

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 SECOND STATUS REPORT**

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

**I. STATUS OF RESPONDENT'S MOTION TO STAY**

On December 3, 2008, Respondent, Whole Foods Market, Inc., filed a motion to stay the administrative trial until September 14, 2009. As stated in Respondent's memorandum in support of this motion, it is not possible for Respondent to complete the appropriate third party discovery and prepare for trial in the time provided by the Scheduling Order. Complaint Counsel opposed on December 8, 2008. On December 11, 2008, the Administrative Law Judge issued an Order certifying Whole Foods' motion to the Commission without a recommendation. On December 15, 2008, the Commission issued an Order stating that it will shortly issue an appropriate order.

## **II. STATUS OF COMPLAINT COUNSEL'S AND RESPONDENT'S DISCOVERY**

Since filing the first status report on November 21, 2008, Respondent, assisted by contract attorneys, has continued to review collected material for responsiveness and privilege. As of December 19, 2008, Respondent has made a total of 19 rolling productions of documents, data, and other materials in response to Complaint Counsel's First Requests for Production of Documents and First Set of Interrogatories, nine of which have been produced since our last status report. On December 18, 2008, Respondent produced information responsive to Complaint Counsel's Second Requests for Production of Documents. To date, Respondent has produced in total more than 130,000 documents, equating to more than 4 million pages, and more than 53 gigabytes of data in response to Complaint Counsel's First and Second Requests for Production of Documents and First Set of Interrogatories.

Whole Foods is scheduled to depose a former Wild Oats employee, whose deposition was noticed but subsequently cancelled by Complaint Counsel, on January 6, 2009. Complaint Counsel has taken a total of 16 depositions to date of Whole Foods employees and two depositions of former Wild Oats employees, seven of which were taken since our last status report. Depositions of Whole Foods employees were taken on the following dates: December 9, 11, 16 and 18. Additional depositions of Whole Foods and former Wild Oats employees are scheduled for December 22 and 23. Depositions noticed by Complaint Counsel on November 20, 2008 for four additional Whole Foods and two former Wild Oats employees remain to be scheduled. On November 25, 2008, Complaint Counsel served its Fourth Notice of Rule 3.34(a)(1) Subpoena Ad Testificandum. On December 15, 2008, Complaint Counsel served its

Fifth Notice of Rule 3.34(a)(1) Subpoena Ad Testificandum. The parties continue to meet and confer regarding these notices.

Both Respondent and Complaint Counsel have some minimal amount of fact discovery yet to be produced that is responsive to outstanding Requests for Production. The parties continue to engage cooperatively in an effort to complete this remaining discovery expeditiously.

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

Respondent Whole Foods has not served any additional subpoenas duces tecum since Respondent's First Status Report was submitted on November 21, 2008. Whole Foods has served subpoenas duces tecum on 96 non-parties, which either compete with Respondent in one or more of the 29 geographic markets alleged by Complaint Counsel, compete with Respondent in areas outside the relevant geographic markets alleged by Complaint Counsel, or supply Respondent and competitor firms. The 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. As we stated in Respondent's First Status Report, 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 December 18, 2008, 61 non-parties have fully or partially responded to their subpoena duces tecum, of which the partial responders represent a significant percentage of these

61 non-parties, and 35 firms have not complied in any way at this time. Respondent's counsel continues to devote substantial time and resources to secure compliance by the subpoenaed non-parties. Two of the non-parties who had partially responded to their subpoenas filed motions to quash or limit – New Seasons Market and Gelson's. On December 16, 2008, the Administrative Law Judge ruled against New Seasons Market and ordered the company to comply by December 29, 2008. We intend to file a response to Gelson's motion to quash on December 19, 2008.

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. At this time Respondent has served 5 non-parties with subpoenas ad testificandum. Respondent expects to depose a significant number of non-party witnesses prior to the January 30, 2009 deadline for completing all depositions. 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. The significant level on noncompliance by many non-parties further supports our request that the trial be stayed and that a revised Scheduling Order be issued that will enable Whole Foods to complete its discovery.

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 or about November 19, 2008, Complaint Counsel issued subpoenas duces tecum to nine non-parties. At this time, counsel for Whole Foods has received a copy of a response from one of these nine non-parties from Complaint Counsel.

Dated December 19, 2008

Respectfully submitted,

By: 

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Counsel for Respondent

**CERTIFICATE OF SERVICE**

I hereby certify that on December 19, 2008, I filed via hand an original and eleven copies of the foregoing Second Status Report with:

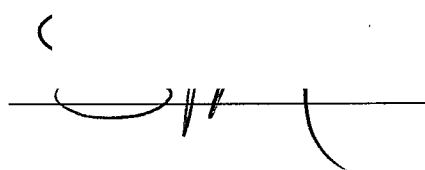
Donald S. Clark, Secretary  
Office of the Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W., Rm. H-159  
Washington, D.C. 20580

I also certify that on December 19, 2008, I delivered via electronic mail one copy and 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 December 19, 2008, I delivered via electronic mail one copy of the foregoing to:

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