



UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

\_\_\_\_\_)  
In the Matter of )  
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 )  
WHOLE FOODS MARKET, INC., )  
 a corporation. )  
 )  
 )  
\_\_\_\_\_)

Docket No. 9324

To: The Honorable D. Michael Chappell  
Chief Administrative Law Judge

**COMPLAINT COUNSEL'S STATUS REPORT**

Pursuant to the Scheduling Order, dated September 10, 2008, Complaint Counsel hereby files its status report.

**I. STATUS OF COMPLAINT COUNSEL'S AND RESPONDENT'S DISCOVERY**

The parties are conducting fact discovery cooperatively and expeditiously. Fact discovery began on September 8, 2008, on which date Complaint Counsel served the First Request for the Production of Documents and First Set of Interrogatories. Each of these requests were subsequently revised on September 9, 2008. Complaint Counsel served a Second Request for Production of Documents on November 18, 2008. On September 23, 2008, Respondent Whole Foods Market, Inc. served one Request for Production of Documents and one Set of Interrogatories.

Respondent's first production of documents occurred on October 3, 2008. On October 9, 2008, the parties agreed to extend the response date until November 10, 2008. Thereafter, Respondent made seven additional productions of documents and interrogatories. On November

10, 2008, the parties again agreed to extend the response date until November 24, 2008. Since that date, Respondent has made three more productions of documents and interrogatories. On October 27, 2008, Complaint Counsel responded to Whole Foods' document requests as well as provided written responses and other documentation to Whole Foods' interrogatories.

Complaint Counsel has taken depositions of eight Whole Foods employees during the fact discovery period, including a Rule 3.34(a)(1) subpoena ad testificandum, and two depositions of former Wild Oats employees. Depositions of Whole Foods employees were taken on the following dates: October 30 and November 7, 8, 11, 12, 13, 19 and 21. The two former Wild Oats employees were deposed on October 6 and October 30. Additional depositions of Whole Foods employees are scheduled for December 9 (two depositions), 11, 16 and 18. On November 20, 2008, Complaint Counsel noticed depositions for nine additional Whole Foods employees and two former Wild Oats employees, all of which are proposed to occur on or before December 19, 2008.

Complaint Counsel reiterates the fact that the discovery process has been cooperative. For example, the Scheduling Order specified a 30-day deadline for responses to both interrogatories and document requests. The responses to Complaint Counsel's first set of documents requests and first set of interrogatories were due October 10, 2008. Complaint Counsel and Respondent have worked cooperatively to manage these responses on a rolling basis. The responses are now scheduled to be completed November 24, 2008.

Complaint Counsel disagrees with any characterization that Complaint Counsel's First Set of Interrogatories contained more than 25 discrete sub-parts. In addition, the vast majority of the interrogatory responses produced by Whole Foods to date reflects an updating of the weekly

pricing data relied upon primarily by Whole Foods' economic expert in the federal preliminary injunction proceeding as well as an updating of store margins and characteristic data previously supplied in the investigation and preliminary injunction phases. The original submission of pricing, margins, and store characteristic data were produced during the investigation and injunction stages in a fraction of a time that Respondent has taken to produce in the Part III discovery proceeding.

With respect to the November 20, 2008 notice of deposition of eleven current or former employees, Complaint Counsel notes that it had listed seven of the employees on its initial witness list of September 16, 2008, and, at least by October 31, 2008, Complaint Counsel had requested scheduling of six of the employees for depositions. Three of the eleven employees have now been scheduled.

## **II. STATUS OF NON-PARTY DISCOVERY**

Respondent Whole Foods Market, Inc. has served subpoenas duces tecum on 96 non-parties grocery store retailers or suppliers in some of the 29 geographic markets alleged by Complaint Counsel. As of November 20, 2008, a number of non-parties have fully or partially responded to their subpoena duces tecum. No officials from these non-parties have been deposed at this time. On September 30, 2008, Mr. John Downing, a former employee of Earth Fare, a non-party, was deposed pursuant to a subpoena issued by Complaint Counsel. On November 19, 2008, Complaint Counsel issued subpoenas duces tecum to nine non-parties, all of whom were listed in the Respondent's Revised Witness List.

Complaint Counsel believes that there is sufficient time to complete non-party discovery. The Commission issued the Amended Complaint on September 8, 2008. During the September

8, 2008 Scheduling Conference hearing, Respondent proposed a discovery schedule in which non-expert deposition discovery would close 233 days following the service of the Amended Complaint, or approximately May 1, 2009. At the hearing, Respondent made arguments about the numerosity of geographic markets and the large number of potential non-party depositions in support of the need for a longer schedule than that proposed by Complaint Counsel. ALJ Rosch evaluated these arguments and issued the current Scheduling Order with all deposition discovery closing on January 31, 2009. Complaint Counsel does not agree that all subpoenaed non-party grocery store retailers compete with Respondent in a significant way and believes that many, at best, are distant competitors to Respondent. Complaint Counsel fully anticipates that the discovery period established in the Scheduling Order will provide sufficient time to gather evidence to meet its burden in the administrative trial.

Dated November 21, 2008

Respectfully submitted,

By: 

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Complaint Counsel

**CERTIFICATE OF SERVICE**

I hereby certify that on November 21, 2008, I filed via hand an original and two copies of the foregoing Complaint Counsel Status Report 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 November 21, 2008, I delivered via hand through the Office of the Secretary two copies of the foregoing to:

The Honorable D. Michael Chappell  
Chief Administrative Law Judge  
600 Pennsylvania Ave., N.W.  
Washington, D.C. 20580

I also certify that on November 21, 2008, I delivered via electronic mail one copy of the foregoing to:

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By: \_\_\_\_\_

  
Albert Y. Kim