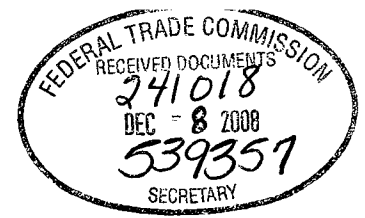


ORIGINAL



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)
)
WHOLE FOODS MARKET, INC.,)
 a corporation.)
)
)
)
)
)

Docket No. 9324

PUBLIC

Oral Argument Requested

GELSON'S MARKETS' MOTION FOR PROTECTIVE ORDER OR IN THE
ALTERNATIVE TO QUASH OR LIMIT THE SUBPOENA

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Counsel for Gelson's Markets

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of)	
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**GELSON’S MARKETS’ MOTION FOR PROTECTIVE ORDER OR IN THE
ALTERNATIVE TO QUASH OR LIMIT THE SUBPOENA**

Pursuant to 16 C.F.R. §§ 3.31(d) and 3.34(c), Gelson’s Markets (“Gelson’s”) respectfully requests that a protective order issue to protect materials listed and withheld by Gelson’s in its response and objections to the subpoena issued by Whole Foods Markets, Inc. (“Whole Foods”) or in the alternative that the subpoena be quashed in part.¹

I. BACKGROUND

Gelson’s operates eighteen premium grocery markets, all of which are located in Southern California. Declaration of Bernard Briskin, ¶ 2 (Briskin Declaration).² Gelson’s is a subsidiary of the Arden Group, Inc. (Arden Group), a publicly held holding company. *Id.* ¶ 3. The Arden Group releases Gelson’s quarterly and annual sales information in the aggregate, as to all of its stores, as part of its regular public filings. *Id.* Those filings are not required to provide store-by-store weekly sales information, and Gelson’s diligently protects its weekly, location-specific sales information, and does not disclose this information to anyone outside of the company. *Id.* ¶ 4-5. We are not aware of any publicly held markets which disclose store-by-

¹ The Whole Foods subpoena *duces tecum* and attachments are attached as Exhibit 1

² The Declaration of Bernard Briskin is attached as Exhibit 2.

store sales information—weekly, monthly or otherwise – because of its use to competitors.

Indeed, Gelson’s has not even provided this information to its outside counsel. *Id.* ¶ 4.

Gelson’s has first hand knowledge of Whole Foods anti-competitive activities in Southern California. Whole Foods repeatedly has either opened, or sought to open, stores in the same immediate areas as Gelson’s, often within a few blocks. As just two examples of Whole Foods’ predatory activity, Whole Foods is currently planning to open stores within a few blocks of the Gelson’s stores in both Santa Barbara and Tarzana, California. *Id.* ¶ 6. Gelson’s understands that Whole Foods actually entered into a letter of intent seeking to acquire the leasehold rights to one of Gelson’s premier locations (Encino, California) several years prior to the expiration of Gelson’s lease on the property. *Id.* ¶ 7. Gelson’s takes very seriously the competitive threat posed by Whole Foods’ unchecked expansion in Southern California, including the acquisition of competitive grocery stores.

On June 28, 2007, the Federal Trade Commission (“FTC”) instituted this administrative action against Whole Foods, challenging the legality of its acquisition of Wild Oats Markets, Inc. (“Wild Oats”). In connection with this proceeding, Whole Foods issued a third party subpoena to Gelson’s on or about October 15, 2008.

Gelson’s obtained an extension to respond and responded on November 19, 2008 by (1) producing certain responsive documents under the subpoena, (2) stating that it did not possess responsive documents to other requests, and (3) withholding other documents, listing such withheld documents, and stating its objections, pursuant to 16 C.F.R. § 3.38A.³

Specifically, Gelson’s withheld (1) documents evidencing weekly sales for each Gelson’s store, responsive to request no. 9(b); and (2) a responsive site study, containing sales projections,

³ The November 19, 2008 letter is attached as Exhibit 3.

responsive to request No. 5. Gelson's response raised several legal objections to the production of these items.⁴ Most critically, Gelson's objected and withheld these documents because they contain Gelson's most highly confidential and sensitive commercial information. The dissemination of this information in any way, especially to Whole Foods, in light of Whole Foods' ongoing activities in Southern California, would cause irreparable harm to Gelson's business. Briskin Declaration ¶ 5. Disclosure of this information to Whole Foods – or to other competitors or to the public – would provide a blueprint for Whole Foods to continue its anti-competitive activities in Southern California and drive Gelson's out of business – as Whole Foods' ongoing activities demonstrate are its clear intention. *Id.* ¶ 5.

After receiving Gelson's letter and production, on November 20, Whole Foods, through counsel, communicated telephonically with counsel for Gelson's and requested that Gelson's fully comply with the subpoena or risk Whole Foods' seeking to compel production. Gelson's offered to provide Whole Foods with gross quarterly and annual sales in lieu of the more highly proprietary commercial data requested in the subpoena. Counsel for Whole Foods rejected Gelson's offer.

Seeking to avoid adjudicative involvement, Gelson's followed up by letter to Whole Foods on December 2, 2008.⁵ The December 2, 2008 letter offered another compromise with

⁴ Gelson's objected to production these items because they contain Gelson's most confidential and proprietary information, the dissemination of which would cause irreparable harm and oppression to Gelson's business. Gelson's further objected on the grounds that the Protective Order was insufficient to protect this critical proprietary information. In addition, Gelson's objected on the grounds that the risks of disclosure outweigh the potential benefits of the information pursuant to 16 C.F.R. § 3.31(c)(1)(iii). Finally, Gelson's also raised objections on the grounds that these requests impose an undue burden and are overly broad and not reasonably calculated to elicit relevant information.

⁵ The December 2, 2008 letter is attached as Exhibit 4.

regard to the requested highly confidential store-specific sales information. Gelson's offered to provide "the percentage of increase or decrease in the sales by Gelson's of organic products for the 3 month period(s) after the opening of a Whole Foods store for each Gelson's store in the same trade area, after January 1, 2006 and within the geographic markets outlined in the subpoena." Gelson's requested that such information be provided to the Administrative Law Judge *in camera* "for his/her determination as to whether it is relevant to a decision on pending issues; and, if deemed relevant (after briefing and argument by Whole Foods and Gelson's), how to protect the information from being made public and how to keep this highly sensitive and proprietary information away from the eyes and knowledge of Whole Foods and other competitors in Southern California."

On December 5, 2008, Whole Foods counsel rejected Gelson's compromise, explaining that it will accept nothing less than location-specific sales data.

Gelson's now seeks an order protecting from disclosure the commercially sensitive documents withheld and described in its response to Whole Foods' subpoena or alternatively, to quash the subpoena with regards to these requests.

II. ARGUMENT

An Administrative Law Judge ("ALJ") has broad discretion to enter a protective order limiting access to information to preserve any privilege "as governed by the Constitution, any applicable act of Congress, or the principles of the common law." 16 C.F.R. § 3.31I(2). An ALJ may limit discovery in FTC adjudicative proceedings "as justice requires" to protect a "party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to protect undue delay in the proceeding." 16 C.F.R. § 3.31(d). Like federal courts, the FTC rules

may limit third party disclosure where the risk of disclosure and the resultant damage to the nonparty outweigh any benefits from enforcing these subpoenas. *See* 16 C.F.R. § 3.311(1)(iii).

Additionally, the Federal Rules inform that subpoenaed information may be protected from disclosure if it is a “trade secret or other confidential research, development, or commercial information.” Fed. R. Civ. P. 45I(3)(B)(1). Further, the FTC’s enabling act mandates that trade secrets and confidential commercial information receive special care. *E.g.*, 15 U.S.C. § 46(f). The FTC Act prohibits the FTC from disclosing of trade secrets as well as commercial or financial information that is privileged or confidential. *Id.* The FTC has interpreted and defined trade secrets and commercial or financial information as “competitively sensitive information, such as costs or various types of sales statistics and inventories. It includes trade secrets in the nature of formulas, patterns, devices, and processes of manufacture, as well as names of customers in which there is a proprietary or highly competitive interest.” 16 C.F.R. § 4.10(a)(2).

A. A Protective Order Should Issue to Protect Gelson’s Most Confidential, Commercially Sensitive Information Because Disclosure Would Be Anti-Competitive

A protective order should issue to protect Gelson’s confidential and commercially sensitive information because disclosure of such information is inherently anti-competitive. Whole Foods’ subpoena would require Gelson’s to provide detailed information regarding the lifeblood of Gelson’s business, including three years’ worth of weekly sales information for each of its locations and a Site Study detailing strategic plans and sales projections in one critical location. In essence, Whole Foods would obtain the blueprint to Gelson’s success in the Southern California market.

The information sought to be protected is detailed, weekly, and location specific commercial information. The location-specific information lies at the very core of Gelson’s business and drives its competitive decision-making. This information – and its secrecy – is

critical to Gelson's existence and continued success in the micro-market in which each of Gelson's store exists. The competitive harm from disclosure of this information to Whole Foods or the public is obvious, especially in light of Whole Foods pattern of anti-competitive activity.

Whole Foods has refused to accept any compromise and seeks only to require Gelson's to turn over this most sensitive, location-specific, weekly sales information to one of its primary competitors – a competitor accused of anti-competitive conduct and which has a history of taking a predatory approach toward its competition.⁶ Whole Foods has an admitted history of “systematically and relentlessly taking [a competitor's] business away from them one market after another,” *See FTC v. Whole Foods Market, Inc.*, Case No. 07-cv-01021 PLF (D.D.C. Aug. 23, 2007) (“*Whole Foods Case*”), Public Version of the Expert Report of Kevin M. Murphy, Ph.D, ¶ 36 (quoting Whole Food's CEO John Mackey summarizing the Whole Foods strategy in February 2005). Whole Foods does not simply want to compete with other supermarkets – its model has long been premised on the elimination of its competitors. In 1998, “Jim Sud [an officer] of Whole Foods noted the importance of the ‘elimination of a competitor in the marketplace, competition for sites, competition for acquisitions, and operational economies of scale. We become the Microsoft of the natural foods industry.’” Plaintiff Federal Trade Commission's Proposed Findings of Fact (Public Version), ¶ 582. With the trade secret information Whole Foods seeks from Gelson's, Whole Foods effectively could eliminate Gelson's as a competitor.

Indeed, Mr. Mackey declared that “Wild Oats needs to be removed from the playing field[.]” Plaintiff Federal Trade Commission's Proposed Findings of Fact (Public Version), ¶ 38.

⁶ Gelson's recognizes that the protective order in this case limits disclosure of confidential information to Whole Foods' outside counsel, experts, consultants, and the like. The shortcomings of the protective order are discussed below.

According to Mr. Mackey, Whole Foods went about “systematically destroying [Wild Oats] viability as a business – market by market, city by city.” *Whole Foods Case*, Part I of Plaintiff’s Public Version of Its Corrected Brief on Its Motion for Preliminary Injunction, p. 6. As Whole Foods’ Regional President Will Paradise succinctly stated: “[m]y goal is simply – I want to crush [Wild Oats] and am willing to spend a lot of money in the process.” *Id* at 25 (alteration in original). To that end, Mr. Mackey said: “I believe that Whole Foods will continue to aggressively enter their markets and will pressure and harass them at every opportunity.” Plaintiff Federal Trade Commission’s Proposed Findings of Fact (Public Version), 1 585. Whole Foods’ approach is to “really punish” their competitors “and make a statement about any competition that thinks about competing with” Whole Foods. *Whole Foods Case*, Public Version of the Supplemental Rebuttal Expert Report of Kevin M. Murphy, Ph.D, ¶ 2.

Whole Foods’ approach of “pressuring,” “harassing;” and “punishing” competitors is not limited to Wild Oats. Whole Foods approach is reflected in its statements regarding Earth Fare, a regional, thirteen-store natural and organic food chain in the Southeast. As Whole Foods’ chief operating officer A.C. Gallo reported to the Whole Foods Board of Directors:

In June we will have an [Earth Fare] market opening up about a half-mile from our [redacted in original] store and expect some fierce competition. We have been remodelling the [redacted in original] store, getting it ready to show [Earth Fare] that it is a bad idea to open up too close to us.

[Earth Fare] opened a store in [redacted in original] less than a mile from our store at the beginning of [redacted in original]. We responded by aggressively matching all of their prices and specials and by doing a strong special program of our own.

We have heard from management at [Earth Fare] that they were surprised by our aggressive pricing and that their coming to the [redacted in original] was probably a mistake.

We are crushing [Earth Fare].... Our opening in [redacted in original] dropped their store from about [redacted in original].

We cannot see how this company is viable going forward, and I expect the investors are going to take some drastic action soon.

Plaintiff Federal Trade Commission's Proposed Findings of Fact (Public Version), ¶ 118 (internal citations omitted).

Gelson's has first hand knowledge of Whole Foods' anti-competitive activities in Southern California. Whole Foods repeatedly has opened stores in the same immediate areas as Gelson's locations, sometimes across the street or within the few blocks. Briskin Declaration ¶ 6. As just two examples of Whole Foods' predatory activity, Whole Foods is currently planning to open stores within a few blocks of the Gelson's stores in both Santa Barbara and Tarzana, California. *Id.* Further, Gelson's understands that Whole Foods actually entered into a letter of intent seeking to acquire the leasehold rights to one of Gelson's premier locations (Encino, California) while a Gelson's Market still occupied the property and had more than several years remaining on its lease. *Id.* ¶ 7. Gelson's takes very seriously the competitive threat posed by Whole Foods unchecked expansion in Southern California.

Whole Foods has approximately 270 stores while Gelson's has just 18. Gelson's has no reason to believe that Whole Foods would not relish the opportunity to do to Gelson's what it did to Wild Oats and what it does to its other competitors such as Earth Fare, and Whole Foods has the size and resources to do it with the assistance of Gelson's trade secrets and other commercially sensitive information.

Further, as a non-party to the dispute between Whole Foods and the FTC, Gelson's is "particularly vulnerable." *Mycogen Plant Science, Inc. v. Monsanto Co.*, 164 F.R.D. 623, 628 (RD. Pa. 1996). "The 'fact of non-party status' is a 'significant factor' in the decision to require disclosure of trade secrets." *Id.* (quoting *Katz, supra*, 984 F.2d at 424). Courts therefore have "a special responsibility to alleviate the risk that the subpoenas present" because "courts should be

concerned that litigation tactics not be adopted with a view to improve a client's competitive position." *Id.* That is particularly true where the requesting party, as here, openly engages in what is admittedly aggressive, punitive competitive tactics which, depending on the outcome of this proceeding, may in fact be unlawful.

Gelson's, in good faith, has offered two compromises to limit production of the most critical and harmful commercial information withheld and the potential anti-competitive effects of disclosure. Gelson's offered to provide public, quarterly and/or annual sales data to Whole Foods. This compromise was rejected by Whole Foods. Gelson's also offered to provide "the percentage of increase or decrease in the sales by Gelson's of organic products for the 3 month period(s) after the opening of a Whole Foods store for each Gelson's store in the same trade area, after January 1, 2006 and within the geographic markets outlined in the subpoena." *See* Letter to Counsel 12/2/08, at Ex. 4. Gelson's offered this information on the condition that such information be provided to the Administrative Law Judge *in camera* "for his/her determination as to whether it is relevant to a decision on pending issues; and, if deemed relevant (after briefing and argument by Whole Foods and Gelson's), how to protect the information from being made public and how to keep this highly sensitive and proprietary information away from the eyes and knowledge of Whole Foods and other competitors in Southern California." *See* Letter to Counsel 12/2/08, at Ex. 3. Again this compromise was rejected by Whole Foods.

It is clear from Whole Foods' repeated denials of Gelson's attempts to cooperate that Whole Foods will stop at nothing less than obtaining Gelson's most critical information – location-specific sales. Disclosure of the information withheld by Gelson's, even if arguably relevant to the FTC proceedings, is itself anti-competitive. Whole Foods should not be allowed to obtain Gelson's private, confidential, highly sensitive information for any purpose.

B. A Protective Order Should Issue to Protect Gelson's Most Confidential, Commercially Sensitive Information Because Disclosure, Even Under The Existing Protective Order, Would Cause Gelson's Irreparable Harm

A protective order should issue to protect the information and documents withheld by Gelson's because Gelson's cannot be compelled to produce its confidential and commercially sensitive information without adequate protection against disclosure or adequate remedies if the information is disclosed. As noted above, although Gelson's is a non-party to this matter, the subpoena nonetheless seeks some of Gelson's most proprietary and commercially sensitive information. If the information became public, or if it were disclosed to Whole Foods' competitive decision-makers, Gelson's would be irreparably damaged. The protective order presently in place in this case does not adequately protect Gelson's confidential information, and certainly fails to provide any remedy to Gelson's if the protective order is violated.

First, a protective order is an inherently insufficient protection, particularly when the confidential information of a non-party is involved. "There is a constant danger inherent in disclosure of confidential information pursuant to a protective order. Therefore, the party requesting disclosure must make a strong showing of need, especially when confidential information from a non-party is sought." *Litton Indus., Inc. v. Chesapeake & Ohio Railway Co.*, 129 F.R.D. 528, 531 (E.D. Wis. 1990). This is particularly true where, as here, the protective order allows outside experts and consultants to access the non-party's confidential information.

As the court in *Litton* warned:

Finally, this court is not sanguine that a protective order could be constructed to sufficiently maintain the confidential nature of this information. The information would, of course, have to be disclosed to Litton's experts. Like all experts, these individuals, often professors, are regularly called upon for assistance. This is one of the things that makes them "experts." But once an expert has digested this confidential information, it is unlikely that the expert will forget. The expert's *raison d'être* is to assimilate information in his or her chosen field and

formulate that material into various theories. The information obtained from Bay [the non-party] will be added to the expert's repository of other information for possible future use. Even with stem sanctions for unauthorized disclosure, how does one practically police a protective order? If the expert is called upon two years after this litigation to assist a potential competitor in structuring its business, will he really be able to compartmentalize all he or she has learned and not use any of the information obtained from Bay?

Id. If Gelson's is compelled to disclose its trade secrets, notwithstanding any protective order and the good faith efforts of the recipients, those trade secrets, as a practical matter, are no longer under Gelson's control and become available, whether specifically or in general terms, to its competitors.. The experts in this case will have Gelson's' confidential information. They cannot unlearn it. Other competitors may hire those experts. Whole Foods has not demonstrated and cannot demonstrate any need for Gelson's' confidential information sufficient to overcome Gelson's right to maintain the privacy of its trade secrets and other confidential information. *See id* at 530 ("It is incumbent upon [the requesting party] to show that its needs outweigh the burden and invasion of corporate privacy that would result to ... a non-party to this action.") (internal quotation omitted).

Second, the protective order does not adequately protect Gelson's information. If either Whole Foods or the FTC chooses to introduce Gelson's confidential information into evidence at the hearing in this matter, the protective order improperly places the burden on Gelson's to protect its confidential information. The protective order requires only that Whole Foods or the FTC provide notice to Gelson's of their intent to introduce Gelson's' confidential information into evidence. Protective Order, ¶ 10. The protective order then places the burden on Gelson's to file a motion with the Administrative Law Judge to show why the confidential information it was compelled to produce should not be made public, and provides Gelson's only five days to do so. *Id.* If the Administrative Law Judge denies that motion, Gelson's' confidential information

will be made public, even though Gelson's considers it to be confidential and even though Gelson's has no obligation to report its store-by-store weekly sales, market share, or other confidential information to anyone. There should be an absolute requirement that Gelson's confidential information be kept confidential. Further, the five-day time period is insufficient to provide Gelson's with a fair opportunity to protect its confidential information. The protective order should provide a period substantially longer than five days for Gelson's to intervene to protect its confidential information from public disclosure, and Whole Foods, as the party seeking Gelson's information, should be required to pay Gelson's costs, including attorney fees, associated with any instance in which Gelson's is required to intervene under the protective order.

Third, and most fundamentally, the protective order fails to provide an adequate disincentive against or remedy for disclosure of Gelson's confidential information. Gelson's recognizes that, by its terms, the protective order does not permit the disclosure of confidential information to anyone within Whole Foods (i.e. only to outside counsel and hired experts). Protective Order, ¶ 7. Gelson's does not impute to Whole Foods' counsel any intent to violate the protective order. Nonetheless, providing Gelson's most sensitive information to Whole Foods' outside counsel is not materially different from providing that information to Whole Foods itself. In any event, any disclosure of Gelson's information, whether directly to Whole Foods or indirectly through public disclosure, would cause Gelson's irreparable competitive harm. Yet the protective order relies meagerly on the bare prohibition against disclosure. That is not enough.

The United States District Court for the District of Columbia agrees. In the injunction proceeding in this matter, the District Court recognized the importance of a significant hammer

hanging over the heads of the parties and their lawyers “as an added incentive against inadvertent misuse of any confidential information[.]” *Whole Foods Case*, July 6, 2007 Memorandum Opinion and Order, p. 5. Accordingly, “[i]n an abundance of caution,” the court required the following penalty provision:

Any violation of this Order will be deemed a contempt and punished by a fine of \$250,000. This fine will be paid individually by the person who violates this Order. Any violator may not seek to be reimbursed or indemnified for the payment the violator has made. If the violator is an attorney, the Court will deem the violation of this Order to warrant the violator being sanctioned by the appropriate professional disciplinary authority and Judge Friedman will urge that authority to suspend or disbar the violator.

Id. Just as the district court found in the *Whole Foods Case*, is not enough to rely on notions of ethical restraints and professionalism, particularly to protect against inadvertent disclosure.

While Gelson’s has no reason to doubt the professionalism or ethics of the lawyers involved in this proceeding, there can be no doubt that, as a practical matter, those in possession of Gelson’s confidential information would take greater measures to protect that information if faced with a substantial personal fine like that set forth in the district court’s protective order.⁷ The lack of any penalty provision in the protective order renders it inadequate, and Gelson’s should not be required to produce its confidential information without an adequate protective order.

Further, the FTC will also receive all materials produced in response to Whole Foods’ subpoena. Notwithstanding the limitations imposed on Whole Foods, the protective order has a gaping hole with respect to the FTC. The protective order provides that the FTC is to use the

⁷ Gelson’s would request the additional modification that any such fine be payable to Gelson’s if its information were disclosed.

information only for purposes of the present proceeding, except that the FTC “may use or disclose confidential material as provided by its Rules of Practice; Sections 6(f) and 21 of the Federal Trade Commission Act; or any other legal obligation imposed upon the Commission.” Protective Order, In other words, the protective order provides Gelson’s with no protection whatsoever with respect to what the FTC does with Gelson’s’ confidential information outside the confines of this proceeding.

For that, Gelson’s apparently must rely on statutory and regulatory prohibitions against the release of its confidential information. There is no question that the FTC has a statutory and regulatory obligation to maintain the confidentiality of Gelson’s financial information. The problem is that, notwithstanding the prohibitions against disclosure, Gelson’s has no remedy if the FTC destroys Gelson’s’ business by disclosing its confidential information. Without a penalty provision of the nature described above, or the FTC’s agreement to make Gelson’s whole in the event of disclosure, Gelson’s has absolutely no protection against the FTC’s inadvertent disclosure.⁸

Moreover, the possibility of improper FTC disclosures is real. Evidence introduced in the district court demonstrated that in the past the Commission has made inappropriate disclosures, and the trial judge noted, a number of instances where informal arrangements for confidential treatment of proprietary information were not strictly honored. He described the disclosures in one case as an evasion, and a violation of the spirit of (an) order. Although legitimate investigation should not be unduly delayed, we agree with the district judge that the unfortunate disclosures by the FTC of confidential information are the kind of governmental behavior that simply cannot be countenanced.

⁸ Gelson’s has no reason to believe that the FTC will intentionally disclose Gelson’s confidential information in violation of statutory prohibitions or the protective order, and makes no such assertion here.

Wearly v. F.T.C., 616 F.2d 662, 664 (3rd Or. 1980) (internal quotations and citations omitted). In a recent case in which there was both a protective order and the statutory protections in place, the FTC posted on its website exhibits to a filing that it did not intend to make public. *See In the Matter of Basic Research, L. L. C. et al.*, Fed. Trade Comm'n Docket No. 9318. Although the FTC disputed, after the disclosure, whether the designation of the documents at issue as “confidential” and “restricted confidential, attorney eyes only” was proper, there is no question that the FTC negligently made those confidential materials available to the public via its website. There is also no question that, despite its error, which the respondents asserted resulted in the public disclosure of its trade secret and confidential financial information, the FTC offered no remedy other than its “deep regret.”

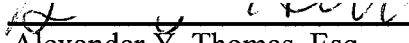
Indeed, the FTC has already publicly disclosed confidential information in this very matter. The FTC publicly filed a document that it had “redacted” through by blackening out text electronically. However, that text – which contained trade secret information – remained in the document, and could be easily copied, pasted, viewed, and published, which the Associated Press did. The information then was widely disseminated, as a direct result of the FTC’s carelessness and apparent failure to take seriously the protection of the confidential information. Gelson’s concern about inadvertent disclosure is not exaggerated or unfounded. The likelihood of disclosure is real. Gelson’s detailed, confidential information and trade secrets should be protected absent a protective order that prohibits the FTC from disclosing information Gelson’s appropriately withheld from production and requires the disclosing party to make Gelson’s financially whole if there is a breach of the protective order. But it is obvious that any fine will not make Gelson’s whole as to the irreparable harm it will surely sustain by disclosure.

III. CONCLUSION

For the forgoing reasons, Gelson's Motion for Protective Order or in the alternative to Quash or Limit the Subpoena concerning all documents listed and withheld in its response to the Whole Foods' subpoena.

DATED this 8th day of December, 2008

Respectfully submitted,



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Daniel Z. Herbst, Esq.

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Counsel for Gelson's Markets

CERTIFICATION PURSUANT TO 16 C.F.R. § 3.22(f)

Pursuant to 16 C.F.R. § 3.22(f), the undersigned counsel for Gelson's states that he conferred telephonically with James Fishkin, counsel for Whole Foods, on October 24, 2008 at 10:30 a.m., November 20, 2008 at 1:00 p.m., and December 5, 2008 at 10:40 a.m. and exchanged written correspondence with Mr. Fishkin on November 19, 2008 and December 2, 2008, attached as exhibits to this motion, all in good faith attempts to resolve the dispute. However, the parties were unsuccessful in reaching an agreement.



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October 14, 2008

VIA FEDERAL EXPRESS

Robert E. Stiles
President
Gelson's
16400 Ventura Blvd., Suite 240
Encino, CA 91436

Re: In the Matter of Whole Foods Market, Inc., FTC Docket No. 9324

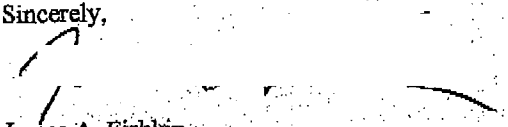
Dear Mr. Stiles:

I am an attorney representing Whole Foods Market, Inc. in the above captioned matter, which is the Federal Trade Commission's administrative litigation against Whole Foods Market, Inc. for its acquisition of Wild Oats Markets, Inc. Enclosed is a subpoena requesting documents related to this matter.

I have also included a copy of the Protective Order in this matter which provides instructions regarding the designation of confidential material and limits who may see material designated as confidential.

Please call me at 202-261-3421 or Gorav Jindal at 202-261-3435 if you have any questions. Thank you for your time and attention to this matter.

Sincerely,


James A. Fishkin

Enclosures



SUBPOENA DUCES TECUM
 Issued Pursuant to Rule 3.34(b), 16 C.F.R. § 3.34(b)(1997)

1. TO

Robert E. Stiles
 President
 Gelson's
 16400 Ventura Blvd., Suite 240
 Encino, CA 91436

2. FROM

UNITED STATES OF AMERICA
 FEDERAL TRADE COMMISSION

This subpoena requires you to produce and permit inspection and copying of designated books, documents (as defined in Rule 3.34(b)), or tangible things - or to permit inspection of premises - at the date and time specified in Item 5, at the request of Counsel listed in Item 9, in the proceeding described in Item 6.

3. PLACE OF PRODUCTION OR INSPECTION

See Attachment A, Part II, No. 1

4. MATERIAL WILL BE PRODUCED TO

James A. Fishkin

5. DATE AND TIME OF PRODUCTION OR INSPECTION

November 5, 2008 at 10:00 am

6. SUBJECT OF PROCEEDING

In the Matter of Whole Foods Market Inc., et al, Docket No. 9324

7. MATERIAL TO BE PRODUCED

See Attachment A, Part III

8. ADMINISTRATIVE LAW JUDGE

Federal Trade Commission
 Washington, D.C. 20580

9. COUNSEL REQUESTING SUBPOENA

James A. Fishkin, Esq.
 Dechert LLP
 1775 I Street, NW
 Washington, DC 20006-2401

DATE ISSUED

October 3, 2008

SECRETARY'S SIGNATURE

Donald S. Clark

GENERAL INSTRUCTIONS

APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed with the Secretary of the Federal Trade Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 9, and upon all other parties prescribed by the Rules of Practice.

TRAVEL EXPENSES

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to counsel listed in Item 9 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from counsel listed in Item 9.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served: (check the method used)

- in person.*
- by registered mail.*
- by leaving copy at principal office or place of business, to wit:*

.....
.....
.....
.....

on the person named herein on:

.....
(Month, day, and year)

.....
(Name of person making service)

.....
(Official title)

ATTACHMENT A

DOCUMENTS TO BE PRODUCED PURSUANT TO SUBPOENA DUCES TECUM

I. Definitions

For the purposes of these Requests for Documents, the following definitions apply:

A. The term "Whole Foods" shall mean Whole Foods Market, Inc., and its predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and all directors, officers, employees, agents and representatives thereof.

B. The term "Wild Oats" shall mean Wild Oats Markets, Inc., the entity acquired by Whole Foods on August 28, 2007, and its predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and all directors, officers, employees, agents, and representatives thereof.

C. The terms "you" and "your" refer to the entity or person to whom this Subpoena is directed, and all predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and including all store formats, brands, and banners under which any of the foregoing operate, and all directors, officers, employees, agents and representatives thereof.

D. The terms "Commission" refers to the Federal Trade Commission and its commissioners, bureau directors, counsel, staff, and employees.

E. "Documents" as used herein shall mean every original and every non-identical copy of any original of all mechanically written, handwritten, typed or printed material, electronically stored data, microfilm, microfiche, sound recordings, films, photographs, videotapes, slides, and other physical objects or tangible things of every kind and description containing stored information, including but not limited to, transcripts, letters, correspondence, notes, memoranda, tapes, records, telegrams, electronic mail, facsimiles, periodicals, pamphlets,

brochures, circulars, advertisements, leaflets, reports, research studies, test data, working papers, drawings, maps, sketches, diagrams, blueprints, graphs, charts, diaries, logs, manuals, agreements, contracts, rough drafts, analyses, ledgers, inventories, financial information, bank records, receipts, books of account, understandings, minutes of meetings, minute books, resolutions, assignments, computer printouts, purchase orders, invoices, bills of lading, written memoranda or notes of oral communications, and any other tangible thing of whatever nature.

F. The terms "relate to," "related to," "relating to," "in relation to," and "concerning" shall mean mentioning, comprising, consisting, indicating, describing, reflecting, referring, evidencing, regarding, pertaining to, showing, discussing, connected with, memorializing or involving in any way whatsoever the subject matter of the request, including having a legal, factual or logical connection, relationship, correlation, or association with the subject matter of the request. A document may "relate to" or an individual or entity without specifically mentioning or discussing that individual or entity by name.

G. The terms "and" and "or" have both conjunctive and disjunctive meanings.

H. The terms "communication" and "communications" shall mean all meetings, interviews, conversations, conferences, discussions, correspondence, messages, telegrams, facsimiles, electronic mail, mailgrams, telephone conversations, and all oral, written and electronic expressions or other occurrences whereby thoughts, opinions, information or data are transmitted between two or more persons.

I. The term "Transaction" shall mean the acquisition of Wild Oats by Whole Foods that occurred on August 28, 2007.

J. The term "Geographic Area" shall mean the following metropolitan areas:

1. Albuquerque, NM;
2. Boston, MA;

3. Boulder, CO;
4. Hinsdale, IL (suburban Chicago);
5. Evanston, IL (suburban Chicago);
6. Cleveland, OH;
7. Colorado Springs, CO;
8. Columbus, OH;
9. Denver, CO;
10. West Hartford, CT;
11. Henderson, NV;
12. Kansas City-Overland Park, KS;
13. Las Vegas, NV;
14. Los Angeles-Santa Monica-Brentwood, CA;
15. Louisville, KY;
16. Omaha, NE;
17. Pasadena, CA;
18. Phoenix, AZ;
19. Portland, ME;
20. Portland, OR;
21. St. Louis, MO;
22. Santa Fe, NM;
23. Palo Alto, CA;
24. Fairfield County, CT;
25. Miami Beach, FL;
26. Naples, FL;
27. Nashville, TN;
28. Reno, NV; and
29. Salt Lake City, UT.

II. Instructions

1. Submit all documents, including information or items in the possession of your staff, employees, agents, representatives, other personnel, or anyone purporting to act on your behalf, by the date listed in Item 5 on the Subpoena Duces Tecum form, to:

James A. Fishkin
 Dechert LLP
 1775 I Street, NW
 Washington, D.C. 20016

In the alternative, under FTC Rule 3.34(b), 16 C.F.R. § 3.34(b), you must produce and permit inspection and copying of the designated books, documents (as defined in Rule 3.34(b)), or

tangible things – or to permit inspection of the premises – at the date and time specified in Item 5, at the request of Counsel listed in Item 9, on the Subpoena Duces Tecum form.

2. If an objection is made to any request herein, all documents and things responsive to the request not subject to the objection should be produced. Similarly, if any objection is made to production of a document, the portion(s) of that document not subject to the objection should be produced with the portion(s) objected to redacted and indicated clearly as such. Otherwise, no communication, document, file, or thing requested should be altered, changed, or modified in any respect. All communications, documents, and files shall be produced in full and unexpurgated form, including all attachments and enclosures either as they are kept in your ordinary course of business or organized to correspond with those requests. No communication, document, file, or thing requested should be disposed of or destroyed.

3. If you object to any request, or otherwise withhold responsive information because of the claim of privilege, work product, or other grounds:

- a. Identify the Request for Documents to which objection or claim of privilege is made;
- b. Identify every Document withheld, the author, the date of creation, and all recipients;
- c. Identify all grounds for objection or assertion of privilege, and set forth the factual basis for assertion of the objection or claim of privilege;
- d. Identify the information withheld by description of the topic or subject matter, the date of the communication, and the participants; and
- e. Identify all persons having knowledge of any facts relating to your claim of privilege.

4. Your responses should reflect all knowledge, information, and documents in your possession, custody, or control, and includes, unless otherwise specifically indicated, your counsel, staff, employees, agents, representatives, other personnel, or anyone purporting to act on your behalf.

5. Your response to the document request should include any document created, prepared or received from January 1, 2006 to the present.

6. Any questions regarding this subpoena should be directed to James A. Fishkin at 202-261-3421 or Gorav Jindal at 202-261-3435.

III. Requests For Documents

Please provide the following:

1. All documents you have provided to the Commission in connection with (a) the Transaction or any investigation of the Transaction; (b) *FTC v. Whole Foods Market, Inc.*, Civil Action No. 1:07-CV-01021-PLF (D.D.C. 2007); or (c) this matter, which is *In re Whole Foods Market, Inc.*, FTC Docket No. 9324.
2. All documents relating to any communications you have had with the Commission in connection with (a) the Transaction; (b) *FTC v. Whole Foods Market, Inc.*, Civil Action No. 1:07-CV-01021-PLF (D.D.C. 2007); or (c) this matter, which is *In re Whole Foods Market, Inc.*, FTC Docket No. 9324.
3. All documents relating to Whole Foods' acquisition of Wild Oats, including documents discussing the effect of the merger on you.
4. All documents discussing competition with Whole Foods or Wild Oats, including responses by you to a new Whole Foods or Wild Oats store and responses by you to

prices, promotions, product selection, quality, or services at Whole Foods or Wild Oats stores.

5. All market studies, strategic plans or competitive analyses relating to competition in each Geographic Area, including documents discussing market shares.
6. All market studies, strategic plans or competitive analyses relating to the sale of natural and organic products, including the sale of natural and organic products in your stores.
7. All documents relating to your plans to increase the shelf space at your stores allocated to natural and organic products, the number of natural and organic products sold in your stores, or the sales of natural or organic products in your stores.
8. All documents discussing your plans to renovate or improve your stores to sell additional natural and organic products or to open stores emphasizing natural and organic products.
9. Provide documents sufficient to show, or in the alternative submit a spread sheet showing: (a) the store name and address of each of your stores separately in each Geographic Area; and (b) for each store provide the total weekly sales for each week since January 1, 2006 to the current date.

CERTIFICATE OF SERVICE

I certify that I served the foregoing Subpoena Duces Tecum and all Attachments via overnight mail delivery to:

Robert E. Stiles
President
Gelson's
16400 Ventura Blvd., Suite 240
Encino, CA 91436

By E-Mail:

J. Robert Robertson, Esq.
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Matthew J. Reilly, Esq.
Catharine M. Moscatelli, Esq.
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, DC 20001

Complaint Counsel

Dated: October 14, 2008

/s/ James A. Fishkin
James A. Fishkin, Esq.

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

In the Matter of

WHOLE FOODS MARKET, INC.,
a corporation.

)
)
) Docket No. 9324
)
)
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PROTECTIVE ORDER GOVERNING CONFIDENTIAL MATERIAL

For the purpose of protecting the interests of the parties and third parties in the above-captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this matter:

IT IS HEREBY ORDERED THAT this Protective Order Governing Confidential Material ("Protective Order") shall govern the handling of all Discovery Material, as hereafter defined.

1. As used in this Order, "confidential material" shall refer to any document or portion thereof that contains non-public competitively sensitive information, including trade secrets or other research, development or commercial information, the disclosure of which would likely cause commercial harm to the producing party, or sensitive personal information. "Discovery Material" shall refer to documents and information produced by a party or third party in connection with this matter. "Document" shall refer to any discoverable writing, recording, transcript of oral testimony, or electronically stored information in the possession of a party or a third party. "Commission" shall refer to the Federal Trade Commission ("FTC"), or

any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this proceeding.

2. Any document or portion thereof produced or submitted by a respondent or a third party during a Federal Trade Commission investigation or during the course of this proceeding that is entitled to confidentiality under the Federal Trade Commission Act, or any regulation, interpretation, or precedent concerning documents in the possession of the Commission, as well as any information taken from any portion of such document, shall be treated as confidential material for purposes of this Order.

3. The parties and any third parties, in complying with informal discovery requests, disclosure requirements, or discovery demands in this proceeding may designate any responsive document or portion thereof as confidential material, including documents obtained by them from third parties pursuant to discovery or as otherwise obtained.

4. The parties, in conducting discovery from third parties, shall provide to each third party a copy of this Order so as to inform each such third party of his, her, or its rights herein.

5. A designation of confidentiality shall constitute a representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain and that counsel believes the material so designated constitutes confidential material as defined in Paragraph 1 of this Order.

6. Material may be designated as confidential by placing on or affixing to the document containing such material (in such manner as will not interfere with the legibility thereof) the designation "CONFIDENTIAL-FTC Docket No. 9324" or any other appropriate notice that identifies this proceeding, together with an indication of the portion or portions of the document considered to be confidential material. Confidential information contained in electronic

documents may also be designated as confidential by placing the designation "CONFIDENTIAL--FTC Docket No. 9324" or any other appropriate notice that identifies this proceeding, on the face of the CD or DVD or other medium on which the document is produced. Masked or otherwise redacted copies of documents may be produced where the portions deleted contain privileged matter, provided that the copy produced shall indicate at the appropriate point that portions have been deleted and the reasons therefor.

7. Confidential material shall be disclosed only to: (a) the Administrative Law Judge presiding over this proceeding, personnel assisting the Administrative Law Judge, the Commission and its employees, and personnel retained by the Commission as experts or consultants for this proceeding, provided such experts or consultants are not employees of the respondent, or any entity established by the respondent, or employees of any third party which has been subpoenaed to produce documents or information in connection with this matter, and provided further that each such expert or consultant has signed an agreement to abide by the terms of this protective order; (b) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter; (c) outside counsel of record for the respondent, their associated attorneys and other employees of their law firm(s), provided such personnel are not employees of the respondent or of any entity established by the respondent; (d) anyone retained to assist outside counsel in the preparation or hearing of this proceeding including experts or consultants, provided such experts or consultants are not employees of the respondent, or any entity established by the respondent, or employees of any third party which has been subpoenaed to produce documents or information in connection with this matter, and provided further that each such expert or consultant has signed an agreement to abide by the terms of this protective order; and (e) any witness or deponent who authored or

received the information in question, or who is presently employed by the producing party.

8. Disclosure of confidential material to any person described in Paragraph 7 of this Order shall be only for the purposes of the preparation and hearing of this proceeding, or any appeal therefrom, and for no other purpose whatsoever, provided, however, that the Commission may, subject to taking appropriate steps to preserve the confidentiality of such material, use or disclose confidential material as provided by its Rules of Practice; Sections 6(f) and 21 of the Federal Trade Commission Act; or any other legal obligation imposed upon the Commission.

9. In the event that any confidential material is contained in any pleading, motion, exhibit or other paper filed or to be filed with the Secretary of the Commission, the Secretary shall be so informed by the party filing such papers, and such papers shall be filed *in camera*. To the extent that such material was originally submitted by a third party, the party including the materials in its papers shall immediately notify the submitter of such inclusion. Confidential material contained in the papers shall continue to have *in camera* treatment until further order of the Administrative Law Judge, provided, however, that such papers may be furnished to persons or entities who may receive confidential material pursuant to Paragraphs 7 or 8. Upon or after filing any paper containing confidential material, the filing party shall file on the public record a duplicate copy of the paper that does not reveal confidential material. Further, if the protection for any such material expires, a party may file on the public record a duplicate copy which also contains the formerly protected material.

10. If counsel plans to introduce into evidence at the hearing any document or transcript containing confidential material produced by another party or by a third party, they shall

provide advance notice to the other party or third party for purposes of allowing that party to seek an order that the document or transcript be granted *in camera* treatment. If that party wishes *in camera* treatment for the document or transcript, the party shall file an appropriate motion with the Administrative Law Judge within 5 days after it receives such notice. Until such time as the Administrative Law Judge rules otherwise, the document or transcript shall be accorded *in camera* treatment. If the motion for *in camera* treatment is denied, all documents and transcripts shall be part of the public record. Where *in camera* treatment is granted, a duplicate copy of such document or transcript with the confidential material deleted therefrom may be placed on the public record.

11. If any party receives a discovery request in another proceeding that may require the disclosure of confidential material submitted by another party or third party, the recipient of the discovery request shall promptly notify the submitter of receipt of such request.

Unless a shorter time is mandated by an order of a court, such notification shall be in writing and be received by the submitter at least 10 business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the submitter of its rights hereunder. Nothing herein shall be construed as requiring the recipient of the discovery request or anyone else covered by this Order to challenge or appeal any order requiring production of confidential material, to subject itself to any penalties for non-compliance with any such order, or to seek any relief from the Administrative Law Judge or the Commission. The recipient of the discovery request shall not oppose the submitter's efforts to challenge the disclosure of confidential material. In addition, nothing herein shall limit the applicability of Rule 4.11(e) of the Commission's Rules of

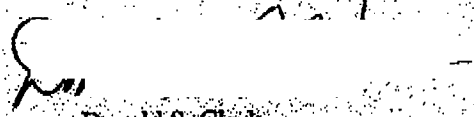
Practice, 16 CFR § 4.11(e), to discovery requests in another proceeding that are directed to the Commission.

12. At the time that any consultant or other person retained to assist counsel in the preparation or hearing of this action concludes participation in the action, such person shall return to counsel all copies of documents or portions thereof designated confidential that are in the possession of such person, together with all notes, memoranda or other papers containing confidential information. At the conclusion of this proceeding, including the exhaustion of judicial review, the parties shall return documents obtained in this action to their submitters, provided, however, that the Commission's obligation to return documents shall be governed by the provisions of Rule 4.12 of the Rules of Practice, 16 CFR § 4.12.

13. The inadvertent production or disclosure of information or documents produced by a party or third party in discovery that is subject to a claim of privilege will not be deemed to be a waiver of any privilege to which the producing party would have been entitled had the inadvertent production or disclosure not occurred, provided the producing party exercised reasonable care to preserve its privilege. In the event of such inadvertent production or disclosure, the party claiming inadvertence shall promptly notify any party that received the information of the claim and the basis for it. After being so notified, the receiving party must promptly return the specified information, and all copies of it, and may not use or disclose the information unless the claim is resolved such that no privilege applies to the information. Nothing in this Order presupposes a determination on the claim of privilege or of reasonable care in preserving privilege if challenged.

14. The provisions of this Protective Order, insofar as they restrict the communication and use of confidential discovery material, shall, without written permission of the submitter or further order of the Commission, continue to be binding after the conclusion of this proceeding.

By the Commission.



Donald S. Clark
Secretary

ISSUED: October 10, 2008

TAB

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**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of)	
)	Docket No. 9324
WHOLE FOODS MARKET, INC.,)	
a corporation.)	PUBLIC
)	
)	
)	
)	

DECLARATION OF BERNARD BRISKIN

I, Bernard Briskin, under penalty of perjury, do hereby declare:


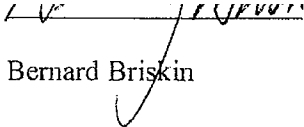
1. I am over the age of 18 and have personal knowledge of the matters set forth herein.
2. I am the Chairman and Chief Executive Officer of Gelson's Markets (Gelson's). Gelson's operates eighteen (18) premium grocery markets, all of which are located in Southern California.
3. Gelson's is a subsidiary of the Arden Group, Inc. (Arden Group), a publicly held holding company. The Arden Group releases Gelson's quarterly and annual sales information in the aggregate for all Gelson's locations in connection with its required quarterly and annual public filings.
4. Gelson's does not publicize any sales data beyond the information contained in public filings to anyone outside of the company. Such information is highly restricted within the company and only certain high level employees have access to this data. Gelson's has not even provided sales data or projections information to its outside counsel.
5. Gelson's diligently protects non-public sales information; in particular, its location-specific sales data and sales projections. Because of the highly competitive nature of the grocery business, information concerning location specific sales data and projections would

be extremely valuable to potential competitors. The disclosure of location-specific sales data or sales projections would cause irreparable harm to Gelson's business interests.

6. Whole Foods repeatedly has either opened or sought to open grocery stores in the immediate areas of Gelson's locations, often within a few blocks. As just two examples of Whole Foods predatory activity, Whole Foods is currently planning to open stores within a few blocks of the Gelson's stores in both Santa Barbara and Tarzana, California.

7. Whole Foods entered into a letter of intent seeking to acquire the leasehold rights to one of Gelson's premier locations in Encino, California several years prior to the expiration of Gelson's lease on the property.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on this 5 day of December 2008 in Los Angeles, California.



Bernard Briskin

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Daniel Z. Herbst
Direct Phone: +1 202 414 9232
Email: dherbst@reedsmith.com

Reed Smith LLP
1301 K Street, N.W.
Suite 1100 - East Tower
Washington, D.C. 20005-3373
+1 202 414 9200
Fax +1 202 414 9299
reedsmith.com

November 19, 2008

Confidential and Proprietary Information Enclosed

Via UPS

James A. Fishkin
Dechert LLP
1775 I Street, NW
Washington, DC 20006-2401

In the Matter of Whole Foods Market, Inc., FTC Docket No. 9324

Dear Mr. Fishkin:

Gelson's Markets ("Gelson's") hereby responds to the subpoena of Whole Foods Market, Inc. ("Whole Foods") served on October 15, 2008. Enclosed please find documents that have been labeled Gelson's 0001-0013.

All documents produced by Gelson's are hereby designated as confidential pursuant to the Protective Order governing this matter and have been labeled "CONFIDENTIAL-FTC Docket No. 9324." Gelson's asserts the full protections afforded confidential and proprietary information under the Protective Order. Gelson's further asserts all protections afforded confidential and proprietary trade secrets and commercial or financial information under the FTC Act and regulations. 15 U.S.C. § 46(f); 16 C.F.R. § 4.10(a)(2).

General Objections

In response to the subpoena, Gelson's states the following general objections:

- The subpoena is overly broad and not reasonably calculated to elicit relevant information.
- The subpoena creates an undue burden on Gelson's.
- The requests are vague and ambiguous.
- The subpoena contemplates information protected by the attorney client privilege, work product doctrine, and other applicable privileges.
- The subpoena seeks confidential trade secrets and commercial information.
- The subpoena's definitions are unreasonably overbroad.

- The applicable time period of the requested information is unreasonably overbroad.
- The instructions pertaining to objections impose greater obligations on Gelson's than the FTC rules.
- Gelson's further objects to the requests because the Protective Order governing this case does not provide adequate protection for Gelson's confidential and proprietary trade secrets and commercial information.

Specific Responses and Objections

Specifically, Gelson's responds to each subpoena request as follows:

1. All documents you have provided to the Commission in connection with (a) the Transaction or any investigation of the Transaction; (b) *FTC v. Whole Foods Market, Inc.*, Civil Action No. 1:07-CV-01021-PLF (D.D.C. 2007); or (c) this matter, which is In re Whole Foods market, Inc., FTC Docket No. 9324.

RESPONSE: Subject to and without waiving its objections, Gelson's will produce all non-privileged documents in its possession or control that are responsive to this request.

2. All documents relating to any communications you have had with the Commission in connection with (a) the Transaction; (b) *FTC v. Whole Foods Market, Inc.*, Civil Action No. 1:07-CV-01021-PLF (D.D.C. 2007); or (c) this matter, which is In re Whole Foods market, Inc., FTC Docket No. 9324.

RESPONSE: Subject to and without waiving its objections, Gelson's will produce all non-privileged documents in its possession or control that are responsive to this request.

3. All documents relating to Whole Foods' acquisition of Wild Oats, including documents discussing the effect of the merger on you.

RESPONSE: Gelson's has no documents responsive to this request in its possession.

4. All documents discussing competition with Whole Foods or Wild Oats, including responses by you to a new Whole Foods or Wild Oats store and responses by you to prices, promotions, production selection, quality, or services at Whole Foods or Wild Oats stores.

RESPONSE: Gelson's has no documents responsive to this request in its possession.

5. All market studies, strategic, plans or competitive analyses relating to competition in each Geographic Area, including documents discussing market shares.

RESPONSE: Objection. In addition to its general objections, Gelson's objects to Request 5 pursuant to 16 C.F.R. § 3.31(d) and 16 C.F.R. § 3.31(c)(iii) and will withhold such information pursuant to 16 C.F.R. § 3.38A.

6. All market studies, strategic, plans or competitive analyses relating to the sale of natural and organic products, including the sale of natural and organic products in your stores.

RESPONSE: Gelson's has no documents responsive to this request in its possession.

7. All documents relating to your plans to increase the shelf space at your stores allocated to natural and organic products, the number of natural and organic products sold in your stores, or the sale of natural or organic products in your stores.

RESPONSE: Gelson's has no documents responsive to this request in its possession.

8. All documents discussing your plans to renovate or improve your stores to sell additional natural and organic products or to open stores emphasizing natural and organic products.

RESPONSE: Gelson's has no documents responsive to this request in its possession.

9. Provide documents sufficient to show, or in the alternative submit a spread sheet showing: (a) the store name and address of each of your stores separately in each Geographic Areas; and (b) for each store provide the total weekly sales for each week since January 1, 2006 to the current date.

RESPONSE: Subject to its general objections, Gelson's will produce all non-privileged documents in its possession that are responsive to request 9(a).

Objection. In addition to its general objections, Gelson's objects to Request 9(b) for weekly sales data for each store since January 1, 2006 pursuant to 16 C.F.R. § 3.31(d) and 16 C.F.R. § 3.31(c)(iii) and will withhold such information pursuant to 16 C.F.R. § 3.38A.

Documents Withheld

- November 2007 Site Study Wilshire Boulevard near Berkley Street, Santa Monica, CA, Performed by Pitney Bowes
- Documents evidencing weekly sales for each store from January 1, 2006 to present

Caryn Hofer has knowledge of all studies and of weekly sales figures

Gelson's states the following objections and bases for withholding documents responsive to requests 5 and 9(b), pursuant to 16 C.F.R. § 3.38A:

Gelson's objects to the request for weekly sales data and market studies, strategic plans and competitive analyses pursuant to 16 C.F.R. § 3.31(d), which limits discovery as "justice requires" to protect a party or third party from "annoyance, embarrassment, oppression, or undue burden or expense, or to protect undue delay in the proceeding." *Id.* The requests for sales data and for strategic plans, which contain sales forecasts, target Gelson's most sensitive proprietary commercial data. Disclosure of this information to a competitor, to the public, or to the Commission in any form oppresses Gelson's and

risks significant harm to its commercial interests. Indeed, Gelson's is so concerned with disclosure of this information that it has refused to provide outside counsel with the requested documents.

Although the protective order provides some protection for Gelson's weekly sales data and strategic plans, it does not go far enough to protect potential public disclosure given the sensitivity of the information. For example, there are no provisions concerning orders or rulings of the Administrative Law Judge ("ALJ"), that could be based upon Gelson's data. If the ALJ premises its ultimate decision upon Gelson's weekly sales data and strategic plans or reports derived therefrom, such portion of the data may become public or part of the public record. In addition, despite certain limitations on who can obtain the information and how it may be used, there are no penalties for disclosure of confidential information under the protective order and therefore no consequences to disclosure. Finally, Gelson's has no assurances under the protective order that its confidential information will be treated *in camera* if sought to be introduced as evidence at the hearing or that such data will not be produced to third parties subject to subpoena, FOIA request, or other discovery request. Gelson's must affirmatively keep watch over its information and must affirmatively move for additional protections. If such motion for protection is denied, its information can become public or become part of the public record which would have a devastating effect on Gelson's business interests.

Gelson's further objects to the request for weekly sales data pursuant to 16 C.F.R. § 3.31(c)(1)(iii). FTC rules limit discovery where the risks of disclosure outweigh the potential benefit. *See* 16 C.F.R. § 3.31(c)(1)(iii). Whole Foods' extremely broad request for weekly sales data by store dating back to 2006 risks significant, irreparable harm if disclosed. As described *supra*, weekly sales data and sales forecasts – contained in the withheld property analysis – are Gelson's most sensitive commercial information. These documents form the lifeblood of Gelson's business. Disclosure to the public or to a competitor would have a devastating effect on Gelson's business and ability to survive in a challenging economy.

I understand from our telephone conversation that Whole Foods asserts that each store's weekly sales data dating back to January 2006 and strategic market plans are necessary for Whole Foods to establish or dispute the nature and scope of the relevant markets. Whole Foods is likely to provide this information to its expert economist to create a report on relevant markets. However, Gelson's is not a big player in the national grocery market, but rather a small business with 18 stores in southern California. Gelson's does not primarily sell organic and natural foods and such information is not delineated in the withheld report or in its weekly sales data.

Even if such information was somehow relevant to Whole Foods, there are far less intrusive and dangerous means for Whole Foods to try to establish or dispute relevant markets without Gelson's critically confidential and proprietary commercial data. For example, Whole Foods could obtain Gelson's public quarterly sales data and/or annual sales data. As formulated, the request for all weekly sales data by store and market studies pose risks of disclosure that far outweigh any potential benefit to Whole Foods.

Accordingly, Gelson's is withholding production of the Santa Monica property site study, requested in number 5, and its weekly sales data, requested in 9(b).

James A. Fishkin
November 19, 2008
Page 5

ReedSmith

Please contact me if you have any questions.

Very truly yours,



11

Daniel Z. Herbst

DZH:tf

Enclosures

cc: Alexander Y. Thomas
Kenneth A. Goldman

1 AB
4

Daniel Z. Herbst
Direct Phone: +1 202 414 9232
Email: dherbst@reedsmith.com

Reed Smith LLP
1301 K Street, N.W.
Suite 1100 - East Tower
Washington, D.C. 20005-3373
+1 202 414 9200
Fax +1 202 414 9299
reedsmith.com

December 2, 2008

Via FACSIMILE and UPS

James A. Fishkin, Esq.
Dechert LLP
1775 I Street, NW
Washington, DC 20006-2401

In the Matter of Whole Foods Market, Inc., FTC Docket No. 9324

Dear Mr. Fishkin:

Gelson's Markets ("Gelson's") hereby proposes to modify its prior objections to the subpoena served by Whole Foods Market, Inc. ("Whole Foods") in a good faith effort to avoid court intervention into this discovery dispute.

As you are aware, Gelson's (unlike Kroger/Ralphs, Safeway/Vons, Supervalu/Albertson's, and other large chains) operates only 18 premium grocery markets, all of which are located in Southern California. In addition, not all of the Gelson's markets are located in the same trade areas where Whole Foods opened markets after January 1, 2006. Whole Foods has either opened or sought to open markets in some of Gelson's trade areas and is, we believe, exploring other locations at this time in certain of Gelson's trade areas. As just two examples, Whole Foods is currently planning to open stores within a few blocks of the Gelson's stores in both Santa Barbara and Tarzana, California. Gelson's deems Whole Foods to be a predator, looking to monopolize segments of Gelson's trade areas and to take away Gelson's customers and business. Indeed, we are informed that Whole Foods actually entered into a letter of intent seeking to acquire the leasehold rights to one of Gelson's premier locations (Encino, California) several years prior to the expiration of Gelson's lease on the property. Gelson's takes very seriously the competitive threat posed by Whole Foods in certain Southern California areas.

Therefore, Gelson's has properly objected to furnishing Whole Foods with its most proprietary information--that is, store by store weekly sales, which Whole Foods is now seeking in the FTC administrative proceeding. As described in my previous letter, the existing protective order does not go far enough to prevent the release of this confidential and proprietary sales information to the public or to Whole Foods. Based on Whole Foods' prior actions, we find it highly implausible that Whole Foods would not seek to obtain and use this information to compete unfairly with Gelson's.

Despite Gelson's well-founded objections to providing Whole Foods with its most proprietary information, Gelson's offers to provide, *in camera*, the following confidential information to the Administrative Law Judge for his/her determination as to whether it is relevant to a decision on pending issues; and, if deemed relevant (after briefing and argument by Whole Foods and Gelson's), how to protect the information from being made public and how to keep this highly sensitive and proprietary

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information away from the eyes and knowledge of Whole Foods and other competitors in Southern California. The proprietary information to be provided will be the percentage of increase or decrease in the sales by Gelson's of organic products for the 3 month period(s) after the opening of a Whole Foods store for each Gelson's store in the same trade area, after January 1, 2006 and within the geographic markets outlined in the subpoena.

Gelson's believes that this is a fair and workable compromise, even though we believe that this also may compromise Gelson's most proprietary rights. Hopefully, you will agree that this proposed compromise meets your objective and the legitimate real concerns of Gelson's Markets. Please let me know if you agree to this proposal, so that we can begin obtaining the information to provide to the Administrative Law Judge, *in camera*.

Please let us know on or before Friday, December 5, 2008, if the above proposal is acceptable to your client as to what Gelson's will be required to provide under the subpoena.

Very truly yours,



Daniel Z. Herbst

DZH:tf

cc: Alexander Y. Thomas
Kenneth A. Goldman
Bernard P. Simons

CERTIFICATE OF SERVICE

I certify that I sent a copy of the foregoing via UPS overnight courier in a sealed, prepaid envelope, on the this 8th day of December 2008, to:

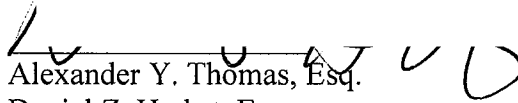
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