

ORIGINAL



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES

\_\_\_\_\_  
In the Matter of \_\_\_\_\_  
\_\_\_\_\_  
WHOLE FOODS MARKET, INC., \_\_\_\_\_  
Respondent. \_\_\_\_\_  
\_\_\_\_\_

Docket No. 9324

**ORDER GRANTING RESPONDENT'S REQUEST  
FOR CERTIFICATION TO THE COMMISSION**

**I.**

On December 3, 2008, Respondent Whole Foods Market, Inc. ("Respondent" or "Whole Foods") filed with the Office of the Secretary a motion to stay the proceedings, to amend the Scheduling Order, and to certify the issues to the Commission for determination ("motion"). The motion was delivered to and received by the Office of Administrative Law Judges on December 8, 2008. Complaint Counsel filed its opposition to Respondent's motion on December 8, 2008.

For the reasons set forth below, Respondent's request for certification to the Commission is GRANTED.

**II.**

Respondent's motion seeks to stay this administrative proceeding until the conclusion of the remand proceeding in *Federal Trade Commission v. Whole Foods Market, Inc.* (Civ. No. 07-1021-PLF) ("remand proceeding") and to amend the Scheduling Order in this proceeding to extend the date of the commencement of the administrative hearing until no earlier than September 14, 2009. Respondent also moves that these questions be certified to the Commission for determination because, Respondent asserts, the Scheduling Order mandates that the Scheduling Order may not be altered absent leave of the Commission.

**A. Request for a stay of this proceeding**

Respondent urges that this administrative proceeding should be stayed pending the remand proceeding which, Respondent states, will entail a detailed examination of the actual effect of the Whole Foods/Wild Oats merger. Respondent further states that the remand record, which will go to the ultimate question of the competitive effect of the Whole Foods/Wild Oats merger, will be highly informative and directly relevant, if not conclusive, to the conduct of the administrative proceeding. Respondent argues that 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, which closed 15 months ago.

Complaint Counsel argues that this proceeding should not be stayed because it is in the public's and Respondent's interest to resolve this matter as expeditiously as possible. Complaint Counsel states that the remand proceedings before the district court will be limited to evaluating the public equities and to take 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, states Complaint Counsel, will be temporary, in place only until the Commission has issued its final decision and all appeals are completed. Complaint Counsel argues that it makes no sense to delay the full trial on the merits, and thus delay final resolution of this matter, until after resolution of the remand proceeding.

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**B. Request for an extension of time for the commencement of the hearing and all intermediate events**

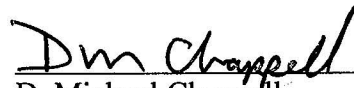
Respondent argues that even if this proceeding is not stayed, the Scheduling Order should be amended to commence the hearing no sooner than September 14, 2009, and that deadlines for all intermediate events be extended accordingly. Respondent asserts that the extent of non-party discovery needed to defend the case in 29 separate geographically disperse relevant markets and the slow rate at which non-parties have been complying with subpoenas served by Respondent necessitate this extension of time. Respondent states that it has issued 96 non-party subpoenas and that, as of December 1, 2008, only 53 non-parties had even partially complied. Respondent further states that under the Scheduling Order, no deposition of a non-party can take place until after copies of the non-party's documents have been produced and that, because of limited compliance with the subpoenas, Respondent has not yet been able to determine which non-parties it intends to depose. The deadline for completing depositions is January 30, 2009. Respondent further argues that, given the intervening holidays and the January 15, 2009 deadline for expert reports, additional time is required for Respondent to complete adequate non-party discovery and properly prepare for trial.

Complaint Counsel states that there is no doubt that the current discovery schedule is rigorous and demanding on all involved, but that the Commission established a time frame that it thought was in the public interest and Complaint Counsel and Respondent are therefore required to do everything in their power to adhere to it.

**III.**

The Scheduling Order in this case, issued by the Commission on September 10, 2008, sets February 16, 2009 (a federal holiday), as the date for the commencement of the hearing. The Scheduling Order, not issued by the undersigned, further states “[t]he schedule imposed by this order shall not be altered absent leave of the Commission.” Pursuant to Rule 3.22(a), Respondent’s motion, which seeks to alter that Scheduling Order, is hereby certified to the Commission, without recommendation.

ORDERED:

  
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D. Michael Chappell  
Administrative Law Judge

Date: December 11, 2008