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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of _____

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

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) Docket No. 9324
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) PUBLIC
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To: The Honorable D. Michael Chappell
Chief Administrative Law Judge

**RESPONDENT'S MEMORANDUM IN SUPPORT OF MOTION TO STAY THE
PROCEEDING, TO AMEND THE SCHEDULING ORDER, AND TO CERTIFY THE
QUESTIONS TO THE COMMISSION FOR DETERMINATION**

Respondent Whole Foods Market, Inc. submits this memorandum in support of its motion to stay this administrative proceedings until the conclusion of the remand proceedings in *Federal Trade Commission v. Whole Foods Market, Inc.* (Civ. No. 07-1021-PLF), to amend the scheduling order to extend the date of the commencement of the administrative hearing until no earlier than September 14, 2009, and to certify the questions to the Commission for determination.

This administrative proceeding should be stayed pending the remand proceeding because the remand proceeding will result in findings of fact regarding the actual effects of the Whole Foods Market/Wild Oats merger and other important issues that necessarily will affect the conduct of the administrative proceeding. Staying the Commission's challenge to this transaction, which was consummated over 15 months ago, will have no adverse effect on the public interest. The delay to the administrative proceeding resulting from this stay will be less

than the 12 month stay previously imposed by the Commission on its own motion. By contrast, forcing Respondent to defend simultaneously the remand proceeding and the administrative proceeding will be unfair to Respondent and force Respondent to incur substantial unnecessary duplicative expense.

Regardless of the resolution of the stay motion, the scheduling order in the administrative proceeding should be amended to commence the hearing no sooner than September 14, 2009. The Commission's complaint requires Respondent to defend claims pertaining to 29 separate geographically disperse relevant markets. It is not possible for Respondent to complete appropriate third party discovery and prepare for trial in the time provided by the Scheduling Order.

FACTS

This administrative action challenging Respondent's acquisition of Wild Oats Markets, Inc. was commenced June 28, 2007 but neither the Commission nor Complaint Counsel pursued the action at that time. Instead the Commission focused its attention on a motion for preliminary injunction filed in federal court seeking to block the proposed Whole Foods Market/Wild Oats merger. On its own motion, the Commission stayed this administrative proceeding "pending the proceedings in the collateral federal district court case." *Order Staying Administrative Proceedings, Docket No. 9324 (Aug. 7, 2007)*. The Commission's Motion for a preliminary injunction was denied by the District Court, *FTC v. Whole Foods Market, Inc.*, 502 F. Supp. 2d 1 (D.D.C. 2007), as were its motions for injunction pending appeal lodged with the District Court and the D.C. Circuit Court of Appeals. Five days after the D.C. Circuit declined to enjoin the transaction pending appeal, Whole Foods completed its acquisition of Wild Oats.

The Commission appealed the denial of its motion for preliminary injunction but notably did not seek expedited treatment for its appeal or lift its self imposed stay of this administrative proceeding.

Nearly one year after the Whole Foods Market/Wild Oats merger closed, the D.C. Circuit reversed the District Court's denial of the Commission's motion for a preliminary injunction against the merger, pointedly declined to order a preliminary injunction, and remanded the case to the District Court. *FTC v. Whole Foods Market, Inc.*, 533 F. 3d 869 (D.C. Cir. 2008), amended, 07-5276 (D.C. Cir. Nov. 21, 2008). Nine days later, even though the federal court proceeding was far from over, the Commission lifted the stay on this administrative action and, for the first time, began vigorous prosecution. Respondents moved that the Commission remove itself as administrative law judge on the grounds that the Commission had prejudged the matter. The Commission denied the motion and set the Scheduling Order currently in effect before later appointing an administrative law judge.

In response to Respondent's petition for rehearing en banc, the D. C. Circuit amended its July 29, 2008 decision on November 21, 2008. *FTC v. Whole Foods Market, Inc.*, 07-5276 (D.C. Cir. Nov. 21, 2008). The amended D. C. Circuit decision, like the earlier decision, reversed the denial of the preliminary injunction and remanded the case to the District Court for further proceedings. But the three judge panel was so badly split that each judge wrote a separate opinion and no two could agree on anything more than the result. There was no opinion of the court.

Judges Brown and Tatel agreed that, on remand, the District Court should consider the balance of the equities. Judge Tatel's opinion confirmed that the public equities to be considered

on remand included “increased employment or reduced prices” resulting from the merger. *Tatel Op.* at 18.

I. The Administrative Proceeding Should be Stayed.

The remand proceeding will entail a detailed examination of the actual effect of the Whole Foods Market/Wild Oats merger. The District Court’s balancing of the equities mandated by the D. C. Circuit will include Whole Foods Market’s post-merger pricing, quality, service, employment and investment. Complaint Counsel has already indicated an interest in each of these subjects as evidenced in depositions of Whole Foods Market team members. The findings arising from this remand proceeding should cause the Commission to reconsider its decision to proceed with the administrative proceeding. Even if the instant matter goes forward, the remand record, which will go to the ultimate question of the competitive effect of the Whole Foods Market/Wild Oats merger, will be highly informative and directly relevant, if not conclusive, to the conduct of the administrative proceeding. Discovery, dispositive motions and motions *in limine* all could be affected by the findings in the remand proceeding.

There is no harm to the public interest from the brief delay that would result from staying the administrative proceeding pending the remand action in the District Court. No schedule has been set yet for the remand proceeding but given that the same court previously decided a preliminary injunction motion within 2.5 months of the complaint being filed, the delay should be brief, certainly much shorter than the full year delay that the Commission initiated when it stayed the case on its own motion.

Simultaneous litigation of the remand and administrative actions would impair the public interest by needlessly imposing costly and wasteful duplication of resources in the challenge to this merger that closed 15 months ago. The public interest is best served by completion of the federal court process before the expenditure of additional public and private resources in the administrative proceeding, as the Commission implicitly acknowledged in its 2007 stay order. It is an inescapable fact that two mergers fell apart this year when faced with the Commission's new and unyielding demand for dual-tracking plus an accelerated hearing schedule. *See In the Matter of Red Sky Holdings LP and Newpark Resources, Inc. Docket No. 9333* and *In the Matter of Inova Health Systems Foundation and Prince William Health Systems, Inc. Docket No. 9326*.

II. The Administrative Hearing Should Commence No Earlier Than September 14, 2009

Separate and apart from the impact of remand proceedings, the Commission should amend the Scheduling Order to provide that the administrative hearing not commence before September 14, 2009 and that deadlines for all intermediate events be extended accordingly. The extent of third party discovery needed to defend the case in 29 relevant markets and the slow rate at which third parties have been complying with subpoenas served by Respondent necessitate this extension of time. Without this extension in the schedule, Respondent will be unable to complete adequate third party discovery in advance of expert reports and the administrative hearing.

Respondent has issued 96 third party subpoenas. As of December 1, 2008 only 53 third parties had even partially complied with the subpoenas. Moreover, one of the two other

premium natural and organic supermarkets, as defined by the Commission, has moved to quash the subpoena.

Under the scheduling order, no deposition of a third party can take place until after copies of the party's documents have been produced to the non-issuing party. Given the trickling and partial nature of subpoena compliance, Respondent is unable to determine what parties it intends to depose. To date, complaint counsel has not yet noticed deposition of any third parties other than former Wild Oats employees. The deadline for completing depositions is January 30, 2009. Given the intervening holidays and the January 15, 2009 deadline for expert reports, additional time is required for Respondents to complete adequate third party discovery and properly prepare for trial.

Accordingly, the Commission should order that the administrative hearing start no earlier than September 14, 2009 and that Respondent and complaint counsel meet and confer to suggest revised dates for other events covered by scheduling order. The order should be without prejudice to either Respondent or Complaint Counsel seeking further relief with respect to the scheduling order if the third party discovery process is further delayed or if other good cause is shown.

Dated December 3, 2008

~~Respectfully submitted,~~

~~By: _____~~

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Whole Foods Market, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2008, I filed via hand an original and two copies of the foregoing Motion to Stay the Proceeding, to Amend the Scheduling Order and to Certify the Questions to the Commission for Determination, Memorandum in Support and Draft Order with:

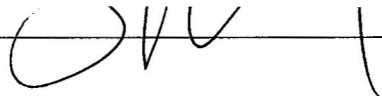
Donald S. Clark, Secretary
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W., Rm. H-159
Washington, D.C. 20580

I also certify that on December 3, 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 December 3, 2008, I delivered via electronic mail one copy of the foregoing to:

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