

ORIGINAL



UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of _____

WHOLE FOODS MARKET, INC., _____
a corporation. _____

Docket No. 9324
PUBLIC

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

RESPONDENT'S FIRST STATUS REPORT

Pursuant to the Scheduling Order, dated September 10, 2008, Respondent hereby files its first 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.

In order to respond to these requests, Respondent, with the assistance of another outside law firm and three electronic discovery vendors, collected paper and electronic records from 12 physical locations and multiple custodians. Respondent, assisted by contract attorneys, reviewed

the collected material for responsiveness and privilege. As of November 21, 2008, Respondent has incurred costs and fees to discovery vendors (not including outside counsel) in excess of \$2 million and has made more than 10 rolling productions of documents and 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. To date, Respondent has produced more than 91,000 documents, equating to more than 1.6 million pages. Respondent's interrogatory responses total more than 53 gigabytes of data, and respond to what Respondent considers to be more than 25 discrete sub-parts. We understand that Complaint Counsel characterizes these data as merely an update of information provided last year. This view, however, ignores the significant burden and expense to Respondent in collecting such materials. Respondent's response to Complaint Counsel's interrogatories has included approximately 300 million records of weekly transaction prices and more than 280 spreadsheets providing detailed statistics on store characteristics, operations, sales, costs and customer demographics for each of the company's stores in or near the 29 alleged geographic markets.

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 seven additional Whole Foods employees and two former Wild Oats employees, all of which are proposed to occur on or before December 19, 2008.

II. STATUS OF NON-PARTY DISCOVERY

Respondent Whole Foods Market, Inc. has served subpoenas duces tecum on 96 non-parties, which either compete with Respondent in some of the 29 geographic markets alleged by Complaint Counsel or supply Respondent and competitor firms. The 96 non-party retailers and suppliers that Respondent has served with subpoenas duces tecum represent a subset of the total number of competitors and suppliers in the 29 alleged geographic markets. Given the limited number of days for non-party discovery -- non-party subpoenas duces tecum could not be issued prior to the issuance of the Protective Order on October 10, 2008 and the deadline for completion of depositions is January 30, 2009 -- Respondent does not have sufficient time to conduct appropriate discovery of all non-party competitors and suppliers prior to trial.

As of November 20, 2008, 37 non-parties have fully or partially responded to their subpoena duces tecum. Most of the responses have been received in the last few days. Respondent's counsel is devoting substantial time and resources to secure compliance by the subpoenaed non-parties. No officials from these non-parties have been deposed at this time, in part because Paragraph 11(e) of the Scheduling Order prohibits the deposition of a non-party until three days after copies of the production are provided to the non-issuing party. Respondent expects to depose a significant number of non-party witnesses prior to the January 30, 2009 deadline for completing all depositions, but, as the document productions have only recently

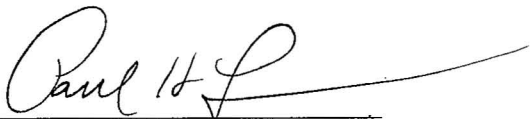
begun to arrive, Respondent has not yet determined which non-parties it will depose. Given the upcoming holidays, and the number of potential witnesses with relevant and material evidence, it will not be possible to complete the depositions of all non-party witnesses within the time permitted by the schedule.

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.

Respondent prepared a proposed joint status report but did not receive Complaint Counsel's comments sufficiently early to permit a joint filing.

Dated November 21, 2008

Respectfully submitted,

By: 

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Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2008, I filed via hand an original and two copies of the foregoing Joint 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

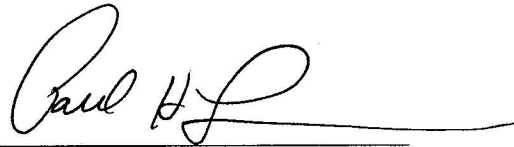
I also certify that on November 21, 2008, I delivered via hand two copies of the foregoing to:

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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