved. However, the Commission has established a time frame that it believes is in the public interest, and Complaint Counsel and Respondent therefore are required to do everything in their power to adhere to the schedule. At this stage, Respondent contends that it will be unable to prepare properly for trial because of the slow pace of nonparty discovery. However, Respondent has not exhausted all of its options to accelerate this discovery; to date, Respondent has not filed a single motion to compel any of the nonparty discovery responses. Intervention by this court to delay the proceeding, let alone delay the proceeding for such an extraordinary period of time, should not even be considered unless all parties have used every tool available to ensure the expeditious proceeding of this matter on the schedule mandated by the Commission.

CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully requests that Respondent's motion be denied.

Dated: December 8, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2008, I filed via hand and electronic mail delivery an original and two copies of the foregoing Complaint Counsel's Opposition to Respondent's Motion to Stay with:

Donald S. Clark, Secretary
Office of the Secretary
Federal Trade Commission
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I also certify that on December 8, 2008, I delivered via hand delivery two copies of the foregoing to:

The Honorable D. Michael Chappell
Chief Administrative Law Judge
via Office of the Secretary
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600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

I also certify that on December 8, 2008, I delivered via electronic mail one copy of the foregoing to:

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