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UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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

Docket No. 9324

**PUBLIC**

**NEW SEASONS MARKET, INC.'S  
MOTION FOR LEAVE TO FILE  
REPLY IN SUPPORT OF NEW  
SEASONS MARKET'S MOTION TO  
QUASH OR LIMIT SUBPOENA FROM  
WHOLE FOODS MARKET, INC.**

Pursuant to 16 C.F.R. § 3.22(c), New Seasons Market, Inc. ("New Seasons") respectfully moves for an order granting New Seasons permission to file a reply in support of its Motion to Quash or Limit Subpoena from Whole Foods Market, Inc. and accepting as filed the proposed reply brief attached hereto as Exhibit 1.

**ARGUMENT**

New Seasons seeks permission to file the attached reply brief because Whole Foods' response to New Seasons' motion misrepresents New Seasons' efforts to resolve this





**EXHIBIT 1**

1 UNITED STATES OF AMERICA

2 BEFORE THE FEDERAL TRADE COMMISSION

3 In the Matter of  
4 WHOLE FOODS MARKET, INC.  
5 a corporation.

Docket No. 9324

**PUBLIC**

**[PROPOSED] REPLY IN SUPPORT OF  
NEW SEASONS MARKET'S MOTION  
TO QUASH OR LIMIT SUBPOENA  
FROM WHOLE FOODS MARKET,  
INC.**

9  
10 **I. INTRODUCTION**

11 Whole Foods' response misrepresents New Seasons' efforts to resolve this dispute  
12 and mischaracterizes the procedural history between New Seasons and the FTC. Whole Foods  
13 also attempts to put an inaccurate gloss on the burden New Seasons would suffer if required to  
14 respond to Whole Foods' subpoena by offering for the first time a restriction to employees at  
15 New Seasons' "headquarters." In addition, Whole Foods incorrectly argues that the protective  
16 order in this matter is the most "stringent" available while failing to address whether the outside  
17 counsel who will have access to New Seasons' confidential information engage in competitive  
18 decision-making. Whole Foods further ignores the fact that, by its terms, the protective order  
19 allows the parties to introduce New Seasons' confidential information into evidence in this  
20 matter as presumptively public. Finally, Whole Foods fails to recognize that New Seasons, as a  
21 private company, is not required to disclose the information Whole Foods seeks to anyone. New  
22 Seasons should not now be required to produce its most sensitive competitive information to a  
23 primary competitor under a protective order that is demonstrably inadequate.

24 **II. ARGUMENT**

25 **A. Whole Foods mischaracterizes the negotiations with New Seasons.**

26 Whole Foods accuses New Seasons of making "contrived" arguments while itself

1 slinging accusations about New Seasons supposedly “stringing Whole Foods along for weeks”  
2 and “renegeing” on claimed promises. Resp., pp. 3, 6, 11. Those accusations are both false and  
3 irrelevant. New Seasons initially sought an extension because its counsel had been out of the  
4 country for several weeks and did not return to the office until October 27, 2008, leaving  
5 insufficient time for him to confer with Whole Foods or otherwise respond to the subpoena. See  
6 Declaration of Robert Newell (“Newell Decl.”), ¶ 2; New Seasons’ Unopposed Motion for  
7 Extension (filed October 24, 2008). Whole Foods’ counsel graciously agreed. Declaration of  
8 James A. Fishkin (“Fishkin Decl.”), ¶ 5. As New Seasons attempted to resolve its differences  
9 with Whole Foods without a motion – as required under the Commission’s rules – it became  
10 apparent that additional time would be beneficial to assess the requests further and to determine  
11 whether agreement could be reached. See Newell Decl., ¶ 3; Fishkin Decl., Ex. 3. Whole Foods’  
12 counsel again graciously agreed. Fishkin Decl., ¶ 6. Although the parties discussed possible  
13 limitations to address the issue of burden, no promises were made and no agreement was  
14 reached. Newell Decl., ¶ 4.

15 Further, Whole Foods offered no meaningful response to New Seasons’  
16 arguments regarding the inadequacy of the protective order. See Fishkin Decl. ¶¶1-15; Newell  
17 Decl., ¶ 5. When it became apparent that even if the issue of burden were resolved, the  
18 inadequacy of the protective order would remain an insurmountable hurdle despite New Seasons’  
19 good faith efforts to reach a resolution, New Seasons filed its motion. Newell Decl., ¶ 5.  
20 Apparently, Whole Foods would have New Seasons either file its motion without making any  
21 effort to resolve this dispute extra-judicially, or confer *ad nauseum* even when it is clear from  
22 Whole Foods’ response that no resolution is possible. New Seasons’ conduct was proper and in  
23 fact required. Whole Foods’ attacks are both unfounded and irrelevant.

24 **B. Whole Foods’ never-before-offered “compromise” would not reduce the**  
25 **burden to New Seasons.**

26 Whole Foods’ supposedly burden-reducing “compromise” involving “high-level”

1 employees and “high-level” documents may make good sound bites but fail to withstand  
2 scrutiny. First, during the conferral process, Whole Foods did not mention any limitation to  
3 corporate headquarters. Newell Decl., ¶ 4. Whole Foods spoke only generally in terms of some  
4 limitation to some number of “higher level” (not even “high level”) employees. Newell Decl., ¶  
5 4. As explained in New Seasons’ motion, New Seasons has a flat management structure with  
6 largely decentralized decision-making. Identifying a “higher level” employee is difficult. Even  
7 if such identification were made, however, it would not materially reduce the burden because all  
8 emails and other documents still must be searched to determine whether the sender or recipient  
9 was “high level.”

10 Any proposed restriction to “high level” documents is equally meaningless. The  
11 universe of emails and other documents to be searched remains unchanged. All documents still  
12 would need to be searched and reviewed to determine whether they are “high level,” whatever  
13 that means. The ultimate number or nature of the documents produced does not reduce the  
14 burden associated with the exact same volume of documents which must be searched.

15 Finally, Whole Foods argues at length that the requested information is highly  
16 relevant to its defense, but ignores that it has available to it numerous other sources of  
17 information on which Whole Foods can rely to show that it competes with more than just New  
18 Seasons in the Portland, Oregon market. Whole Foods can look at its own sales numbers in  
19 Portland as compared to other markets, the number of competitors’ stores in the market, market  
20 demographics and the like to make its case. Whole Foods nonetheless insists on compelling  
21 New Seasons to engage in a burdensome search to produce its confidential information, with no  
22 hint of any offer to share in the cost of responding to its subpoena.

23 ///  
24 ///  
25 ///  
26

1           **C. The protective order is inadequate to protect New Seasons' confidential**  
2           **information.**

3           **1. Whole Foods' argument that the protective order is the "most**  
4           **stringent" it can be is provably incorrect and relies on a misplaced**  
5           **distinction between in-house and retained counsel.**

6           Tellingly, Whole Foods never argues that the protective order adequately protects  
7           New Seasons' confidential trade secret information. Instead, Whole Foods incorrectly argues  
8           that the protective order is the most stringent that exists in civil litigation. Resp., p. 12. That is  
9           provably false: the protective order lacks the added protection New Seasons requests in the form  
10          of a penalty provision for disclosure in violation of the protective order, a provision included in  
11          the District Court's protective order.

12          Moreover, the inside counsel versus outside counsel distinction on which Whole  
13          Foods relies is entirely irrelevant. See Resp., p. 12. There is no greater or lesser likelihood of  
14          inadvertent disclosure merely because counsel is retained as opposed to in-house.

15                 Denial or grant of access ... cannot rest on a general assumption  
16                 that one group of lawyers are [sic] more likely or less likely  
17                 inadvertently to breach their duty under a protective order. Indeed,  
18                 it is common knowledge that some retained counsel enjoy long and  
19                 intimate relationships and activities with one or more clients,  
20                 activities on occasion including retained counsel's service on a  
21                 corporate board of directors. Exchange of employees between a  
22                 client and a retained law firm is not uncommon. Thus the factual  
23                 circumstances surrounding each individual counsel's activities,  
24                 association, and relationship with a party, whether counsel be in-  
25                 house or retained, must govern any concern for inadvertent or  
26                 accidental disclosure.

27          *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 (Fed. Cir. 1984). The individual lawyer's  
28          ethical standards or record is also irrelevant. *Infosint v. H. Lundbeck A.S.*, 2007 WL 1467784, \*3  
29          (S.D.N.Y. May 16, 2007) ("The inquiry should not be directed at any one attorney's own ethical  
30          standards or record."). "Even if the competitor's counsel acted in the best of faith and in  
31          accordance with the highest ethical standards, the question remains whether access to the moving  
32          party's confidential information would create an unacceptable opportunity for inadvertent  
33          disclosure." *Id.* (quotation omitted). Indeed,



1 Like retained counsel ... in-house counsel are officers of the court,  
2 are bound by the same Code of Professional Responsibility, and  
3 are subject to the same sanctions. In-house counsel provide the  
4 same services and are subject to the same types of pressures as  
5 retained counsel. The problem and importance of avoiding  
6 inadvertent disclosure is the same for both. Inadvertence, like the  
7 thief-in-the-night, is no respecter of its victims. ... Whether an  
8 unacceptable opportunity for inadvertent disclosure exists,  
9 however, must be determined, as above indicated, by the facts on a  
10 counsel-by-counsel basis, and cannot be determined solely by  
11 giving controlling weight to the classification of counsel as in-  
12 house rather than retained.

13 *U.S. Steel*, 730 F.2d at 1468. Whole Foods' attempt to label the protective order as the most  
14 "stringent" available fails because it is based on an artificial distinction between in-house and  
15 retained counsel.

16 New Seasons raised this very issue in its motion to quash. New Seasons noted  
17 that the scope of Whole Foods' outside counsel's role is unknown and that it is unknown whether  
18 Whole Foods' retained outside counsel provides ongoing counseling with respect to competitive  
19 decision-making. Mot., p. 11. It is telling that Whole Foods utterly failed to offer any evidence  
20 that its outside counsel's role is limited to defense of this antitrust matter or otherwise does not  
21 include active participation in Whole Foods' competitive decision-making. Whole Foods cannot  
22 rely on its naked proclamations that New Seasons is adequately protected when it coyly avoids  
23 any representation that its outside counsel is divorced from Whole Foods' competitive decision-  
24 making. *See Infosint*, 2007 WL 1467784 at \*4 (protective order allowing outside counsel access  
25 to highly confidential information was inappropriate where outside counsel and his firm were  
26 involved in competitive decision-making). Particularly given the absence of any evidence that  
Whole Foods' retained counsel does not in fact participate in competitive decision-making, the  
"outside counsel only" provision is meaningless, and the protective order does not adequately  
protect New Seasons against inadvertent disclosure of its confidential information, either  
publicly or internally within Whole Foods.

///

1                   **2. Whole Foods fails to address the impact of its experts' access to New**  
2                   **Seasons' confidential information.**

3                   Whole Foods also fails to address in any way the fact that the protective order  
4 allows the industry experts Whole Foods has retained to have unfettered access to New Seasons'  
5 confidential information. Those experts will undoubtedly work for other New Seasons'  
6 competitors as well. Try though they might, those experts cannot unlearn or meaningfully  
7 compartmentalize and exclude from consideration New Seasons' confidential information.  
8 Instead, New Seasons' information "will be added to the expert's repository of other information  
9 for possible future use." *Litton Indus., Inc. v. Chesapeake & Ohio Railway Co.*, 129 F.R.D. 528,  
10 531 (E.D. Wis. 1990). The protective order offers no enforceable protection against this use and  
11 disclosure. Whole Foods fails to respond to this point because it is irrefutable.

12                   **3. Even if the protective order is followed, it offers inadequate protection**  
13                   **to New Seasons' confidential information.**

14                   Whole Foods also ignores the fact that even if the protective order were followed  
15 in every respect, by the terms of the order New Seasons' confidential information remains  
16 confidential only so long as New Seasons continues to fight to protect its confidential  
17 information and the administrative law judge agrees that the information is confidential. Under  
18 the protective order, if Whole Foods or the FTC plans to introduce New Seasons' confidential  
19 information into evidence, it is presumptively public. The parties merely have to give New  
20 Seasons some unspecified amount of "advance notice," and then the protective order places the  
21 burden on New Seasons to file a motion to seek *in camera* treatment, and provides New Seasons  
22 only five days to intervene to attempt to protect its confidential information. Protective Order, ¶  
10.

23                   Whole Foods does not respond to this argument because the inadequacy of the  
24 protective order in this regard is indisputable. In short, information that New Seasons, as a  
25 privately held corporation, treats as confidential, can presumptively be publicly released by the  
26 terms of the very protective order that supposedly protects New Seasons' information from

1 disclosure. The protective order does not protect New Seasons' confidential information.  
2 Instead, it merely provides cover to Whole Foods to obtain its competitors' confidential  
3 information and then New Seasons – a non-party to this case – is left to litigate on an  
4 inexplicably short timeframe the confidentiality of its trade secret information. This scheme  
5 hardly squares with Whole Foods' bald declaration that the protective order is the most  
6 "stringent" protective order available.

7 **4. Whole Foods misrepresents the nature and outcome of New Seasons'**  
8 **motion to quash the CID the Commission served last year.**

9 Whole Foods also misrepresents New Seasons' dispute with the Commission in  
10 connection with the CID the Commission issued last year. First, Whole Foods ignores that,  
11 although a single Commissioner (Pamela Jones Harbour) denied New Seasons' motion to quash  
12 the CID, New Seasons appealed that decision to the full Commission and the full Commission  
13 never ruled. Newell Decl., ¶ 6, Ex. 1. Instead, New Seasons withdrew its request for full  
14 Commission review after the Commission's counsel agreed that New Seasons did not have to  
15 produce any confidential information and that the Commission would not issue any further  
16 CID's or subpoenas to New Seasons in this matter. Newell Decl., ¶ 7, Exs. 2-3. Whole Foods'  
17 failure to provide the entire procedural history – one which ended with an undecided appeal and  
18 no production of confidential information – is decidedly misleading.

19 Whole Foods similarly mischaracterizes the argument New Seasons made to the  
20 Commission regarding damages. Resp., p. 14. New Seasons did not make the "precise  
21 argument" it now makes, because there was no protective order in place to provide ostensible  
22 protection to New Seasons at the time it filed its Petition to Limit the CID. The Commission  
23 relied solely on statutory and regulatory protections. Further, New Seasons asked for damages if  
24 the Commission breached its statutory and regulatory obligations. By contrast, what New  
25 Seasons now seeks – and what Judge Friedman ordered – was a penalty in the event of disclosure  
26 of confidential information. The first was a measure of damages that New Seasons would suffer

1 from disclosure; the latter is a non-reimbursable penalty for violation of the protective order.  
2 New Seasons presently asks for a provision like that Judge Friedman included in the prior  
3 protective order in this matter, not for a damages remedy like that New Seasons requested in the  
4 absence of a protective order.

5 **5. The newly remanded district court case dilutes the protective order in**  
6 **this matter.**

7 Concurrent with New Seasons' filing in this matter, the District of Columbia  
8 Circuit Court of Appeals remanded the case before the United States District Court for the  
9 District of Columbia, *FTC v. Whole Foods Market, Inc.*, Case No. 07-01021, for further  
10 proceedings.<sup>1</sup> The protective order in that case allows Whole Foods' general counsel access to  
11 unredacted drafts of pleadings, deposition transcripts, and the like, which could include New  
12 Seasons' confidential information. *See FTC v. Whole Foods Market, Inc.*, Case No. 07-01021,  
13 Docket No. 100. The supposedly most "stringent" protective order in this matter effectively  
14 allows Whole Foods to preview New Seasons' confidential trade secret information to determine  
15 whether to seek it under a protective order that allows Whole Foods' general counsel access to  
16 that information. All Whole Foods then has to do is issue its subpoena under a new caption.

17 Moreover, the protective order in the district court case was amended to provide  
18 general counsel's access after an interim protective order had been put in place. *See id.* Third  
19 parties who produced information under the interim protective order – which was an "outside  
20 counsel" only protective order – suddenly found their confidential information available to  
21 Whole Foods' inside counsel. *See FTC v. Whole Foods Market, Inc.*, Case No. 07-01021,  
22 Docket No. 11. There is no guarantee that the protective order presently in place here will not  
23 similarly be amended to allow broader disclosure of confidential information.

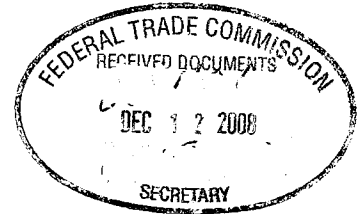
24 \_\_\_\_\_  
25 <sup>1</sup> The D.C. Circuit denied Whole Foods' motion for rehearing before the full panel by amended opinion  
26 dated November 21, 2008, when New Seasons' motion was already in transit for filing on November 24,  
2008.



1 **DAVIS WRIGHT/TREMAINE LLP**

2  
3 By

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1  
2 UNITED STATES OF AMERICA  
3 BEFORE THE FEDERAL TRADE COMMISSION

4 In the Matter of  
5 WHOLE FOODS MARKET, INC.  
6 a corporation.

Docket No. 9324

**PUBLIC**

**[PROPOSED] ORDER GRANTING  
NEW SEASONS MARKET, INC.'S  
MOTION FOR LEAVE TO FILE  
REPLY IN SUPPORT OF NEW  
SEASONS MARKET'S MOTION TO  
QUASH OR LIMIT SUBPOENA FROM  
WHOLE FOODS MARKET, INC.**

11  
12 Upon due consideration of New Seasons Market, Inc.'s Motion for Leave to File  
13 Reply in Support of New Seasons Market's Motion to Quash or Limit Subpoena from Whole  
14 Foods Market, Inc., it is hereby ORDERED that:

- 15 1. New Seasons Market, Inc.'s motion is GRANTED;  
16  
17 2. New Seasons Market, Inc.'s proposed reply attached as Exhibit 1 to New  
18 Season Market Inc.'s motion is hereby deemed filed.

19 IT IS SO ORDERED.

20 Date: \_\_\_\_\_

21 \_\_\_\_\_  
22 D. Michael Chappell  
23 Administrative Law Judge

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I served a copy of the foregoing **NEW SEASONS MARKET,**  
3 **INC.'S MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF NEW SEASONS**  
4 **MARKET'S MOTION TO QUASH OR LIMIT SUBPOENA FROM WHOLE FOODS**  
5 **MARKET, INC.** on:

6 James A. Fishkin  
7 Dechert, LLP  
8 17551 I Street, N.W.  
9 Washington, DC 20006-2401

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

10 Of Attorneys for Whole Foods Market, Inc.

Of Attorneys for Federal Trade Commission

11 Matthew J. Reilly  
12 Catharine M. Moscatelli  
13 Federal Trade Commission  
14 601 New Jersey Avenue, N.W.  
15 Washington, DC 20001

The Honorable D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

16 Of Attorneys for Federal Trade  
17 Commission

18  by mailing a copy thereof in a sealed, first-class postage prepaid envelope, addressed  
19 to said attorney's last-known address and deposited in the U.S. mail at Portland, Oregon on the date set  
20 forth below;


21  by sending a copy thereof via overnight courier in a sealed, prepaid envelope,  
22 addressed to said attorney's last-known address on the date set forth below;

23  by faxing a copy thereof to said attorney at his/her last-known facsimile number on  
24 the date set forth below; or

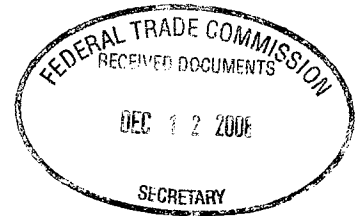
25  by electronically mailed notice on the date set forth below.

26 Dated this 12<sup>th</sup> day of December, 2008.

**DAVIS WRIGHT TREMAINE LLP**

By  \_\_\_\_\_  
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UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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

Docket No. 9324

**PUBLIC**

**DECLARATION OF ROBERT D.  
NEWELL**

I, Robert D. Newell, under penalty of perjury, hereby declare:

1. I am one of the attorneys representing New Seasons Market, Inc. ("New Seasons") in connection with the subpoena issued to New Seasons by Whole Foods Market, Inc. ("Whole Foods") in the above-captioned matter. I make this declaration based on personal knowledge and am competent to testify as to all matters contained herein.

2. I was on vacation from September 27, 2008 until October 27, 2008 and was out of the country nearly that entire time. I did not return to the office until October 27, 2008 and therefore did not have sufficient time to respond to Whole Foods' subpoena to New Seasons without an extension of the time to move to quash the subpoena and/or to respond to the subpoena. It was for these reasons that New Seasons requested a two-week extension of time.

1           3.       Shortly after my return to the office, I began the conferral process with  
2 Whole Foods' counsel James Fishkin. As stated in my previously filed Statement of Counsel, I  
3 spoke with Mr. Fishkin on three separate occasions in an effort to resolve by agreement the  
4 issues presented in New Seasons' Motion to Quash. At the outset of that process, it became clear  
5 that additional time would be beneficial to assess the requests fully and determine whether  
6 agreement could be reached. It was for these reasons that New Seasons requested a second two-  
7 week extension of time.

8           4.       During my conversations with Whole Foods' counsel, I raised the  
9 concerns regarding burden described in New Seasons' motion to quash. In response, Whole  
10 Foods' counsel offered to limit the subpoena to cover some limited number of "higher level"  
11 employees. I explained New Seasons' decentralized management structure and the difficulty in  
12 determining who is a "higher level" employee. I have no memory of Mr. Fishkin ever making  
13 any mention of New Seasons' headquarters or offering to limit the scope of the subpoena to  
14 documents at New Seasons' headquarters. Although Whole Foods' counsel and I discussed  
15 possible limitations to address the issue of burden, I made no promises and we did not reach any  
16 agreement.

17           5.       During my conversations with Whole Foods' counsel, I also raised the  
18 concerns regarding the inadequacy of the protective order which are described in New Seasons'  
19 motion to quash. Whole Foods' counsel did not offer any resolution of those issues and instead  
20 responded simply that it is the Commission's order and he could do nothing about it, even  
21 though he admitted that the parties jointly submitted it. New Seasons proceeded with its motion  
22 to quash only after it became apparent that even if Whole Foods and New Seasons were able to  
23 reach agreement regarding issues of burden, the inadequacy of the protective order would remain  
24 insurmountable despite New Seasons' good faith efforts to reach a resolution.

25           6.       New Seasons was served with a Civil Investigative Demand ("CID") from  
26



**EXHIBIT 1**

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BEFORE THE UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION

In the Matter of the Proposed Acquisition by  
Whole Foods Market, Inc. of Wild Oats  
Markets, Inc.,

File No. 071-0114

**NEW SEASONS MARKET, INC.'S  
REQUEST FOR FULL COMMISSION  
REVIEW OF COMMISSIONER  
PAMELA JONES HARBOUR'S  
DISPOSITION OF NEW SEASON  
MARKET, INC.'S PETITION TO  
QUASH OR LIMIT CIVIL  
INVESTIGATIVE DEMAND**

**PUBLIC**

Pursuant to 16 C.F.R. § 2.7(f), New Seasons Market, Inc. ("New Seasons") hereby requests that the full Federal Trade Commission ("FTC") review the ruling made by Commissioner Pamela Jones Harbour disposing of New Season's petition to quash or limit the Civil Investigative Demand ("CID") issued to it on April 24, 2007 ("Ruling").<sup>1</sup> For the reasons stated below, the FTC should vacate the Ruling and grant New Seasons' petition.

**I. INTRODUCTION**

The FTC issued a CID to New Seasons on April 24, 2007. The CID contains two

<sup>1</sup> Copies of New Seasons' petition and of the Ruling are attached hereto as Exhibits A and B, respectively.

1 specifications. New Seasons promptly complied with the first specification. The second  
2 specification, however, seeks New Seasons' confidential, commercially sensitive information.  
3 After engaging the FTC in numerous and ongoing negotiations in a good faith effort to reach an  
4 agreement regarding New Seasons' concerns – including discussions of New Seasons' intention  
5 to file a petition to quash if a resolution was not reached – New Seasons filed a petition to limit  
6 or quash the CID on June 15, 2007. By letter dated June 26, 2007, Commissioner Harbour  
7 issued the Ruling, in which she denied the petition based on her finding that the petition was not  
8 timely filed.<sup>2</sup> Because this finding is erroneous, and because New Seasons is entitled on the  
9 merits of its petition to the relief it seeks, New Seasons hereby asks the full FTC review the  
10 Ruling pursuant to 16 C.F.R. § 2.7(f).

## 11 II. ARGUMENT

### 12 A. The petition was timely filed.

13 The Ruling denies New Seasons' petition based on the erroneous finding that  
14 New Seasons' petition was not timely filed. As the Ruling states, the time for filing a petition to  
15 quash can be extended "in conformity with 16 C.F.R. § 2.7(d)(3)." Ruling, p. 2. Under  
16 C.F.R. § 2.7(d)(3), certain employees of the FTC have the delegated authority to extend the time  
17 within which a petition to quash must be filed. The rule contains no requirement that such  
18 extensions be in writing. Here, the FTC, acting through its authorized representatives, extended  
19 the time by which New Seasons could file a petition to quash until June 15, 2007, and the Ruling  
20 therefore erroneously denied New Seasons' petition as untimely.

21 The CID references a return date of April 30, 2007. The Ruling notes that the  
22 FTC provided written approvals extending the return date to May 29, 2007. Ruling, p. 2 n.3.  
23 The Ruling then states that the "Commission has reason to believe that two additional extensions  
24 of the deadline for compliance were approved by an Assistant Director." *Id.* Of course, the

25 \_\_\_\_\_  
26 <sup>2</sup> New Seasons received the original of the Ruling on July 5, 2007. Affidavit of Robert D. Newell, ¶ 5.

1 "Commission has reason to believe" that the deadline was extended because the FTC's  
2 representatives expressly represented to New Seasons that the deadline was extended. Newell  
3 Aff., ¶ 3. The Ruling nonetheless attempts to dismiss these approved extensions because the  
4 FTC documented one only in an email and failed to provide written documentation of the final  
5 extension despite its express promise to do so. See Newell Aff., ¶ 3. The FTC cannot rely on its  
6 own breach of its promises and representations to argue that New Seasons did not actually  
7 receive the benefit of the extensions the FTC approved.<sup>3</sup>

8 Moreover, the FTC's grant of extensions until June 15, 2007 included an  
9 extension of the time in which to file a petition to quash. On this point, the Ruling states: "An  
10 extension of the time to comply does not *automatically* extend the time within which a petition to  
11 quash must be filed. Linking the two extensions together might provide both the means and the  
12 incentive to delay investigations unnecessarily." Ruling, p. 2 (internal citations omitted)  
13 (emphasis added). New Seasons does not argue that its time to file the petition was somehow  
14 *automatically* extended. Instead, the ongoing discussions with the FTC specifically included  
15 discussion of New Seasons' intention to file a petition to quash the CID if New Seasons and the  
16 FTC could not reach agreement regarding the handling of New Seasons' confidential  
17 information. Newell Aff., ¶ 4. The FTC granted extensions to June 15, 2007 having been  
18 expressly advised of New Seasons' stated intention to petition to quash if no resolution was  
19 reached. In addition, the extensions were necessitated in large part by the FTC's own delay in  
20 providing a representative with sufficient authority with whom New Seasons could address its  
21 concerns. Newell Aff., ¶ 4. Indeed, the FTC representative to whom New Seasons was  
22 ultimately directed never responded to New Seasons' efforts to contact her. Newell Aff., ¶ 4.  
23 Having granted extensions in light of New Seasons' intention to petition to quash if negotiations

24 <sup>3</sup> Moreover, nothing in the FTC's rule addressing extensions of time requires such extensions to be in  
25 writing. See 16 C.F.R. § 2.7(c). The Ruling relies solely on a statement in the CID purporting to require  
26 that "[a]ll modifications to this CID must be agreed to in writing by the Commission representative."  
Ruling, p. 2, n.3.

1 failed and having itself caused the delay, the FTC cannot now be heard to argue that it did not  
2 extend the time for New Seasons to file its petition to quash. Indeed, far from providing “the  
3 means and the incentive” for New Seasons to delay, allowing the FTC to grant extensions, make  
4 unfulfilled promises of written confirmation, and then claim that the extensions both did not  
5 occur and did not encompass the time to file a petition to quash in fact provides the FTC with  
6 “the means and the incentive” to create false impressions leading to the loss of the responding  
7 parties’ rights.<sup>4</sup>

8 **B. On the merits, New Seasons’ petition should be granted.**

9 On the merits, New Seasons’ petition to quash should be granted. The Ruling  
10 discusses the merits of New Seasons’ petition only in a conclusory footnote proclaiming that  
11 “[r]eaching the merits of NSM’s Petition would not change this result.” Ruling, p. 1, n. 1. The  
12 Ruling fails to address the substance of New Seasons’ arguments in any meaningful way, and  
13 New Seasons therefore incorporates herein and relies on its arguments set forth in its petition.  
14 New Seasons notes, however, that the Ruling appears to recognize the possibility of “inadvertent  
15 public disclosure.” Ruling, p. 1, n. 1. The FTC does not refute that such disclosures have  
16 occurred in the past or that the possibility of disclosure in this case is not equally real. Moreover,  
17 even if the FTC does not publicly disclose New Seasons’ confidential information, the FTC will  
18 provide that confidential information to Whole Foods and Wild Oats in the context of the FTC’s  
19 civil action,<sup>5</sup> which would arguably be even more damaging than a general public disclosure.  
20 Indeed, the flurry of third-party motions to intervene in that case to attempt to prevent Whole  
21 Foods’ general counsel from obtaining its competitors’ confidential information shows that the  
22 FTC is unwilling or unable to protect the confidential information it has obtained. New Seasons

23 \_\_\_\_\_  
24 <sup>4</sup> Further, it should not be forgotten that New Seasons is not the subject of the FTC’s investigation in this  
25 matter. New Seasons is only trying to protect its commercially sensitive information from its competitors  
26 who are accused of anti-competitive conduct.

<sup>5</sup> See *FTC v. Whole Foods Market, Inc., et al.*, U.S.D.C. Case No. 1:07-cv-01021 (D.D.C).





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**CERTIFICATE OF SERVICE**

I hereby certify that I served a copy of the foregoing **NEW SEASONS MARKET'S PETITION TO QUASH OR LIMIT CIVIL INVESTIGATIVE DEMAND** on:

Samyukt Bajaj  
U.S. Federal Trade Commission  
Bureau of Competition  
601 New Jersey Avenue, NW  
Washington DC 20580  
Tel: 202-326-2284  
Fax: 202-326-3396  
Email: sbajaj@ftc.gov

Of Attorneys for Federal Trade Commission

by mailing a copy thereof in a sealed, first-class postage prepaid envelope, addressed to said attorney's last-known address and deposited in the U.S. mail at Portland, Oregon on the date set forth below;

by causing a copy thereof to be hand-delivered to said attorney's address as shown above on the date set forth below;

by personally handing a copy thereof to said attorney on the date set forth below;

by sending a copy thereof via overnight courier in a sealed, prepaid envelope, addressed to said attorney's last-known address on the date set forth below;

by faxing a copy thereof to said attorney at his/her last-known facsimile number on the date set forth below; or

by electronically mailed notice on the date set forth below.

Dated this 9<sup>th</sup> day of July, 2007.

**DAVIS WRIGHT TREMAINE LLP**

By Constance Pendleton  
Constance Pendleton  
Davis Wright Tremaine LLP  
1919 Pennsylvania Avenue, N.W. - Suite 200  
Washington D.C. 20006-3402  
Tel: (202) 973-4229  
Fax: (202) 973-4499  
Email: constancependleton@dwt.com *OMP*

Of Attorneys for New Seasons Market

**EXHIBIT 2**

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FEDERAL TRADE COMMISSION  
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DOCUMENT PROCESSING

BEFORE THE UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION

In the Matter of the Proposed Acquisition by  
Whole Foods Market, Inc. of Wild Oats  
Markets, Inc.,

File No. 071-0114

**NEW SEASONS MARKET, INC.'S  
WITHDRAWAL OF ITS PETITION TO  
QUASH OR LIMIT CIVIL  
INVESTIGATIVE DEMAND AND OF  
ITS REQUEST FOR FULL  
COMMISSION REVIEW OF  
COMMISSIONER PAMELA JONES  
HARBOUR'S DENIAL OF THE  
PETITION**

Pursuant to the agreement between New Seasons Market, Inc. ("New Seasons")  
and the Federal Trade Commission ("FTC"), New Seasons hereby withdraws its Petition to  
Quash or Limit the Civil Investigative Demand ("CID") issued to it on April 24, 2007 and  
further withdraws its request for full FTC review of the letter ruling made by Commissioner

///  
///  
///  
///

1 Pamela Jones Harbour disposing of New Season's petition to quash or limit the CID.

2 DATED this 23<sup>rd</sup> day of July, 2007.

3 DAVIS WRIGHT TREMAINE LLP

4  
5 By Robert D. Newell, OSB #79091  
6 Kevin H. Kono, OSB #02352  
7 Tel: (503) 241-2300  
8 Fax: (503) 778-5499  
9 Email: [bobnewell@dwt.com](mailto:bobnewell@dwt.com)  
10 Email: [kevinkono@dwt.com](mailto:kevinkono@dwt.com)

11 By Constance Pendleton  
12 Davis Wright Tremaine LLP  
13 1919 Pennsylvania Avenue, N.W. - Suite 200  
14 Washington D.C. 20006-3402  
15 Tel: (202) 973-4229  
16 Fax: (202) 973-4499  
17 Email: [constancependleton@dwt.com](mailto:constancependleton@dwt.com)  
18 *Connie*

19 Of Attorneys for New Seasons Market

20  
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26

1 CERTIFICATE OF SERVICE

2 I hereby certify that I served a copy of the foregoing NEW SEASONS  
3 MARKET, INC.'S WITHDRAWAL OF ITS PETITION TO QUASH OR LIMIT CIVIL  
4 INVESTIGATIVE DEMAND AND OF ITS REQUEST FOR FULL COMMISSION  
5 REVIEW COMMISSIONER PAMELA JONES HARBOUR'S DENIAL OF THE  
6 PETITION on:

7 Samyukt Bajaj  
8 U.S. Federal Trade Commission  
9 Bureau of Competition  
10 601 New Jersey Avenue, NW  
11 Washington DC 20580  
12 Tel: 202-326-2284  
13 Fax: 202-326-3396  
14 Email: sbajaj@ftc.gov

15 Of Attorneys for Federal Trade Commission

16  by mailing a copy thereof in a sealed, first-class postage prepaid envelope,  
17 addressed to said attorney's last-known address and deposited in the U.S. mail at Portland,  
18 Oregon on the date set forth below;

19  by causing a copy thereof to be hand-delivered to said attorney's address as  
20 shown above on the date set forth below;

21  by personally handing a copy thereof to said attorney on the date set forth  
22 below;

23  by sending a copy thereof via overnight courier in a sealed, prepaid envelope,  
24 addressed to said attorney's last-known address on the date set forth below; or

25  by faxing a copy thereof to said attorney at his/her last-known facsimile  
26 number on the date set forth below.

Dated this 23<sup>rd</sup> day of July, 2007.

DAVIS WRIGHT TREMAINE LLP

By Constance Pendleton  
Constance Pendleton  
Davis Wright Tremaine LLP  
1919 Pennsylvania Avenue, N.W. - Suite 200  
Washington D.C. 20006-3402  
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Fax: (202) 973-4499  
Email: constancependleton@dwt.com  
*Constance*

Of Attorneys for New Seasons Market

Page 3 - CERTIFICATE OF SERVICE

**EXHIBIT 3**

**Coffey, Linda**

---

**From:** Schwab, Jennifer [jschwab@ftc.gov]  
**Sent:** Thursday, July 19, 2007 10:00 AM  
**To:** Newell, Bob  
**Cc:** Moscatelli, Catharine M.; Coffey, Linda  
**Subject:** RE: CID/Subpoena to New Seasons Market

**Bob:**

This e-mail confirms that the FTC agrees that it will not issue any additional civil investigative demands and/or subpoenas to New Seasons in the matter styled FTC v. Whole Foods, et al., Civil Action No. 1:07cv01021 (D.D.C.).

Regards,

Jenny Schwab  
Bureau of Competition  
Federal Trade Commission  
601 New Jersey Avenue, NW  
Washington, DC 20001  
(202) 326-2335 (direct dial)  
(202) 326-2286 (fax)  
jschwab@ftc.gov

This message and any attachments contain information that may be confidential. If you are not the intended recipient, you may not read, copy, distribute, or use this information. If you have received this transmission in error, please notify the sender immediately by reply e-mail and then delete this message.

-----Original Message-----

**From:** Newell, Bob [mailto:bobnewell@DWT.COM]  
**Sent:** Thursday, July 19, 2007 12:56 PM  
**To:** Schwab, Jennifer  
**Cc:** Moscatelli, Catharine M.; Coffey, Linda  
**Subject:** RE: CID/Subpoena to New Seasons Market

This is fine as far as it goes. We also agreed that there would be no new subpoenas or CIDs issued by the FTC to New Seasons in this case. If you can confirm that, I will get the material to you today.

Robert D. Newell | Davis Wright Tremaine LLP  
1300 SW Fifth Avenue, Suite 2300 | Portland, OR 97201  
Tel: (503) 778-5234 | Fax: (503) 778-5299  
Email: bobnewell@dwt.com | Website: www.dwt.com

Anchorage | Bellevue | Los Angeles | New York | Portland | San Francisco  
| Seattle | Shanghai | Washington, D.C.

-----Original Message-----

**From:** Schwab, Jennifer [mailto:jschwab@ftc.gov]  
**Sent:** Thursday, July 19, 2007 9:45 AM  
**To:** Newell, Bob  
**Cc:** Moscatelli, Catharine M.  
**Subject:** CID/Subpoena to New Seasons Market



Please see attached.

Regards,

Jenny Schwab  
Bureau of Competition  
Federal Trade Commission  
601 New Jersey Avenue, NW  
Washington, DC 20001  
(202) 326-2335 (direct dial)  
(202) 326-2286 (fax)  
jschwab@ftc.gov

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<<07.19.07 Schwab to Newell.PDF>>



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

Jennifer K. Schwab, Esq.  
Bureau of Competition  
Federal Trade Commission  
601 New Jersey Ave., N.W.  
Washington, DC 20580

Direct Line: (202) 326-2335  
Fax: (202) 326-2286  
E-mail: [jschwab@ftc.gov](mailto:jschwab@ftc.gov)

July 19, 2007

Via email

Robert D. Newell, Esq.  
Davis Wright Tremaine LLP  
1300 S.W. Fifth Avenue  
Suite 2300  
Portland, Oregon 97201-5630

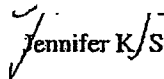
Re: *Federal Trade Commission v. Whole Foods Market, Inc., et al.*, Civil No.  
07-cv-01021 PLF (D.D.C.)

Dear Mr. Newell:


This letter confirms that the Federal Trade Commission will not take action to enforce the Civil Investigation Demand ("CID"), dated April 24, 2007, or subpoena duces tecum issued in the above-styled case ("Subpoena"), dated June 18, 2007, provided that New Seasons Market, Inc. ("New Seasons") immediately: (a) provides the Commission with any data and/or documents responsive to the Subpoena, as modified; and (b) withdraws its Request for Full Commission Review of Commissioner Harbour's Disposition of its Petition to Quash or Limit the CID.

We also understand that New Seasons has no documents responsive to Request No. 4 of the Subpoena, and request that you please confirm this understanding in writing as part of New Seasons' response to the Subpoena.

Sincerely,

  
Jennifer K. Schwab

Approved:

---

Catharine M. Moscatelli  
Acting Assisting Director  
Mergers IV Division

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I served a copy of the foregoing **DECLARATION OF**  
3 **ROBERT D. NEWELL** on:

4 James A. Fishkin  
5 Dechert, LLP  
6 17551 I Street, N.W.  
7 Washington, DC 20006-2401

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

8 Of Attorneys for Whole Foods Market, Inc.

Of Attorneys for Federal Trade Commission

9 Matthew J. Reilly  
10 Catharine M. Moscatelli  
11 Federal Trade Commission  
12 601 New Jersey Avenue, N.W.  
13 Washington, DC 20001

The Honorable D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

14 Of Attorneys for Federal Trade  
15 Commission

16  by mailing a copy thereof in a sealed, first-class postage prepaid envelope, addressed  
17 to said attorney's last-known address and deposited in the U.S. mail at Portland, Oregon on the date set  
18 forth below;

19  by sending a copy thereof via overnight courier in a sealed, prepaid envelope,  
20 addressed to said attorney's last-known address on the date set forth below;

21  by faxing a copy thereof to said attorney at his/her last-known facsimile number on  
22 the date set forth below; or

23  by electronically mailed notice on the date set forth below.

24 Dated this 12<sup>th</sup> day of December, 2008.

25 **DAVIS WRIGHT TREMAINE LLP**

26 By \_\_\_\_\_

Ronald G. London, DCB #456284  
Davis Wright Tremaine LLP  
1919 Pennsylvania Avenue, N.W. – Suite 200  
Washington D.C. 20006-3402  
Tel: (202) 973-4229  
Fax: (202) 973-4499  
Email: [ronaldlondon@dwt.com](mailto:ronaldlondon@dwt.com)