UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

COMMISSIONERS: **William E. Kovacic, Chairman**
Pamela Jones Harbour
Jonathan Leibowitz
J. Thomas Rosch

In the Matter of	)	
	)	**Docket No. 9324**
Whole Foods Market, Inc. **a corporation.**	)	

ORDER AMENDING SCHEDULING ORDER AND DENYING RESPONDENT'S MOTION TO STAY PROCEEDING

Respondent Whole Foods Market, Inc. has filed a Motion to stay this administrative proceeding until the conclusion of the federal district court remand proceeding, and to amend the September 10, 2008 Scheduling Order to postpone the commencement of the administrative hearing until no earlier than September 14, 2009. The Commission has determined to deny Respondent's Motion, but to amend the Scheduling Order in certain respects.

The Scheduling Order currently provides that the administrative trial will begin on February 16, 2009. Respondent argues that (1) a stay is warranted 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 proceedings" (Motion at 1); and (2) without a seven-month extension, it "will be unable to complete adequate third party discovery in advance of expert reports and the administrative hearing." *Id*. at 5. Although we find that Whole Foods has failed to adequately justify staying these proceedings or delaying trial for seven months, we nevertheless will delay the trial until April 6, 2009.

First, although the current rules allow for a stay of administrative proceedings while a collateral federal court proceeding is ongoing (see Rule 3.51), such a decision is discretionary. The circumstances here do not justify a stay. The Court of Appeals in reversing the district court's denial of a preliminary injunction determined that the Commission had established a likelihood of success on the merits. *Federal Trade Commission v. Whole Foods Market Inc.*, No. 07-5276, 2008 U.S. App. LEXIS 24092 at *32, *54 (Tatel, J.); *id*. at *10, *30 (Brown J.). As a result, the decision on remand will not determine whether the transaction is illegal.

In contrast, the district court's original decision denying a preliminary injunction effectively prevented any finding that the transaction was illegal. The district court found that the Commission had established no likelihood of success on the merits. If that finding– that there was no likelihood of success on the merits – was correct, it would have been virtually impossible for the Commission to find a violation, and the Commission, in all likelihood, would have dismissed this action. Therefore, for prudential reasons, the Commission did not lift the stay until the Court of Appeals reversed that district court's finding. The posture of the federal court action no longer supports staying this proceeding.

Three prudential reasons justify proceeding with this action. If the transaction is anticompetitive, there could be ongoing consumer harm. Moreover, should the Commission determine that the transaction is illegal, the longer it takes to make the decision, the more difficult it will be to fashion effective relief that would protect consumers. Although the Commission believes certain preliminary relief - such as a hold separate order - will help protect a potential remedy, the Commission should still attempt to resolve this matter as expeditiously as possible. Finally, should the district court grant some form of preliminary relief, resolving this matter quickly limits the intrusiveness of such a remedy.

In addition, Whole Foods is speculating on how the federal court action will proceed on remand. It is not obvious that there will be significant overlap and repetition between the two actions. The district court action is not a determination on the merits. Further, the district court weighs equities related to preliminary relief that are different than the factors related to the need for permanent relief. Although Whole Foods claims that the findings in the federal court action will be conclusive (or nearly so) on this matter, that argument is premature.

Second, with regard to Respondent's separate request for an extension of the administrative trial until September 14, 2009, the motion rests entirely on its unsupported assertion that, absent this extension, it will be unable to conduct necessary third-party discovery. Respondent claims that, in order to defend claims pertaining to the 29 separate geographic markets at issue in this case, it requires compliance with 96 third party subpoenas it has issued, but only 53 third parties have even partially complied with the subpoenas, and it cannot take the depositions of any third party until that compliance has occurred. Motion at 5-6. A party who encounters a problem in this respect is expected promptly to call the problem to the court's attention. The court normally either orders prompt compliance with the subpoena, or, if the subpoena is overly broad or unduly burdensome, the court modifies it and sets a date for the deposition. Respondent's motion makes no showing that any of this occurred. Among other things, Respondent has made no showing (by affidavit or otherwise) that it needed to issue 96 third party subpoenas to begin with, that a problem even exists with any of the 96 subpoenas, much less with all of them, or that it has taken any steps to attempt to resolve these problems.

Although it appears that Respondent has not yet taken a single third party deposition to date, it has failed to show good cause for not having done so. As Commissioner Rosch explains in his dissent, it appears that Part 11(e) may be creating some problems with scheduling third party depositions. The Commission will delete Part 11(e) from the scheduling order.

It is certainly true that the current discovery schedule is a demanding one. Notwithstanding that, when we issued the scheduling order in September, we believed that this schedule would be a feasible one. The Commission has made it clear – in issuing the September scheduling order and in its recent actions to revise its Rules of Practice relating to Part 3 proceedings – that it is committed to resolving adjudicative proceedings expeditiously as is required by law. We also recognize that this case is in a unique procedural posture because at the time it was filed there was no foreshadowing that the Commission would revise its rules to expedite proceedings, the transaction has since been consummated, and this administrative litigation was stayed for a year. Under these unique circumstances, we believe that the reasons for expedited deadlines do not apply with quite the same force as they will in future cases. Thus, although we find that Respondent has failed to support its assertion that a lengthy seven-month delay in the hearing is warranted, we will extend the commencement of the administrative hearing to April 6, 2009, with the attendant deadlines to be adjusted accordingly.[1] We wish to emphasize, however, that we will not lightly depart from this schedule, and if Respondent believes that any further extension is required it will need to make a particularized showing, with factual support rather than mere unsupported assertions. Accordingly,

IT IS ORDERED THAT Respondent's request to stay this administrative proceeding is **denied;**

IT IS FURTHER ORDERED THAT Respondent's request to amend the Scheduling Order to postpone the commencement of the administrative hearing until no earlier than September 14, 2009 is **denied**;

IT IS FURTHER ORDERED THAT Part 9 of the September 10, 2008 Scheduling Order is amended in the following respects:

1. The Commencement of Hearing will occur on Monday, April 6, 2009, at 10:00 a.m. in Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW Washington, D.C.; and

2. The deadlines specified in Part 9, beginning with December 19, 2008, are changed as follows:

    a. December 19, 2008 is changed to February 4, 2009;

    b. January 5, 2009 is changed to February 19, 2009;

---

[1] With the new hearing date – which is approximately eight months from the date that the Commission lifted the stay in these proceedings, pretrial discovery and preparation will be longer than the roughly five months that the federal district courts allowed in the *Oracle* and *Microsoft* cases. *See*, *U.S. v. Oracle Corp.*, 331 F. Supp.2d 1098 (N.D. Cal. 2004); *U.S. v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001).

c. January 15, 2009 is changed to March 2, 2009;

d. January 22, 2009 is changed to March 9, 2009;

e. January 27, 2009 is changed to March 16, 2009;

f. January 30, 2009 is changed to March 19, 2009;

g. February 4, 2009 is changed to March 24, 2009; and

h. February 11, 2009 is changed to March 31, 2009; and

IT IS FURTHER ORDERED THAT Part 11(e) of the September 10, 2008 Scheduling Order is deleted.

By the Commission, Commissioner Rosch dissenting.

Donald S. Clark
Secretary

SEAL
ISSUED: December 19, 2008