

Interlocutory Orders, Etc.

IN THE MATTER OF

**WHOLE FOODS MARKET, INC.,
AND
WILD OATS MARKETS, INC.**

Docket No. 9324 Order, September 10, 2008

Order approving the Scheduling Order.

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 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 Amended Complaint, to the proposed relief or to the defense of the Respondent.

2. Statement of Facts. On February 21, 2007, Whole Foods and Wild Oats executed an agreement whereby Whole Foods would acquire all the voting securities of Wild Oats. The FTC issued an administrative complaint on June 27, 2007 alleging that Whole Foods' acquisition of Wild Oats violates the antitrust laws. On

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).

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July 17, 2007, Whole Foods and Wild Oats each filed their Answers to the 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. See no. 8 below (related cases). Whole Foods completed its acquisition of Wild Oats on August 28, 2007.

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 filed a motion to amend the Complaint, and on September 8, 2008, the Commission issued an Order Amending the Complaint and an Amended Complaint. The 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 Wilds Oats were each other's closest competitors in approximately 22 geographic markets.

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

- a. 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. 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;

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(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. On August 12, 2008, the Commission granted Respondent's motion and 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. The Commission denied that motion on September 5, 2008.

5. Amendment of the Pleadings. On August 26, 2008, Complaint Counsel filed a motion to amend the Complaint, and the Commission issued an Order Amending Complaint and an 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.

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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.

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- ii. Documents created after April 1, 2007: there is no limit on 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 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 thirty (30) days of service of the discovery request. Notwithstanding these limits, Complaint Counsel and Respondent are encouraged to respond on a rolling basis, particularly with respect to document 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 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.

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- ii) **Avoidance of Duplication.** Complaint Counsel and Respondent are encouraged to take steps to avoid duplicative discovery. Several witnesses have already been deposed during the federal court proceedings. Respondent stipulated to the admissibility of this earlier testimony in these proceedings. A party witness deposed previously during the federal court proceedings shall not be deposed on subject matters that were the subject of examination absent a showing of good cause. This limitation should be interpreted narrowly and it should not be used to stymie the discovery.
- iii) **Duration of Depositions.** Complaint Counsel and Respondent are encouraged to limit the duration of depositions in this matter to a single day with seven hours of testimony.

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.

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9. Scheduling. The following is the pre-hearing schedule:

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| 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. |
| November 20, 2008 | Deadline for serving document requests, requests for admission, and interrogatories, except discovery for purposes of authenticity and admissibility of exhibits |
| November 21, 2008 | Status report due and, if requested by either party, conference with the presiding official. |
| December 19, 2008 | Close of discovery, other than depositions and discovery permitted under FTC Rules of Practice § 3.24(a)(4) and discovery for purposes of authenticity and admissibility of exhibits.

Status report due and, if requested by either party, conference with the presiding official. |
| January 5, 2009 | Complaint Counsel serves expert witness list and expert witness reports other than rebuttal expert reports. |

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January 15, 2009 Respondent serves expert witness list and expert witness reports.

January 22, 2009 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.

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).

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).

January 27, 2009 Deadline for filing motions for summary decision, motions *in limine*, motions to strike, and motions for in camera treatment of proposed trial exhibits.

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January 30, 2009	Deadline for completion of all depositions including those of experts.
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 motions for summary decision motions <i>in limine</i> , 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 <i>in limine</i> , 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

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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 which to present its opening statements, *in limine* motions, all arguments excluding the closing argument, direct or cross examinations, or other evidence.

- a. Opening Statements. Each side shall be permitted to make an opening statement that is no more than 2 hours in duration.
- 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.

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- 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.

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- 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). Drafts of expert reports and notes taken by expert witnesses need not be produced. Communications (oral, written and by e-mail) between expert witnesses and counsel or consultants need not be produced and are not discoverable unless relied upon.
- h. 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; or (c) 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 depose any witness added to the witness list pursuant to this paragraph, even if the discovery takes place during the hearing.

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- 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.
- 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 filing of the application.
- k. Complaint Counsel shall serve, with a courtesy copy to the presiding official, 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, with a courtesy copy to the presiding official, 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 in advance of Complaint Counsel's rebuttal case, Complaint Counsel shall provide Respondent, with a courtesy copy to the presiding official, 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 to be used with a witness.

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- 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", 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.

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IN THE MATTER OF

NORTH TEXAS SPECIALTY PHYSICIANS

Docket No. 9312 Order, September 12, 2008

Order amending Paragraph II.A.2 of the Commission's November 29, 2005, Final Order and Opinion to remove the language that the 5th Circuit determined to be "overly broad and internally inconsistent," and change the prohibition on refusals to deal (or threats to refuse to deal) to those taken in furtherance of otherwise prohibited conduct.

ORDER ON REMAND

This matter is before the Federal Trade Commission on remand from the United States Court of Appeals for the Fifth Circuit. On May 14, 2008, the Fifth Circuit affirmed the Commission decision -- embodied in its November 29, 2005 Final Order and Opinion -- that certain activities of Respondent North Texas Specialty Physicians (NTSP) constituted horizontal price fixing in violation of Section 5 of the FTC Act, 15 U.S.C. § 45. *North Texas Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008).¹ Specifically relevant to the issue before us, the Circuit Court identified concerted refusals to deal as one of the mechanisms NTSP used to increase its bargaining power and help achieve its collective price demands. The Commission's order prohibited NTSP from entering into agreements "to deal, refuse to deal, or threaten to refuse to deal with any payor." Paragraph II.A.2. Although approving most of the order provisions, the

¹ The Respondent and Respondent's counsel were served with the Final Order and the Opinion of the Commission on December 7, 2005, and the Final Order therefore became effective on the sixtieth day thereafter; that is, on February 6, 2006. See 15 U.S.C. § 5(g)(2); Commission Rule 3.56(a), 16 C.F.R. § 3.56(a) (2008). In an Order issued on January 20, 2006, the Commission stayed enforcement of the Respondent's obligation to comply with Paragraphs IV.B. and IV.C. of the Final Order until the Fifth Circuit issued its ruling disposing of the petition for review. In a second Order issued on January 20, 2006, the Commission modified the Opinion of the Commission in certain respects not relevant here.