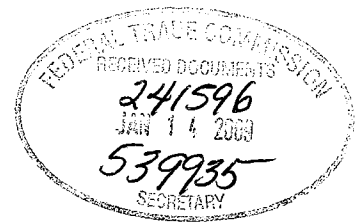


ORIGINAL



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

In the Matter of

**WHOLE FOODS MARKET, INC.,
a corporation.**

Docket No. 9324

Public

**WHOLE FOODS MARKET, INC.'S MOTION
FOR ENFORCEMENT OF SUBPOENA DUCES TECUM
ISSUED TO NON-PARTY T.A.C.T. HOLDING COMPANY**

Respondent Whole Foods Market, Inc. ("Whole Foods") hereby moves to compel non-party T.A.C.T. Holding Company ("TACT"), the controlling shareholder of Trader Joe's Company (referred to collectively with TACT as "Trader Joe's"), to comply with the subpoena duces tecum served on it by Whole Foods, attached as Ex. 1 hereto.

INTRODUCTION

Trader Joe's continued pursuit of discredited objections is an unnecessary waste of judicial and party resources. Like non-parties New Seasons Markets, Inc. ("New Seasons") and Gelson's Markets ("Gelson's"), Trader Joe's should be compelled to produce weekly sales data responsive to Request 9(b) of the subpoena.

The weekly sales data sought by Whole Foods is critical to one of the central antitrust issues in this administrative action – the appropriate definition of the relevant market. The Federal Trade Commission (the "FTC" or "Commission") alleges that Whole Foods competed against only three other retailers in a narrow product market. Whole Foods needs the requested

weekly sales data in order to demonstrate that it competed against a large number of other retailers, including Trader Joe's.

The ALJ has previously ruled that counsel for Whole Foods is entitled to other retailers' weekly sales data. On December 16, 2008, the ALJ denied a motion by New Seasons to quash an identical Whole Foods subpoena, observing that

[t]he documents sought by Whole Foods *are relevant* to one of the central antitrust issues in this proceeding – the appropriate definition of the relevant market. The burden to New Seasons to comply *is not unduly burdensome* and its *confidential documents will be adequately protected* under the Protective Order.

Ex. 2, December 16, 2008 Order Denying New Seasons Market's Motion to Quash or Limit Subpoena Duces Tecum ("December 16, 2008 Order"), at 7 (emphases added). Similar to Trader Joe's here, New Seasons objected to producing weekly sales data responsive to Request 9(b) of Whole Foods' subpoena. *Id.* at 4. The ALJ specifically overruled New Seasons' undue burden and confidentiality objections and ordered New Seasons to produce these documents as well as documents responsive to all other requests. *Id.* at 7. The ALJ similarly rejected confidentiality objections made by Gelson's and ordered it to produce data responsive to Request 9(b). *See* Ex. 3, Dec. 23, 2008 Order Denying Gelson's Markets' Motion for a Protective Order or in the Alternative To Quash or Limit the Subpoena ("December 23, 2008 Order").

Here, despite the ALJ's prior rulings on the issues of burden and confidentiality and observations regarding the relevance of Whole Foods' requests, Trader Joe's continues to withhold documents based on these same grounds.¹ Trader Joe's objections should be overruled,

¹ Trader Joe's has informally advised Whole Foods that it does not possess any documents responsive to the other requests in the subpoena. *See* Ex. 4, Whole Foods Market, Inc.'s Rule 3.22(f) Statement of James A. Fishkin in Support of Motion for Enforcement of Subpoena Duces Tecum Issued to Non-Party T.A.C.T. Holding Company ("Fishkin

and it should be compelled to produce its weekly sales data responsive to Request 9(b).

FACTUAL BACKGROUND

Trader Joe's operates over 300 specialty retail grocery stores across the United States. On October 15, 2008, Whole Foods served a document subpoena on Trader Joe's, containing nine requests for documents that are identical to the requests in the other 92 subpoenas Whole Foods served on other food retailers (both large and small) it competes against throughout most of the geographic areas alleged in the Amended Complaint. See Ex. 1, Oct. 14, 2008 Subpoena Duces Tecum. The return date on the subpoena was November 5, 2008. Id. Only one of the nine requests in the subpoena is at issue here, as Trader Joe's maintains that it possesses documents responsive only to Request 9(b) (seeking the identification of total weekly store sales since January 1, 2006).²

With respect to Request 9(b), Trader Joe's objected on the grounds that "the burden of producing its highly confidential weekly sales information is unlikely to outweigh its likely benefit, and it is not reasonably calculated to lead to the discovery of admissible evidence." Ex. 5, TACT's Oct. 24, 2008 Responses and Objections, at 7. Trader Joe's did not explain, in its objections or subsequent discussions between counsel, why it would be burdensome to produce this information, which presumably exists on its computer systems, nor did it explain why it believes that the Protective Order would not adequately protect its confidential information.

Statement") ¶ 6. This representation is not easily reconciled with its objection to searching for responsive documents on the ground that doing so would pose an undue burden. See Ex. 5, TACT's Oct. 24, 2008 Responses and Objections to Subpoena, at 2.

² Instead of producing documents, this ninth request alternatively allowed Trader Joe's to produce a spreadsheet. Id. at Request 9.

Instead, Trader Joe's stated that it would provide summaries of the "average sales for all Trader Joe's stores within each Geographic Area for the first half of 2006, 2007, and 2008." *Id.* at 7.

Counsel for Whole Foods and counsel for Trader Joe's met and conferred over a period of several weeks in an effort to resolve the objections. Ex. 4, Fishkin Statement ¶¶ 5-9. These discussions were tabled in anticipation of a ruling on the then-pending motion to quash filed by New Seasons, as it was expected that the ALJ's ruling on this motion would resolve the issues raised by Trader Joe's in its objections. Ex. 4, Fishkin Statement ¶ 7. On December 16, 2008, the ALJ denied New Seasons' motion. Ex. 2, December 16, 2008 Order. Counsel for Whole Foods immediately sent a copy of the Order to counsel for Trader Joe's, requesting that Trader Joe's withdraw its objections to the subpoena. Ex. 4, Fishkin Statement ¶ 8; Ex. 6, December 17, 2008 email. Counsel for Trader Joe's replied that it intended to stand on its objections and demanded that Whole Foods justify the relevance of Request 9(b), notwithstanding the ALJ's observation that the document requests seek information "relevant to one of the central antitrust issues in this proceeding" Ex. 2, Dec. 16, 2008 Order, at 7. *See* Ex. 4, Fishkin Statement ¶ 9; Ex. 6, December 22, 2008 email. This motion ensued.

ARGUMENT

I. TRADER JOE'S SHOULD BE COMPELLED TO COMPLY WITH THE SUBPOENA

A. The Documents That Trader Joe's Refuses to Produce Are Critical to Whole Foods' Defense.

Request 9(b) seeks information that is not only relevant, but pivotal to Whole Foods' defense. As the ALJ observed in the December 16 Order denying New Seasons' motion, "[t]he documents sought by Whole Foods are relevant to one of the central antitrust issues in this

proceeding – the appropriate definition of the relevant market.” Ex. 2, December 16, 2008 Order, at 7. Judge Friedman took a similar view last year when considering whether to preliminarily enjoin the acquisition. See FTC v. Whole Foods Market, Inc., 502 F. Supp. 2d 1, 34 (D.D.C. 2007) (“[T]he relevant product market in this case is not premium natural and organic supermarkets . . . as argued by the FTC but . . . at least all supermarkets.”); Ex. 7, Respondent Whole Foods Market, Inc.’s Answer To Am. Compl. ¶ 35.

Whole Foods’ position in this litigation is that Judge Friedman rightfully rejected the Commission’s proposed definition last year as artificially narrow. To support its position, Whole Foods intends to demonstrate that it competes with many other food retailers, including Trader Joe’s. The weekly sales data that Trader Joe’s is currently refusing to produce is critical to Whole Foods’ case, because it can be used to show how competitive interactions among Trader Joe’s, Whole Foods, Wild Oats and other supermarkets affect the sales of the others. For example, these data can be used to show that the opening of a new Whole Foods store took business away from a nearby Trader Joe’s store, and not just a Wild Oats store. Whole Foods can also use such data to show that the closing of a Wild Oats store caused an uptick in sales at a nearby Trader Joe’s store, rather than exclusively benefiting Whole Foods.³

The summaries that Trader Joe’s offered to provide would not be useful to Whole Foods’ defense on this critical issue, since they would not allow Whole Foods to correlate sales figures with specific time periods and geographic areas for instances when Whole Foods stores were opened or that Wild Oats stores were closed. Without the weekly sales data being withheld by

³ The FTC has raised the issue of the effect on competitor sales by the openings and closings of Whole Foods and Wild Oats stores at nearly every deposition of a Whole Foods witness. Accordingly, Whole Foods requires the sales data of its competitors to refute the Commission’s allegations.

Trader Joe's, Whole Foods cannot properly defend itself against the Commission's allegations.

B. The ALJ has Rejected the Argument that Whole Foods' Document Requests Are Unduly Burdensome.

Trader Joe's burden objection should be overruled. The ALJ has resolved the issue of burden, overruling the objection made by New Seasons in response to an *identical* subpoena, finding that "[t]he burden to New Seasons to comply is not unduly burdensome and its confidential documents will be adequately protected under the Protective Order." Ex. 2, December 16, 2008 Order, at 7. The ALJ further noted that "[s]ome burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest." *Id.* at 4 (quoting FTC v. Dresser Indus., Inc., Misc. No. 77-44, 1977 U.S. Dist. LEXIS 16178, at *13 (D.D.C. Apr. 26, 1977)).

The ALJ further noted that "[i]nconvenience to third parties may be outweighed by the public interest in seeking the truth in every litigated case." *Id.* (quoting Covey Oil Co. v. Continental Oil Co., 340 F.2d 993, 999 (10th Cir. 1965)). Moreover, the ALJ found that any burden was ameliorated by Whole Foods' agreement to limit its document requests from New Seasons to only higher level employees. See Ex. 2, December 16, 2008 Order, at 3-4. Whole Foods has agreed to similarly limit Trader Joe's subpoena. Ex. 4, Fishkin Statement ¶ 5.

Unlike New Seasons, Trader Joe's has not even attempted to substantiate its alleged burden. See Ex. 8, New Season's Motion to Quash or Limit, at 2-5. Trader Joe's has provided only a conclusory assertion that responding would be "unreasonable and burdensome." In any event, the argument that Whole Foods' document requests are unduly burdensome articulated by Trader Joe's in its objections has already been specifically addressed and rejected by the ALJ. Trader Joe's has provided no reason why, in light of the ALJ's Order denying New Seasons'

motion, it should be treated differently than other third parties.

C. The ALJ Has Twice Rejected Objections Based on Confidentiality.

Trader Joe's appears to object to producing its weekly sales data due to confidentiality concerns that have been rejected by the ALJ. See Ex. 5, TACT's Responses and Objections, at 3, 7. The ALJ has now *twice* found that the Protective Order issued in this case is sufficient to protect the confidentiality of these documents, noting that "[t]he Protective Order prohibits any Whole Foods employees, including inside counsel, from reviewing the documents produced by non-parties. In addition, the Protective Order and the Commission's Rules governing *in camera* treatment of confidential information prohibit disclosure of highly confidential documents." Ex. 2, December 16, 2008 Order, at 6.⁴ The ALJ echoed this sentiment in denying Gelson's motion to quash an identical subpoena, finding that the document requests were not anticompetitive and that the Protective Order sufficiently protected Gelson's confidential documents. See Ex. 3, December 23, 2008 Order. Any concerns that Trader Joe's has regarding production of its confidential documents have already been twice addressed – and rejected – by the ALJ.

II. TRADER JOE'S HAS WAIVED ITS OBJECTIONS BY FAILING TO FILE A TIMELY MOTION FOR PROTECTION

Trader Joe's objections should be overruled on the independent ground of its failure to file a timely motion to quash. As discussed above, there is no good faith basis for Trader Joe's to pursue its objections in light of the ALJ's December 16, 2008 Order. Under FTC rules and practice, if Trader Joe's wishes to pursue its objections, it, and not Whole Foods, bore the burden

⁴ The ALJ also found that Whole Foods' document requests were not anticompetitive, noting that "the fact that these documents may contain confidential and commercially sensitive information does not provide a basis to quash or limit the subpoena." Id. at 4.

of filing a timely motion. Trader Joe's did not file the required motion, however, and instead is forcing Whole Foods to incur the expense associated with seeking court enforcement of the subpoena. See 16 C.F.R. § 3.34(c) ("Any motion by the subject of a subpoena to limit or quash the subpoena shall be filed within the earlier of ten (10) days after service thereof or the time for compliance therewith."); 16 C.F.R. § 3.37 (permitting objections to be filed only in response to document requests served by "any *party* . . . on *another party*) (emphasis added); 16 C.F.R. § 3.38A (obviating the need for the recipient of a subpoena to file a timely motion to quash only when it withholds responsive material due to an evidentiary privilege). Because Trader Joe's is not a party to this action and did not purport to withhold documents on the basis of an evidentiary privilege, its failure to timely move to quash the subpoena results in a waiver of its objections.

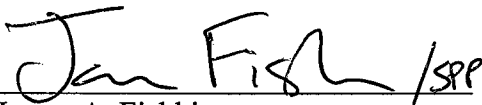
CONCLUSION

For the foregoing reasons, Whole Foods' motion should be granted.

Dated: January 14, 2009

Respectfully submitted,

By:

/SPP

James A. Fishkin

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Attorneys for Whole Foods Market, Inc.

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

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

**[PROPOSED] ORDER GRANTING WHOLE FOODS MARKET,
INC.'S MOTION FOR ENFORCEMENT OF SUBPOENA DUCES
TECUM ISSUED TO NON-PARTY T.A.C.T. HOLDING COMPANY**

Upon due consideration of Whole Foods Market, Inc.'s ("Whole Foods") Motion for Enforcement of Subpoena Duces Tecum Issued to Third Party T.A.C.T. Holding Company ("Trader Joe's"), and any opposition thereto, it is hereby ORDERED that:

1. Whole Foods' Motion is GRANTED; and
2. Trader Joe's shall produce all documents and data responsive to Request 9(b) of Whole Foods' subpoena no later than ten days from the date of this Order.

IT IS SO ORDERED.

Date: _____

D. Michael Chappell
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Enforcement of Subpoena Duces Tecum Issued to Third Party T.A.C.T. Holding Company was served on January 14, 2009, on the following persons by the indicated method:

By Hand Delivery and Email:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

By Hand Delivery and Email:

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

By E-Mail and First Class Mail:

Scott Reiter, Esq.
O'Melveny & Myers LLP
1625 Eye Street, N.W.
Washington, D.C. 20006

Counsel for T.A.C.T. Holding Company

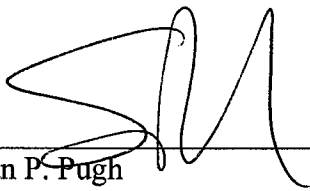
By E-Mail:

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

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

Complaint Counsel

By:


Sean P. Pugh

DECHERT LLP
1775 I Street, N.W.
Washington, D.C. 20006-2401
Telephone: (202) 261-3300
Facsimile: (202) 261-3333

Attorney for Whole Foods Market, Inc.

EXHIBIT 1



SUBPOENA DUCES TECUM

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

1. TO

Daniel Bane, CEO
T.A.C.T. Holding Company
800 S. Shamrock Avenue
Monrovia, CA 91016

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:

Daniel Bane, CEO
T.A.C.T. Holding Company
800 S. Shamrock Avenue
Monrovia, CA 91016

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

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

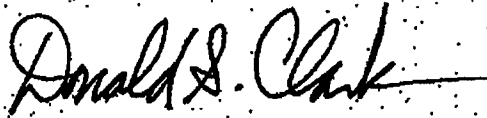
Practice, 16 CFR § 4.11(e), to discovery requests in another proceeding that are directed to the Commission.

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

EXHIBIT 2

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

In the Matter of)
)
)

WHOLE FOODS MARKET, INC.,)
Respondent.)
)

Docket No. 9324

**ORDER ON NON-PARTY NEW SEASONS MARKET'S MOTION TO
QUASH OR LIMIT SUBPOENA FROM WHOLE FOODS MARKET, INC.**

I.

On November 24, 2008, non-party New Seasons Market, Inc. ("New Seasons") filed a motion to quash or limit the subpoena issued to it by Respondent Whole Foods Market, Inc. ("Respondent" or "Whole Foods"). Respondent filed its Response in Opposition on December 4, 2008.

On December 12, 2008, New Seasons filed a motion for leave to file a reply and its reply. New Seasons' motion for leave to file a reply is GRANTED.

On December 16, 2008, Complaint Counsel filed a memorandum regarding New Seasons' motion. In it, Complaint Counsel states that it does not take a position on New Seasons' motion to quash, but concluded that the motion should be denied.

For the reasons set forth below, New Seasons' motion to quash or limit the subpoena is DENIED.

II.

New Seasons asserts that it is Whole Foods' top competitor in Portland, Oregon. New Seasons further asserts that the documents which Whole Foods seeks contain New Seasons' trade secrets and other highly confidential information. New Seasons argues that if it were required to produce the information Whole Foods seeks, this would provide Whole Foods with a blueprint to New Seasons' success and the means for Whole Foods to engage in anticompetitive conduct against one of its primary competitors in the Portland, Oregon market. New Seasons seeks an order quashing the subpoena with respect to requests three through nine on grounds that

those requests are: (1) unduly burdensome; (2) are themselves anticompetitive; and (3) seek trade secret and other confidential, commercially sensitive information without an adequate protective order.

Respondent asserts that the documents it seeks are directly relevant to the issues raised by the Complaint and that Respondent has no other effective means to obtain information from its non-party competitors necessary for its defense. Respondent further asserts that the requests are not unduly burdensome and that the Protective Order entered by the Commission in this case on October 10, 2008, ("Protective Order") adequately protects New Seasons' confidential information.

III.

Parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint. 16 C.F.R. § 3.31(c)(1). An Administrative Law Judge may limit discovery if the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or if the burden and expense of the proposed discovery outweigh its likely benefit. 16 C.F.R. § 3.31(c). In addition, an Administrative Law Judge may enter a protective order to protect a party from undue burden or expense. 16 C.F.R. § 3.31(d). Parties resisting discovery of relevant information carry a heavy burden of showing why discovery should be denied. *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975).

The subpoena served on New Seasons consists of nine requests for documents. The first two requests seek documents relating to communications with the Federal Trade Commission ("FTC") and documents previously produced to the FTC. New Seasons' motion addresses only the third through ninth requests. These requests, which seek all documents from January 1, 2006 to present, are:

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.

New Seasons does not make the objection that the documents requested are not relevant to the issues raised in the Complaint or the defenses asserted thereto. Instead, New Seasons argues the subpoena should be quashed or limited because the requests: (a) are unduly burdensome; and (b) are themselves anticompetitive; and (c) seek trade secrets and other confidential, commercially sensitive information without an adequate protective order.

A. The requests are not unduly burdensome

New Seasons argues that requests three, four, seven, and eight should be quashed or limited because they are unduly burdensome. New Seasons asserts that although Respondent has offered to limit these requests for "all documents" to "all documents generated by high level New Seasons' employees," this restriction does not materially alter the burden associated with producing the documents. New Seasons argues that to search through all of its emails to determine whether the sender or recipient was "high level" and whether the email is responsive could cost New Seasons between \$250,000 and \$500,000. New Seasons states that it does not wish to divert the resources necessary to accomplish the search and review called for by the requests. New Seasons further argues that because it is owned and operated locally in Portland, Oregon, and has no stores outside of that local market, any information New Seasons would provide would have no impact on the multitude of other geographic areas involved in this proceeding.

Respondent states that it has met and conferred with New Seasons in an attempt to reduce New Seasons' burden of compliance with the subpoena. Respondent also states that Respondent represented to New Seasons that New Seasons did not need to search for documents at any of its stores, but rather need only produce "high-level" documents from its "high-level" management employees at its Portland, Oregon headquarters. According to Respondent, the Commission has taken the position that, in 2007, New Seasons was one of just two competitors of Whole Foods and Wild Oats. Thus, Respondent argues, the documents Respondent seeks from New Seasons will bear heavily on the definition of the relevant market in this case.

New Seasons responds that identifying which employees are "high level" employees is difficult and would require a search through documents to determine whether the sender or recipient was "high level." New Seasons also responds that even if the request is limited to "high level" documents, it must still search the same volume of documents to determine which documents are responsive and "high level." Accordingly, argues New Seasons, the burden on New Seasons is not ameliorated by these restrictions.

"Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest." *Federal Trade Commission v. Dresser Indus., Inc.*, 1977 U.S. Dist. LEXIS 16178, *13 (D.D.C. 1977). "Inconvenience to third parties may be outweighed by the public interest in seeking the truth in every litigated case." *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993, 999 (10th Cir. 1965) (denying motion to quash subpoenas served on competitors). The requests seek relevant information. In light of the limitations to which Respondent has agreed and as are set forth below, the burden on New Seasons is not an undue burden.

B. The requests are not anticompetitive

New Seasons argues that requests three through nine should be quashed because they ask New Seasons to provide its most confidential and commercially sensitive information to one of its primary competitors, Whole Foods. New Seasons argues that Whole Foods has a history of taking competitors' business away from them and of harassing and punishing competitors. New Seasons suggests that Whole Foods may be using litigation tactics to improve its competitive position. Respondent responds that New Seasons' accusations of anticompetitive conduct are a bald attempt to divert attention from the issues raised by the discovery dispute.

The implied allegations that Whole Foods may be using the document requests to gain a competitive advantage over New Seasons are without support. Accordingly, they do not provide a reasonable basis to quash the subpoena. The fact that these documents may contain confidential and commercially sensitive information does not provide a basis to quash or limit the subpoena. The Commission's Rules of Practice do not specifically protect trade secrets or confidential information from discovery. Section 6(f) of the Federal Trade Commission Act and Section 21(d)(2) of the Improvements Act (codified at 15 U.S.C. § 46(f) and 15 U.S.C. § 57b-2(b), respectively) limit the Commission's ability to disclose confidential information to the public. The Commission's Rules of Practice also do not limit a litigant's ability to obtain confidential information through discovery. *In re E.I. DuPont de Nemours & Co.*, 97 F.T.C. 116, 116 (Jan. 21, 1981) (These provisions do "not absolutely bar disclosure of business data as evidence in [FTC] adjudicatory proceedings.").

Courts interpreting discovery sought under the Federal Rules of Civil Procedure have held that there is no immunity protecting the disclosure of trade secrets. *Federal Trade Commission v. J.E. Lonning*, 539 F.2d 202, 209-210 (D.C. Cir. 1976); *LeBaron v. Rohm and Hass Co.*, 441 F.2d 575, 577 (9th Cir. 1971) ("The fact that discovery might result in the disclosure of sensitive competitive information is not a basis for denying such discovery."). See also *Federal Trade Commission v. Rockefeller, et al.*, 441 F. Supp. 234, 242 (S.D.N.Y.

1977), *aff'd* 591 F.2d 182 (2d Cir. 1979) (An objection to a subpoena on grounds that it seeks confidential information “poses no obstacle to enforcement.”).

The issue of whether the Protective Order adequately protects New Seasons’ confidential information from disclosure is addressed in the following section.

C. The Protective Order adequately protects New Seasons

New Seasons states that the requests seek detailed information regarding sales information, strategic plans, and documents relating to its plans to increase sales. New Seasons asserts that it is a private company and is not required to release this information to anyone outside of the company. New Seasons further argues that the Protective Order issued by the Commission does not adequately protect its confidential material. New Seasons expresses concerns that Whole Foods’ outside counsel may provide ongoing counseling to Whole Foods with respect to competitive decision-making and that experts retained in this case may be hired by other competitors in the future and would not be able to “unlearn” the information learned from New Seasons’ documents.

New Seasons points to instances where, in another administrative proceeding, the FTC caused discovery material that had been marked by the respondent as confidential to be posted on the FTC’s public website and where, in the District Court case *FTC v. Whole Foods Market, Inc.*, the FTC filed publicly a document that had been “redacted” by blackening out text electronically in a manner which allowed the trade secret information to be viewed. New Seasons argues that these instances cause New Seasons to be concerned about the likelihood of disclosure of its confidential information. New Seasons urges that it should not be required to provide confidential information without a protective order that prohibits the FTC from disclosing information New Seasons considers to be confidential and that requires the disclosing party to pay a penalty for violation of the protective order.

Respondent argues that the Protective Order in this case adequately protects confidential documents of third parties through a number of safeguards. The Protective Order allows disclosure of confidential documents to a limited group of people and prohibits any Whole Foods employees, including inside counsel, from reviewing confidential documents subject to the Protective Order. Respondent states that New Seasons has provided no authority to support its request that the Commission agree to pay damages in the event of an inadvertent public disclosure of confidential information and that if the Protective Order is violated, New Seasons can raise the issue with the Commission.

The Protective Order entered by the Commission in this case restricts disclosure of confidential material 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 the appellate proceedings involving this matter; (c) outside counsel of record for any 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.

The Protective Order prohibits any Whole Foods employees, including inside counsel, from reviewing the documents produced by non-parties. In addition, the Protective Order and the Commission's Rules governing *in camera* treatment of confidential information prohibit disclosure of highly confidential documents.

"[A]bsent a showing to the contrary, one has to assume that the protective order will work, especially in light of the extensive use of the device in Commission litigation (in cases frequently involving experts)." *Coca-Cola Bottling*, 1976 FTC LEXIS 33, *5 (Dec. 7, 1976). New Seasons' speculation that its documents may be disclosed or that outside counsel may use the information gained to advise Whole Foods in the future on commercial decisions or that experts or consultants will inadvertently use information they learned in this litigation in future litigation is just that – speculation. New Seasons has not made an adequate showing to support its argument that the Protective Order will not protect it.

New Seasons suggests that the Protective Order is inadequate because it does not provide for a fixed monetary penalty on counsel if the Protective Order were to be violated. New Seasons points to the protective order issued by the United States District Court for the District of Columbia in *FTC v. Whole Foods, Inc.*, July 6, 2007, which included a penalty of \$250,000 to be paid by any person who violated the protective order in that case. However, New Seasons has provided no authority in support of its argument that the Commission has authority to require a disclosing party to pay a penalty for a violation of its protective orders.

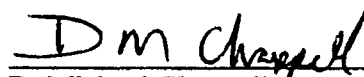
In light of the limitations set forth below and the confidentiality provisions of the Protective Order, enforcement of the subpoenas, as limited by this Order, is not unreasonable or oppressive.

IV.

The documents sought by Whole Foods are relevant to one of the central antitrust issues in this proceeding – the appropriate definition of the relevant market. The burden to New Seasons to comply is not unduly burdensome and its confidential documents will be adequately protected under the Protective Order.

New Seasons' motion to quash or limit the subpoena is DENIED. Request numbers three, four, seven and eight are hereby limited to documents from New Seasons' senior management team located at New Seasons' Portland, Oregon headquarters. New Seasons shall produce all responsive documents no later than December 29, 2008.

ORDERED:



D. Michael Chappell
Administrative Law Judge

Date: December 16, 2008

EXHIBIT 3

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

In the Matter of)
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WHOLE FOODS MARKET, INC.,)
Respondent.)
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Docket No. 9324

**ORDER ON NON-PARTY GELSON'S MARKETS' MOTION
FOR PROTECTIVE ORDER OR TO QUASH OR
LIMIT SUBPOENA FROM WHOLE FOODS MARKET, INC.**

I.

On December 8, 2008, non-party Gelson's Markets ("Gelson's") filed a motion for a protective order or to quash or limit the subpoena issued to it by Respondent Whole Foods Market, Inc. ("Respondent" or "Whole Foods"). Respondent filed its Response in Opposition on December 19, 2008.

On December 16, 2008, Complaint Counsel filed a memorandum regarding a similar motion filed by another non-party, New Seasons Market, Inc. While Complaint Counsel stated that it did not take a position on New Seasons' motion to quash, it concluded that the motion should be denied. Complaint Counsel further stated that its memorandum is also pertinent to the instant motion filed by Gelson's.

For the reasons set forth below, Gelson's motion for a protective order or to quash or limit the subpoena is DENIED.

II.

Gelson's states that it operates 18 premium grocery markets, all of which are located in Southern California, and that it is one of Whole Foods' primary competitors. Gelson's asserts that the documents it seeks to withhold from production are commercially sensitive documents and that the disclosure of these documents to its competitor would cause competitive harm. Gelson's further argues that the Protective Order entered by the Commission in this case on October 10, 2008, ("Protective Order") does not adequately protect Gelson's confidential information and that disclosure of such information would cause irreparable harm.

Respondent asserts that the documents it seeks are directly relevant to the issues raised by the Complaint and that Respondent has no other effective means to obtain information from its non-party competitors necessary for its defense. Respondent argues that simply because Gelson's documents are confidential does not provide a basis for withholding the documents. Respondent further asserts that the Protective Order and the Commission's *in camera* rules adequately protect Gelson's confidential information.

III.

Parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint. 16 C.F.R. § 3.31(c)(1). Discovery may be limited by the Administrative Law Judge if the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or if the burden and expense of the proposed discovery outweigh its likely benefit. 16 C.F.R. § 3.31(c). In addition, an Administrative Law Judge may enter a protective order to protect a party from undue burden or expense. 16 C.F.R. § 3.31(d). Parties resisting discovery of relevant information carry a heavy burden of showing why discovery should be denied. *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975).

Gelson's states that it has withheld documents responsive to Request Numbers 5 and 9(b). Request Number 5 seeks: all market studies, strategic plans or competitive analyses relating to competition in each Geographic Area, including documents discussing market shares. Request Number 9(b) seeks: documents sufficient to show, or in the alternative, a spread sheet showing the total weekly sales for each week since January 1, 2006 to the current date. The documents Gelson's seeks to withhold are: (1) a site study, containing sales projections, responsive to Request Number 5; and (2) documents evidencing weekly sales for each Gelson's store, responsive to Request Number 9(b).

Gelson's does not make the objection that the documents requested are unduly burdensome or not relevant to the issues raised in the Complaint or the defenses asserted thereto. Instead, Gelson's seeks a protective order or an order quashing or limiting the subpoena on the grounds that: (A) disclosure of commercially sensitive information would be anticompetitive; and (B) the Protective Order does not adequately protect Gelson's confidential, commercially sensitive information.

A. Disclosure of the requested documents pursuant to the Protective Order would not harm competition

Gelson's argues that the subpoena should be quashed or limited because it asks Gelson's to provide confidential and commercially sensitive information to one of its primary competitors, Whole Foods. Gelson's also argues that Whole Foods' subpoena would require Gelson's to provide detailed information regarding the lifeblood of Gelson's business and provide Whole Foods with the blueprint to Gelson's success in the Southern California market. Gelson's charges that Whole Foods has a history of harassing, punishing, and taking business away from competitors. Gelson's states that it has no reason to believe that Whole Foods would

not relish the opportunity to drive Gelson's out of business and that Whole Foods has the size and resources to do it, with the assistance of Gelson's trade secrets and other commercially sensitive information. Respondent asserts that Gelson's accusations of anticompetitive conduct have no bearing on this discovery dispute.

Gelson's has not demonstrated that Whole Foods is seeking these documents merely to gain a competitive advantage, rather than to defend itself in this action. Accordingly, such unsupported allegations fail to provide a reasonable basis to quash the subpoena.

The claim that these documents contain confidential and commercially sensitive information also does not provide a basis to quash or limit the subpoena. *LeBaron v. Rohm and Hass Co.*, 441 F.2d 575, 577 (9th Cir. 1971) ("The fact that discovery might result in the disclosure of sensitive competitive information is not a basis for denying such discovery."). See also *Federal Trade Commission v. Rockefeller, et al.*, 441 F. Supp. 234, 242 (S.D.N.Y. 1977), *aff'd* 591 F.2d 182 (2d Cir. 1979) (an objection to a subpoena on grounds that it seeks confidential information "poses no obstacle to enforcement").

Moreover, the Commission's Rules of Practice do not specifically protect trade secrets or confidential information from discovery. Section 6(f) of the Federal Trade Commission Act and Section 21(d)(2) of the Improvements Act (codified at 15 U.S.C. § 46(f) and 15 U.S.C. § 57b-2(b), respectively) limit the Commission's ability to disclose confidential information to the public. The Commission's Rules of Practice also do not limit a litigant's ability to obtain confidential information through discovery. *In re E.I. DuPont de Nemours & Co.*, 97 F.T.C. 116, 116 (Jan. 21, 1981) (These provisions do "not absolutely bar disclosure of business data as evidence in [FTC] adjudicatory proceedings."). Accordingly, Gelson's cannot withhold relevant documents based solely on its desire to shield confidential information from a competitor.

B. The requested information is adequately protected by the Protective Order

Gelson's states that the requests seek detailed information 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 location. Gelson's further states that it diligently protects its weekly, location specific sales information and does not disclose this information to anyone outside of the company. Gelson's expresses concerns that experts retained in this case may be hired by other competitors in the future and would not be able to unlearn the information learned from Gelson's documents and that Whole Foods could use information from Gelson's to eliminate Gelson's as a competitor.

Gelson's further asserts that the Protective Order does not adequately protect Gelson's information because it places the burden on Gelson's to file a motion for *in camera* treatment to prevent disclosure to the public. Next, Gelson's asserts that the Protective Order fails to provide an adequate disincentive against or remedy for disclosure of Gelson's' confidential information. Gelson's points out that, in another administrative proceeding, the FTC caused discovery material that had been marked by a respondent as confidential to be posted on the FTC's public website and that, in the District Court case *FTC v. Whole Foods Market, Inc.*, the FTC filed

publicly a document that had been redacted by blackening out text electronically in a manner which allowed the trade secret information to be viewed. Gelson's argues that it should not be required to provide information that Gelson's considers to be confidential without a protective order that prohibits the FTC from disclosing such information. Gelson's asserts that the protective order should contain an adequate disincentive that would require the disclosing party to pay a penalty for any violation of the protective order.

Respondent submits that the Protective Order in this case does adequately protect confidential documents of third parties. The Protective Order allows disclosure of confidential documents to a limited group of people and prohibits any Whole Foods employees, including inside counsel, from reviewing confidential documents subject to the Protective Order. Respondent asserts further that Gelson's has provided no authority to support its request that the Commission agree to pay damages in the event of an inadvertent public disclosure of confidential information. Respondent also submits that, in the event the Protective Order is violated, Gelson's can raise the issue with the Commission.

The Protective Order entered by the Commission in this case allows disclosure of confidential documents to an extremely limited group. Such documents may be disclosed only to the Administrative Law Judge and the Commission, and employees assisting them; expert witnesses, who may not be employees of Respondent or a third party which has been subpoenaed; judges and other court personnel of any court having jurisdiction over the appellate proceedings involving this matter; and outside counsel for Whole Foods. The Protective Order, thus, prohibits any Whole Foods employees, including inside counsel, from reviewing the documents produced by non-parties.

Gelson's asserts that providing Gelson's sensitive information to Whole Foods' outside counsel is, in effect, no different from providing that information to Whole Foods itself and that experts or consultants may inadvertently use information they learned in this litigation in future litigation. These assertions are without merit. "[A]bsent a showing to the contrary, one has to assume that the protective order will work, especially in light of the extensive use of the device in Commission litigation (in cases frequently involving experts)." *Coca-Cola Bottling*, 1976 FTC LEXIS 33, *5 (Dec. 7, 1976). Gelson's has failed to demonstrate that the Protective Order will not sufficiently protect the withheld documents.

Gelson's refers to the protective order issued by the United States District Court for the District of Columbia in *FTC v. Whole Foods, Inc.*, July 6, 2007, which included a penalty of \$250,000 to be paid by any person who violated the protective order in that case. Gelson's argues that the Protective Order in this case is inadequate because it does not provide for a fixed monetary penalty on counsel for a violation. However, Gelson's has provided no authority in support of its argument that the Commission has authority to require a disclosing party to pay a penalty for a violation of its protective orders.

In addition to the safeguards of the Protective Order, the Commission's Rules governing *in camera* treatment of confidential information prohibit disclosure of highly confidential documents. Pursuant to Commission Rule 3.45(b), if either party seeks to introduce Gelson's


confidential information into evidence, Gelson's may file a motion for *in camera* treatment for documents it feels should be withheld from the public record. In Commission proceedings, requests for *in camera* treatment must show that the public disclosure of the documentary evidence will result in a clearly defined, serious injury to the person or corporation whose records are involved. *In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500, 500 (1984); *In re H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). That showing can be made by establishing that the documentary evidence is "sufficiently secret and sufficiently material to the applicant's business that disclosure would result in serious competitive injury," and then balancing that factor against the importance of the information in explaining the rationale of Commission decisions. *Kaiser*, 103 F.T.C. at 500; *In re General Foods Corp.*, 95 F.T.C. 352, 355 (1980); *In re Bristol Myers Co.*, 90 F.T.C. 455, 456 (1977). Confidential information is withheld from the public record when this standard is met.

The *in camera* procedures in Part III adjudication and the Protective Order entered by the Commission in this case adequately protect Gelson's confidential information from disclosure.

IV.

For the reasons stated above, Gelson's motion for a protective order or to quash or limit the subpoena is DENIED. Gelson's shall produce all responsive documents no later than December 31, 2008.

ORDERED:



D. Michael Chappell
Administrative Law Judge

Date: December 23, 2008

EXHIBIT 4

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

In the Matter of

**WHOLE FOODS MARKET, INC.,
a corporation.**

Docket No. 9324

Public

**WHOLE FOODS MARKET, INC.'S RULE 3.22(F) STATEMENT OF JAMES FISHKIN
IN SUPPORT OF MOTION FOR ENFORCEMENT OF SUBPOENA DUCES
TECUM ISSUED TO NON-PARTY T.A.C.T. HOLDING COMPANY**

I, James A. Fishkin, under penalty of perjury, hereby declare:

1. I am one of the attorneys for Whole Foods Market, Inc. ("Whole Foods") in the above-captioned matter.
2. In October, 2008, Whole Foods served subpoenas duces tecum on 93 of its non-party competitors.
3. Of the 93 companies that were subpoenaed, over 60 have so far fully or partially complied by producing documents or stating that they possess no responsive documents.
4. On October 15, 2008, Whole Foods served a subpoena duces tecum, along with the protective order entered by the Commission in this matter, on T.A.C.T. Holding Company ("TACT"), the controlling shareholder of Trader Joe's Company (referred to collectively with TACT as "Trader Joe's"). The subpoena and protective order are attached as Exhibit 1 to Whole Foods' motion.
5. After receiving Trader Joe's objections to the subpoena, I spoke with counsel for Trader Joe's, Scott Reiter, Esq., on November 3, 2008. I told Mr. Reiter that Whole Foods

would be willing to limit its subpoena to those documents prepared or maintained by higher level Trader Joe's executives, rather than those prepared or maintained at the store level.


6. On December 3, 2008, Mr. Reiter informed me that the only documents that Trader Joe's possessed that were not previously produced and that were responsive to Whole Foods' subpoena, as limited by me in our November 3 conversation, were weekly sales data responsive to Request 9 of the subpoena.

7. On December 10, 2008, I informed Mr. Reiter of the motion to quash an identical Whole Foods subpoena that had been filed by third-party New Seasons Markets, Inc. ("New Seasons"). Mr. Reiter and I agreed to table our discussion pending the Administrative Law Judge's ("ALJ") ruling on New Seasons' motion.

8. On December 16, 2008, the ALJ denied New Seasons' motion. On December 17, 2008, I sent a copy of the ALJ's Order to Mr. Reiter and requested that Trader Joe's withdraw its objections to Whole Foods' subpoena.

9. On December 22, 2008, Mr. Reiter sent me an email requesting that I justify why Trader Joe's weekly sales data was relevant to Whole Foods' defense. Mr. Reiter made no offer to withdraw Trader Joe's objections and produce the documents requested in the subpoena. I subsequently spoke with Mr. Reiter and explained the reasons behind Whole Foods' request.

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 14th day of January, 2009.


James A. Fishkin

DECHERT LLP
1775 I Street, N.W.
Washington, D.C. 20006
Telephone: (202) 261-3300
Facsimile: (202) 261-3333

Attorney for Whole Foods Market, Inc.

EXHIBIT 5

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the matter of)	
)	
WHOLE FOODS MARKET, INC.,)	Docket No. 9324
)	
Respondent.)	
)	

**T.A.C.T. HOLDING COMPANY'S RESPONSES AND OBJECTIONS
TO WHOLE FOODS MARKET, INC.'S SUBPOENA DUCES TECUM**

Non-party T.A.C.T. Holding Company ("TACT"), the controlling shareholder of Trader Joe's Company (referred to collectively with TACT as "Trader Joe's"), pursuant to Rules 3.34 and 3.37 of the Federal Trade Commission's Rules of Practice hereby submits the following responses and objections to Respondent Whole Foods Market, Inc.'s ("Whole Foods") subpoena duces tecum ("Subpoena") issued on October 14, 2008.

PRELIMINARY STATEMENT AND GENERAL OBJECTIONS

Trader Joe's incorporates the following general objections, which are incorporated into each individualized response.

1. Background.
 - a. On March 30, 2007, the FTC issued a civil investigative demand to Trader Joe's seeking certain documents and evidence ("CID"). Trader Joe's produced materials to the FTC responsive to the CID. The FTC also issued a subpoena ad testificandum to Trader Joe's, and on April 16, 2007 conducted an investigational hearing of Daniel Bane, Trader Joe's Chief Executive Officer.

b. On June 21, 2007, Whole Foods served Trader Joe's with a subpoena under Fed.R.Civ.P. 45 that requested documents and information. Trader Joe's produced materials to Whole Foods responsive to that subpoena. On July 5, 2007 Mr. Bane was again deposed, this time by both the FTC and Whole Foods.

c. The present Subpoena was issued on October 14, 2008. It is the third round of document demands that Trader Joe's has received in this matter. Its CEO has been deposed twice.

d. The Subpoena requires that Trader Joe's search its files for documents dating back to January 1, 2006. These files already have been searched at great expense to Trader Joe's in response to the first two rounds of document demands, and it would be unreasonable and burdensome to do so again. There is no good cause to require Trader Joe's to undergo such an effort.

h. Trader Joe's has cooperated with the parties in discovery to date by producing documents. Trader Joe's is not a party to this matter and has no interest in it. The evidentiary value of any further evidence the parties may gain from Trader Joe's is far outweighed by the burden and costs to Trader Joe's. Thus, Trader Joe's objects to each document request as unduly burdensome and duplicative.

2. Trader Joe's objects to Whole Food's definitions and instructions to the extent that they purport to impose obligations on Trader Joe's not authorized by applicable laws, statutes and FTC rules.

3. Trader Joe's objects to each document request because they are overly broad and unduly burdensome, are not reasonably calculated to lead to the discovery of admissible evidence, or seek information not related to the claims or defenses of any party.

4. Trader Joe's objects to each document request to the extent it seeks access to information or documents that are protected from disclosure under any confidentiality obligation imposed by law, contract, or court order.

5. Trader Joe's objects to each document request to the extent it seeks information or documents that are a matter of public record, or otherwise accessible to all parties.

6. Trader Joe's objects to each document request to the extent it seeks information and documents that have already been produced to the FTC or Whole Foods.

7. Trader Joe's objects to each document request that calls for the production of confidential business materials the disclosure of which, either to the public or anyone within Whole Foods, would materially harm Trader Joe's. Trader Joe's is being asked again to bear the risk that its proprietary and confidential business information will be disclosed. It is unjust to place this burden on Non-Party Trader Joe's.

8. Trader Joe's objects to each document request on the grounds that it seeks to require Trader Joe's to produce documents in a location in Washington, D.C., in a manner contrary to the requirements of Rules 3.34 and 3.37.

9. Trader Joe's objects to each document request to the extent that it seeks documents that (i) were prepared for or in anticipation of litigation; (ii) constitute or contain material subject to the attorney-client privilege; (iii) constitute or contain privileged attorney

work product; (iv) are protected by the joint defense doctrine; or (v) are otherwise protected from disclosure.

10. Trader Joe's reserves the right to supplement its responses in accordance with applicable law.

11. Trader Joe's objects to the definitions of "you" and "your" as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence, and also objects to the definitions to the extent that they purport to require Trader Joe's to produce information or documents not in its custody or control. In responding and objecting to these document requests, Trader Joe's interprets "you" and "yours" to mean Trader Joe's.

SPECIFIC OBJECTIONS

REQUEST NO. 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 TO REQUEST NO. 1:

In addition to the general objections set forth above, Trader Joe's objects to this request as unduly burdensome since it is duplicative of information already produced by Trader Joe's to both the FTC and Whole Foods, or by the FTC to Whole Foods.

REQUEST NO. 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 TO REQUEST NO. 2:

In addition to the general objections set forth above, Trader Joe's objects to this request as unduly burdensome since it is duplicative of information requested by and provided to both Whole Foods and the FTC, or by the FTC to Whole Foods.

REQUEST NO. 3

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

RESPONSE TO REQUEST NO. 3:

In addition to the general objections set forth above, Trader Joe's objects to this request as unduly burdensome.

REQUEST NO. 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.

RESPONSE TO REQUEST NO. 4:

In addition to the general objections set forth above, Trader Joe's objects to this request as unduly burdensome.

REQUEST NO. 5

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

RESPONSE TO REQUEST NO. 5:

In addition to the general objections set forth above, Trader Joe's objects to this request as unduly burdensome since it is duplicative of information requested by and provided to both Whole Foods and the FTC, or by the FTC to Whole Foods. The definition of "Geographic Area" is overly broad and unduly burdensome to the extent that it exceeds the relevant markets the FTC

has defined in its complaint, and to the extent that it asks for documents and information for areas in which Trader Joe's has no operations.

REQUEST NO. 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 TO REQUEST NO. 6:

In addition to the general objections set forth above, Trader Joe's objects to this request as unduly burdensome since it is duplicative of information requested by and provided to both Whole Foods and the FTC, or by the FTC to Whole Foods. This request is also vague and ambiguous as the terms "natural" and "organic" are undefined.

REQUEST NO. 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.

RESPONSE TO REQUEST NO. 7:

In addition to the general objections set forth above, Trader Joe's objects to this request as unduly burdensome. This request is also vague and ambiguous as the terms "natural" and "organic" are undefined.

REQUEST NO. 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 TO REQUEST NO. 8:

In addition to the general objections set forth above, Trader Joe's objects to this request as unduly burdensome. This request is also vague and ambiguous as the terms "natural" and

“organic” are undefined.

REQUEST NO. 9

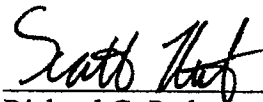
Provide documents sufficient to show, or in the alternative submit a spread sheet showing: (a) the store name and address of each of your stores separately in each Geographic Area; and (b) for each store provide the total weekly sales for each week since January 1, 2006 to the current date.

RESPONSE TO REQUEST NO. 9:

In addition to the general objections set forth above, Trader Joe’s objects to this request because the burden of producing its highly confidential weekly sales information is unlikely to outweigh its likely benefit, and it is not reasonably calculated to lead to the discovery of admissible evidence. In addition, the definition of “Geographic Area” is overly broad and unduly burdensome to the extent that it exceeds the relevant markets the FTC has defined in its complaint, and to the extent that it asks for documents and information for areas in which Trader Joe’s has no operations.

Notwithstanding and without waiving the above objections, Trader Joe’s will produce at a mutually agreed upon time and location average sales for all Trader Joe’s stores within each Geographic Area for the first half of 2006, 2007, and 2008.

Dated: October 24, 2008



Richard G. Parker
Scott Reiter
O’MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006-4001
Telephone: (202) 383-5300
Facsimile: (202) 383-5414

Attorneys for Non-Party T.A.C.T Holding Company

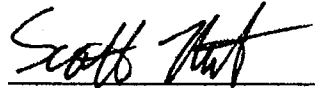
CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of October, 2008, I served the foregoing T.A.C.T. HOLDING COMPANY'S RESPONSES AND OBJECTIONS TO WHOLE FOODS MARKET, INC.'S SUBPOENA DUCES TECUM on the following counsel of record by first class mail, postage prepaid, and also by electronic mail.

James A. Fishkin, Esq.
DECHERT LLP
1775 I Street, NW
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james.fishkin@dechert.com

Matthew J. Reilly, Esq.
Catherine M. Moscatelli, Esq.
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Scott Reiter
O'Melveny & Myers LLP
1625 Eye Street, NW
Washington, DC 20006

Attorney for Non-Party
T.A.C.T. Holding Company

EXHIBIT 6

Davis, Evan

From: Fishkin, James
Sent: Wednesday, January 07, 2009 11:12 AM
To: Davis, Evan
Subject: FW: Trader Joe's Response to the Whole Foods Subpoena

From: Reiter, Scott L. [mailto:sreiter@omm.com]
Sent: Monday, December 22, 2008 9:37 AM
To: Fishkin, James
Subject: RE: Trader Joe's Response to the Whole Foods Subpoena

Jim,

Thank you for sending Judge Chappell's Decision and Order. You confirm in your below e-mail Whole Foods' understanding that Trader Joe's has consistently indicated a willingness to provide sales data in response to specification 9. However, it continues to remain unclear to Trader Joe's the relevance of receiving this competitive sales information on a weekly basis. I would appreciate your explaining why Whole Foods needs this competitive information on a weekly basis as opposed to in the six month intervals proposed by Trader Joe's.

Best,
Scott

Scott Reiter
O'Melveny & Myers LLP
1625 Eye Street, NW
Washington, DC 20006
phone: (202) 383-5266
sreiter@omm.com

This message and any attached documents contain information from the law firm of O'Melveny & Myers LLP that may be confidential and/or privileged. 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.

From: Fishkin, James [mailto:james.fishkin@dechert.com]
Sent: Wednesday, December 17, 2008 5:28 PM
To: Reiter, Scott L.
Subject: Trader Joe's Response to the Whole Foods Subpoena

<<Order 02.pdf>> <<Memo re New Seasons Motion to Quash.PDF>>

Scott,

I want to follow-up with you regarding our last call on Dec. 10th when we discussed Trader Joe's refusal to provide sales data in response to spec 9 as requested rather than your offer to group store sales together in 6 month intervals. During our call I advised you that there was a motion to quash by non-party New Seasons Market's pending before Administrative Law Judge Chappell. Because the subpoena to New Seasons was

identical to that served on Trader Joe's, I advised you that the ALJ's anticipated ruling would decide the issues raised in your objections. That motion has been decided, and your objections are now moot.

Attached for your review is ALJ Chappell's Decision and Order dated December 16, 2008. I have also attached the FTC's memorandum in support of our response to New Seasons motion to quash that was also filed on December 16, 2008. Footnote 1 of the FTC memorandum also references Gelson's motion to quash.

In his decision, ALJ Chappell ruled that the requests are not unduly burdensome; are not anticompetitive; that the Protective Order provides adequate protection; and that the requested information is "relevant to one of the central antitrust issues in this proceeding – the appropriate definition of the relevant market." See December 16, 2008 Order.

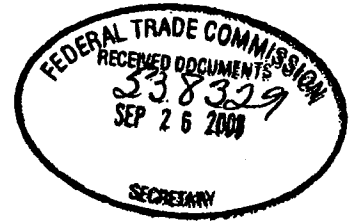
In light of this ruling, there is no good faith basis for Trader Joe's to maintain its objections to the subpoena, including its objection to Request 9(b), which you have represented to be the only request for which Trader's Joe's possesses responsive documents. We therefore request that you withdraw your objections immediately.

Please let us know by December 18, 2008 whether you will withdraw your objections. Given the tight discovery schedule we are operating under, time is of the essence.

Jim

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EXHIBIT 7



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

In the Matter of)

WHOLE FOODS MARKET, INC.,)
a corporation.)

Docket No. 9324

PUBLIC

**RESPONDENT WHOLE FOODS MARKET, INC.'S
ANSWER TO THE AMENDED COMPLAINT**

Pursuant to 16 C.F.R. § 3.12, Respondent Whole Foods Market, Inc. ("Whole Foods") hereby answers the Federal Trade Commission's September 8, 2008, Amended Complaint as follows:

RESPONSES TO THE FTC'S ALLEGATIONS

Introduction: Whole Foods admits that the language quoted in the Introduction appeared in an e-mail sent to the Board of Directors, but denies all remaining allegations in the Introduction, except to the extent the Introduction contains legal conclusions to which no response is required.

1. Whole Foods admits the allegations in Paragraph 1.
2. Whole Foods admits the allegations in Paragraph 2.
3. Whole Foods denies the allegations in Paragraph 3.
4. Whole Foods admits that Mr. Mackey made the statements quoted in Paragraph 4.
5. Whole Foods admits the allegations in Paragraph 5, except to the extent that Paragraph 5 contains legal conclusions to which no response is required.

6. Whole Foods admits the allegations in Paragraph 6.
7. Whole Foods admits that it is in the process of operating certain former Wild Oats Markets, Inc. ("Wild Oats") stores as Whole Foods stores but denies the remainder of the allegations in Paragraph 7.
8. Whole Foods admits the allegations in Paragraph 8.
9. Whole Foods lacks knowledge or information sufficient to admit or deny any allegations in Paragraph 9, except to the extent this Paragraph contains legal conclusions to which no response is required.
10. Whole Foods admits that on June 7, 2007, United States District Court Judge Paul L. Friedman of the United States District Court for the District of Columbia issued a consent Order granting the Commission's motion for a temporary restraining Order. Whole Foods admits that on August 16, 2007, Judge Friedman issued an order that denied the Commission's request for a preliminary injunction and, on August 23, 2007, the United States Court of Appeals for the District of Columbia Circuit issued an order that denied the Commission's emergency motion for an injunction pending appeal. Whole Foods admits that it consummated the acquisition of Wild Oats on August 28, 2007. Whole Foods admits that on July 29, 2008, the United States Court of Appeals for the District of Columbia Circuit issued three opinions and its judgment, which speak for themselves. Whole Foods denies the remainder of the allegations in Paragraph 10, except to the extent this Paragraph contains legal conclusions to which no response is required.

11. Whole Foods denies the allegations in Paragraph 11 to the extent that Paragraph 11 purports to define an industry standard term for “natural foods.”
12. Whole Foods denies the allegations in Paragraph 12 to the extent that Paragraph 12 purports to define the term “organic foods” in any way other than foods that meet the requirements of the United States Department of Agriculture’s Organic Food Production Act of 1990.
13. Paragraph 13 contains legal conclusions to which no response is required.
14. Whole Foods denies the allegations in Paragraph 14.
15. Whole Foods admits that the statements quoted in Paragraph 15 were made, but denies the remainder of the allegations in that Paragraph.
16. Whole Foods admits that the statements quoted in Paragraph 16 were made, but denies the remainder of the allegations in that Paragraph.
17. Whole Foods admits that the statement quoted in Paragraph 17 was made, but denies the remaining allegations in that Paragraph.
18. Whole Foods denies the allegations in Paragraph 18.
19. Whole Foods denies the allegations in Paragraph 19.
20. Whole Foods denies the allegations in Paragraph 20.
21. Whole Foods admits that the statements quoted in Paragraph 21 were made, but denies the remainder of the allegations in that Paragraph.
22. Whole Foods admits that the statements quoted in Paragraph 22 were made, but denies the remainder of the allegations in that Paragraph.

23. Whole Foods admits that the statement quoted in Paragraph 23 was made, but denies the remaining allegations in that Paragraph.
24. Whole Foods admits that the statements quoted in Paragraph 24 were made, but denies the remainder of the allegations in that Paragraph.
25. Whole Foods admits that the statements quoted in Paragraph 25 were made, but denies the remainder of the allegations in that Paragraph.
26. Whole Foods denies the allegations in Paragraph 26.
27. Whole Foods denies the allegations in Paragraph 27.
28. Whole Foods denies the allegations in Paragraph 28.
29. Whole Foods admits the allegations in the first sentence of Paragraph 29. Whole Foods admits that approximately 70% of its sales in fiscal 2006 were from perishable products, but denies this allegation with respect to Wild Oats.
30. Whole Foods denies the allegations in Paragraph 30.
31. Whole Foods denies the allegations in Paragraph 31.
32. Whole Foods admits the allegations in the first sentence of Paragraph 32. Whole Foods denies the remainder of the allegations in Paragraph 32.
33. Whole Foods admits that Mr. Mackey made the statements quoted in Paragraph 33, but denies all remaining allegations in Paragraph 33.
34. Whole Foods denies the allegations in Paragraph 34.
35. Whole Foods denies the allegations in Paragraph 35, except to the extent this Paragraph contains legal conclusions to which no response is required.

36. Whole Foods denies the allegations in Paragraph 36, except to the extent this Paragraph contains legal conclusions to which no response is required.
37. Whole Foods denies the allegations in Paragraph 37.
38. Whole Foods denies the allegations in Paragraph 38.
39. Whole Foods denies the allegations in Paragraph 39, including each of its subparts, except to the extent that Paragraph 39, including any subparts, contains legal conclusions to which no response is required.
40. Whole Foods denies, admits, and responds to Paragraph 40 of the Amended Complaint, as set forth in the preceding paragraphs of this Answer.
41. Paragraph 41 contains legal conclusions to which no response is required.
42. Whole Foods denies, admits, and responds to Paragraph 42 of the Amended Complaint, as set forth in the preceding paragraphs of this Answer.
43. Paragraph 43 contains legal conclusions to which no response is required.

DEFENSES

The inclusion of any ground within this section does not constitute an admission that Whole Foods bears the burden of proof on each or any of the matters, nor does it excuse Complaint Counsel from establishing each element of its purported claim for relief.

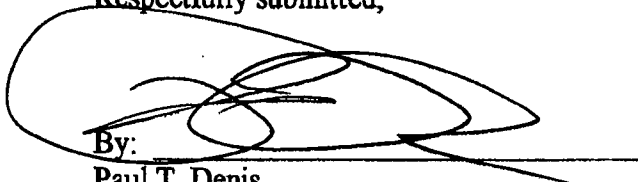
1. The Amended Complaint fails to state a claim upon which relief can be granted.
2. Granting the relief sought is contrary to the public interest.
3. Efficiencies and other pro-competitive benefits resulting from the merger outweigh any and all proffered anticompetitive effects.

4. Whole Foods reserves the right to assert any other defenses as they become known to Whole Foods.

WHEREFORE, Respondent Whole Foods respectfully requests that the Commission (i) deny the contemplated relief, (ii) dismiss the Amended Complaint in its entirety with prejudice, (iii) award Whole Foods their costs of the suit, including attorneys' fees, and (iv) award such other and further relief as the Commission may deem proper.

Dated: September 26, 2008

Respectfully submitted,



By:

Of Counsel:

Roberta Lang
Vice-President of Legal Affairs
and General Counsel
Whole Foods Market, Inc.
550 Bowie Street
Austin, TX 78703

Paul T. Denis
Paul H. Friedman
Jeffrey W. Brennan
James A. Fishkin
Michael D. Farber
DECHERT LLP
1775 I Street, N.W.
Washington, DC 20006-2401
Telephone: (202) 261-3300
Facsimile: (202) 261-3333

Attorneys for Whole Foods Market, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Respondent Whole Foods Market, Inc.'s Answer to the Amended Complaint was served on September 26, 2008, upon the following persons:

By Hand Delivery and Email:

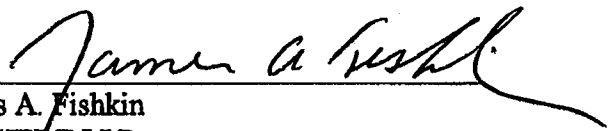
Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW
Room H-172
Washington, D.C. 20580

By Hand Delivery and 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

By: 
James A. Fishkin
DECHERT LLP
1775 I Street, N.W.
Washington, D.C. 20006-2401
Telephone: (202) 261-3300
Facsimile: (202) 261-3333

Attorneys for Whole Foods Market, Inc.

EXHIBIT 8

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BEFORE THE UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

Docket No. 9324
PUBLIC
**NEW SEASONS MARKET'S MOTION
TO QUASH OR LIMIT SUBPOENA
FROM WHOLE FOODS MARKET,
INC.**
Oral Argument Requested

Pursuant to 16 C.F.R. § 3.34(c), New Seasons Market, Inc. ("New Seasons") hereby moves to quash or limit the subpoena issued to it by Whole Foods Market, Inc. for the reasons set forth below.¹

I. INTRODUCTION

The Federal Trade Commission ("FTC") has brought an administrative adjudicative proceeding against Whole Foods Market, Inc. ("Whole Foods") to challenge the lawfulness of Whole Foods' acquisition of Wild Oats Markets, Inc. ("Wild Oats"). In connection with that proceeding, Whole Foods issued a subpoena to New Seasons by mail on or

¹ A copy of the subpoena is attached hereto as Exhibit 1.

1 about October 14, 2008. Although the subpoena demands a response by November 4, 2008,
2 Whole Foods has granted extensions of the time to respond to December 2, 2008 and of the time
3 to file a motion to quash or limit until November 24, 2008. As a precautionary measure, on
4 October 24, 2008, New Seasons filed with the FTC an unopposed motion for an extension of the
5 time to file the present motion to quash and filed on November 7, 2008 an amended unopposed
6 motion. That motion remains pending.

7 The subpoena requests nine categories of documents. The first two requests seek
8 documents relating to communications with the FTC and documents previously produced to the
9 FTC.² This motion addresses the third through ninth requests, which seek New Seasons' trade
10 secrets and other highly confidential information. New Seasons is Whole Food's top competitor
11 in Portland, Oregon. If New Seasons were required to produce the information Whole Foods
12 seeks, it would provide Whole Foods with a blueprint to New Seasons' success and the means
13 for Whole Foods to engage in anti-competitive conduct against one of its primary competitors in
14 the Portland, Oregon market. The subpoena should be quashed as to requests three through nine
15 because those requests: (1) are unduly burdensome; (2) are themselves anti-competitive; and (3)
16 seek trade secret and other confidential, commercially sensitive information without an adequate
17 protective order.

18 II. ARGUMENT

19 A. **Requests Three, Four, Seven and Eight should be quashed because they are** 20 **unduly burdensome.**

21 The third, fourth, seventh and eighth requests in the subpoena should be quashed
22 or limited because they are unduly burdensome, particularly when considering that New
23 Seasons' sole involvement in the present proceeding is as a non-party. *See Echostar Comm.*

24 ² In April 2007, the FTC issued a Civil Investigative Demand to New Seasons in connection with
25 the FTC's pre-merger investigation of Whole Foods' proposed acquisition of Wild Oats and in
26 June 2007 the FTC issued a subpoena to New Seasons in connection with the case the FTC filed
against Whole Foods seeking injunctive relief.

1 *Corp. v. News Corp.*, 180 F.R.D. 391, 394 (D. Colo. 1998) (non-party status is “a factor which
2 weighs against disclosure”). Each of these requests seeks “all documents” relating to a generally
3 described category of documents from January 1, 2006 to the present:

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

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

9 * * *

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

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

15 Whole Foods’ counsel has stated that Whole Foods is willing to limit these requests for “all
16 documents” to “all documents” generated by “high level” New Seasons’ employees. While this
17 restriction somewhat narrows the number of documents that might be responsive, it does not
18 materially alter the burden associated with producing them. New Seasons still must wade
19 through all of its documents from a nearly three-year period to identify whether any documents
20 “relate” to the merger, or “discuss” competition, or “relate” to plans for expansion.

21 Likewise, counsel’s proposed “high level” restriction for ultimate production does
22 not materially reduce the burden. These requests require New Seasons to search the documents
23 of its merchandisers, buyers, store managers, and department managers to determine whether
24 there are responsive documents. New Seasons’ management team comprises over 300
25 employees. Because of the way New Seasons is structured, it is difficult to determine how to
26 draw the line regarding who is a “high level” employee. For example, an assistant department

1 manager responsible for buying meat may need to communicate with an assistant store manager
2 and a merchandising manager about daily or weekly stocking decisions affected by Whole
3 Foods' competition. The subpoena demands production of such communications. Accordingly,
4 New Seasons still must search through all of its emails to determine whether the sender or
5 recipient was "high level" and whether the email is responsive. To search, process, review and
6 produce responsive documents from more than 300 employees, each with their own New
7 Seasons email account, would cost New Seasons between \$250,000-500,000 based on the
8 estimate it has received.

9 Moreover, because the largest portion of New Seasons' sales are in the natural
10 and organic product category, requests seven and eight necessarily cover all documents relating
11 to nearly all New Seasons plans relating to shelf space, expansion, renovation, or increased sales.
12 As written, requests seven and eight would include any document created in the last three years
13 having anything to do with any merchandising plans. Diverting the resources necessary to
14 accomplish this search and review would significantly disrupt and hinder New Seasons normal
15 business operations, particularly as New Seasons heads into the critical holiday season. Rohter
16 Declaration ¶ 4. *See F. T. C. v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) (investigative
17 subpoenas that "unduly disrupt or seriously hinder normal operations of a business" may be
18 unduly burdensome or unreasonably broad); *Fed. Trade Comm'n v. Invention Submission Corp.*,
19 965 F.2d 1086, 1090 (reasonable conditions and restrictions on production in response to a civil
20 investigative demand are appropriate if the demand is unduly burdensome). The fact that New
21 Seasons is not a party to this litigation but is merely caught in the crossfire heightens the
22 impropriety of this burdensome subpoena. *See Katz v. Batavia Marine & Sporting Supplies,*
23 *Inc.*, 984 F.2d 422, 424 (Fed. Cir. 1993) ("[T]he fact of nonparty status may be considered by the
24 court in weighing the burdens imposed in the circumstances.").

25 Further, the burden to New Seasons of responding to Whole Foods' subpoena
26 must be weighed against the fact that the subpoena to New Seasons is peripheral to and only a

1 very small part of the dispute between Whole Foods and the FTC. New Seasons is owned and
2 operated locally in Portland, Oregon, and has no stores outside of this local market. It is only
3 one of several grocery chains in the Portland market. Any information New Seasons could
4 provide will have no impact on the multitude of other geographic areas involved in this
5 proceeding.

6 Despite the relative insignificance of New Seasons' information, Whole Foods'
7 subpoena asks New Seasons to search through nearly three years of emails and other documents
8 to identify a broad range of documents that include virtually all of New Seasons' plans for
9 expansion of its physical space as well as all plans to increase "the sales of natural or organic
10 products in [its] stores." Particularly given that New Seasons is not the subject of the FTC's
11 complaint (and leaving aside the absolute need to protect the confidentiality of the information),
12 requests three, four, seven and eight should be quashed or limited as unduly burdensome.

13 **B. The subpoena should be quashed or limited because the subpoena itself is**
14 **anti-competitive.**

15 Requests three through nine of the subpoena should be quashed because they are
16 themselves inherently anti-competitive. Those requests ask New Seasons to provide its most
17 confidential and commercially sensitive information to Whole Foods. Indeed, the subpoena asks
18 that New Seasons give to one of its primary competitors detailed information regarding the
19 lifeblood of New Seasons' business, including three years' worth of weekly sales information, its
20 strategic plans, and all documents relating to its plans to increase sales. In essence, Whole Foods
21 asks for the blueprint to New Seasons' success. New Seasons is a private company. It is not
22 required to release this information to anyone outside of the company. New Seasons diligently
23 protects this information, and does not disclose this information to anyone outside of the
24 company. Rohter Decl. ¶ 6. The competitive harm from disclosure of this information to Whole
25 Foods or the public is obvious. This information lies at the very core of New Seasons' business

26

1 and drives its competitive decision-making. This information – and its secrecy – is critical to
2 New Seasons’ existence and continued success.

3 Yet the subpoena would require New Seasons to turn this critical information over
4 to one of its primary competitors – a competitor accused of anti-competitive conduct and which
5 has a history of taking a predatory approach toward its competition.³ Whole Foods has an
6 admitted history of “systematically and relentlessly taking [a competitor’s] business away from
7 them one market after another.” See *FTC v. Whole Foods Market, Inc.*, Case No. 07-cv-01021-
8 PLF (D.D.C. Aug. 23, 2007) (“*Whole Foods Case*”), Public Version of the Expert Report of
9 Kevin M. Murphy, Ph.D, ¶ 36 (quoting Whole Food’s CEO John Mackey summarizing the
10 Whole Foods strategy in February 2005). Whole Foods does not simply want to compete with
11 other supermarkets – its model has long been premised on the elimination of its competitors. In
12 1998, “Jim Sud [an officer] of Whole Foods noted the importance of the ‘elimination of a
13 competitor in the marketplace, competition for sites, competition for acquisitions, and
14 operational economies of scale. We become the Microsoft of the natural foods industry.”
15 Plaintiff Federal Trade Commission’s Proposed Findings of Fact (Public Version), ¶ 582. With
16 the trade secret information Whole Foods seeks from New Seasons, Whole Foods could
17 eliminate New Seasons as a competitor.

18 Indeed, Mr. Mackey declared that “Wild Oats needs to be removed from the
19 playing field[.]” Plaintiff Federal Trade Commission’s Proposed Findings of Fact (Public
20 Version), ¶ 38. According to Mr. Mackey, Whole Foods went about “systematically destroying
21 [Wild Oats’] viability as a business – market by market, city by city.” *Whole Foods Case*, Part 1
22 of Plaintiff’s Public Version of Its Corrected Brief on Its Motion for Preliminary Injunction, p. 6.
23 As Whole Foods’ Regional President Will Paradise succinctly stated: “[m]y goal is simply – I

24 _____
25 ³ New Seasons recognizes that the protective order in this case limits disclosure of confidential
26 information to Whole Foods’ outside counsel, experts, consultants, and the like. The
shortcomings of the protective order are discussed in Section II.C below.

1 want to crush [Wild Oats] and am willing to spend a lot of money in the process.” *Id.* at 25
2 (alteration in original). To that end, Mr. Mackey said: “I believe that Whole Foods will continue
3 to aggressively enter their markets and will pressure and harass them at every opportunity.”
4 Plaintiff Federal Trade Commission’s Proposed Findings of Fact (Public Version), ¶ 585. Whole
5 Foods’ approach is to “really punish” their competitors “and make a statement about any
6 competition that thinks about competing with” Whole Foods. *Whole Foods Case*, Public
7 Version of the Supplemental Rebuttal Expert Report of Kevin M. Murphy, Ph.D, ¶ 2.

8 Whole Foods’ approach of “pressuring,” “harassing,” and “punishing”
9 competitors is not limited to Wild Oats. Earth Fare, a regional, thirteen-store natural and organic
10 food chain in the Southeast is perhaps most similarly situated to New Seasons. As Whole Foods’
11 chief operating officer A.C. Gallo reported to the Whole Foods Board of Directors:

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

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

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

24 We are crushing [Earth Fare].... Our opening in [redacted in
25 original] dropped their store from about [redacted in original]. We
26 cannot see how this company is viable going forward, and I expect
the investors are going to take some drastic action soon.

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

29 Whole Foods has approximately 270 stores. New Seasons has nine. New
30 Seasons has no reason to believe that Whole Foods would not relish the opportunity to do to
31 New Seasons what it did to Wild Oats and what it does its other competitors such as Earth Fare,

1 and Whole Foods has the size and resources to do it with the assistance of New Seasons' trade
2 secrets and other commercially sensitive information. Further, as a non-party to the dispute
3 between Whole Foods and the FTC, New Seasons is "particularly vulnerable." *Mycogen Plant*
4 *Science, Inc. v. Monsanto Co.*, 164 F.R.D. 623, 628 (E.D. Pa. 1996). "[T]he 'fact of non-party
5 status' is a 'significant factor' in the decision to require disclosure of trade secrets." *Id.* (quoting
6 *Katz, supra*, 984 F.2d at 424). Courts therefore have "a special responsibility to alleviate the risk
7 that the subpoenas present" because "courts should be concerned that litigation tactics not be
8 adopted with a view to improve a client's competitive position." *Id.* (internal quotation omitted).
9 That is particularly true where the requesting party, as here, openly engages in what is admittedly
10 aggressive, punitive competitive tactics which, depending on the outcome of this proceeding,
11 may in fact be unlawful.

12 The subpoena, even if arguably relevant to the FTC proceedings, is itself anti-
13 competitive. Whole Foods should not be allowed to obtain New Seasons' private, confidential,
14 highly sensitive information for any purpose.

15 **C. The subpoena should be quashed or limited because it asks New Seasons to**
16 **give its confidential, commercially sensitive information to a competitor**
17 **accused of anti-competitive conduct without providing an adequate**
18 **protective order.**

18 Finally, the subpoena should be quashed as to requests three through nine because
19 those requests seek New Seasons' confidential and commercially sensitive information without
20 adequate protection against disclosure or adequate remedies if the information is disclosed. As
21 noted above, although New Seasons is a non-party to this matter, the subpoena nonetheless seeks
22 some of New Seasons' most proprietary and commercially sensitive information. If the
23 information became public, or if it were disclosed to Whole Foods' competitive decision-makers,
24 New Seasons would be irreparably damaged. Following the Whole Foods merger with Wild
25 Oats, New Seasons is the only other large scale grocery chain in Portland, Oregon that focuses
26 on natural and organic products. The protective order presently in place in this case does not

1 adequately protect New Seasons' confidential information, and certainly fails to provide any
2 remedy to New Seasons if the protective order is violated.

3 First, a protective order is an inherently insufficient protection, particularly when
4 the confidential information of a non-party is involved. "There is a constant danger inherent in
5 disclosure of confidential information pursuant to a protective order. Therefore, the party
6 requesting disclosure must make a strong showing of need, especially when confidential
7 information from a non-party is sought." *Litton Indus., Inc. v. Chesapeake & Ohio Railway Co.*,
8 129 F.R.D. 528, 531 (E.D. Wis. 1990). This is particularly true where, as here, the protective
9 order allows outside experts and consultants to access the non-party's confidential information.
10 As the court in *Litton* warned:

11 Finally, this court is not sanguine that a protective order could be
12 constructed to sufficiently maintain the confidential nature of this
13 information. The information would, of course, have to be
14 disclosed to Litton's experts. Like all experts, these individuals,
15 often professors, are regularly called upon for assistance. This is
16 one of the things that makes them "experts." But once an expert
17 has digested this confidential information, it is unlikely that the
18 expert will forget. The expert's *raison d'être* is to assimilate
19 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 stern 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?

20 *Id.* If New Seasons is compelled to disclose its trade secrets, notwithstanding any protective
21 order and the good faith efforts of the recipients, those trade secrets as a practical matter are no
22 longer under New Seasons' control and become available, whether specifically or in general
23 terms, to its competitors. The experts in this case will have New Seasons' confidential
24 information. They cannot unlearn it. Other competitors may hire those experts. Whole Foods
25 has not demonstrated and cannot demonstrate any need for New Seasons' confidential
26 information sufficient to overcome New Seasons' right, particularly as a private company, to

1 maintain the privacy of its trade secrets and other confidential information. *See id.* at 530 (“It is
2 incumbent upon [the requesting party] to show that its needs outweigh the burden and invasion
3 of corporate privacy that would result to ... a non-party to this action.”) (internal quotation
4 omitted).

5 Second, the protective order does not adequately protect New Seasons’
6 information. If either Whole Foods or the FTC chooses to introduce New Seasons’ confidential
7 information into evidence at the hearing in this matter, the protective order improperly places the
8 burden on New Seasons to protect its confidential information. The protective order requires
9 only that Whole Foods or the FTC provide notice to New Seasons of their intent to introduce
10 New Seasons’ confidential information into evidence. Protective Order, ¶ 10. The protective
11 order then places the burden on New Seasons to file a motion with the Administrative Law Judge
12 to show why the confidential information it was compelled to produce should not be made
13 public, and provides New Seasons only five days to do so. *Id.* If the Administrative Law Judge
14 denies that motion, New Seasons’ confidential information will be made public, even though
15 New Seasons considers it to be confidential and even though New Seasons is a private company
16 with no obligation to report its sales, market share, or other confidential information to anyone.
17 There should be an absolute requirement that New Seasons’ confidential information be kept
18 confidential, or at the very least that Whole Foods and the FTC have the burden of showing why
19 New Seasons’ confidential information should be made public, not the other way around.
20 Further, the five-day time period is insufficient to provide New Seasons with a fair opportunity
21 to protect its confidential information. The protective order should provide a period substantially
22 longer than five days for New Seasons to intervene to protect its confidential information from
23 public disclosure, and Whole Foods, as the party seeking New Seasons’ information, should be
24 required to pay New Seasons’ costs, including attorney fees, associated with any instance in
25 which New Seasons is required to intervene under the protective order.

26

1 Third, and most fundamentally, the protective order fails to provide an adequate
2 disincentive against or remedy for disclosure of New Seasons' confidential information. New
3 Seasons recognizes that, by its terms, the protective order does not permit the disclosure of
4 confidential information to anyone within Whole Foods (i.e. only to outside counsel and hired
5 experts). Protective Order, ¶ 7. New Seasons does not impute to Whole Foods' counsel any
6 intent to violate the protective order. But the scope of Whole Foods' role as outside counsel is
7 unknown. New Seasons does not know whether outside counsel in this matter provides ongoing
8 counseling to Whole Foods with respect to competitive decision-making. If that is the case, then
9 providing New Seasons' most sensitive information to Whole Foods' outside counsel is not
10 materially different than providing that information to Whole Foods itself. In any event, any
11 disclosure of New Seasons' information, whether directly to Whole Foods or indirectly through
12 public disclosure, would cause New Seasons irreparable competitive harm. Yet the protective
13 order relies meagerly on the bare prohibition against disclosure. That is not enough.

14 The United States District Court for the District of Columbia agrees. In the
15 injunction proceeding in this matter, the District Court recognized the importance of a significant
16 hammer hanging over the heads of the parties and their lawyers "as an added incentive against
17 inadvertent misuse of any confidential information[.]" *Whole Foods Case*, July 6, 2007
18 Memorandum Opinion and Order, p. 5. Accordingly, "[i]n an abundance of caution," the court
19 required the following penalty provision:

20 Any violation of this Order will be deemed a contempt and
21 punished by a fine of \$250,000. This fine will be paid individually
22 by the person who violates this Order. Any violator may not seek
23 to be reimbursed or indemnified for the payment the violator has
24 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.

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

1 While New Seasons has no reason to doubt the professionalism or ethics of the lawyers involved
2 in this proceeding, there can be no doubt that, as a practical matter, those in possession of New
3 Seasons' confidential information would take greater measures to protect that information if
4 faced with a substantial personal fine like that set forth in the district court's protective order.⁴
5 The lack of any penalty provision in the protective order renders it inadequate, and New Seasons
6 should not be required to produce its confidential information without an adequate protective
7 order.

8 Further, the FTC will also receive all materials produced in response to Whole
9 Foods' subpoena. Notwithstanding the limitations imposed on Whole Foods, the protective
10 order has a gaping hole with respect to the FTC. The protective order provides that the FTC is to
11 use the information only for purposes of the present proceeding, except that the FTC "may use or
12 disclose confidential material as provided by its Rules of Practice; Sections 6(f) and 21 of the
13 Federal Trade Commission Act; or any other legal obligation imposed upon the Commission."
14 Protective Order, ¶ 8. In other words, the protective order provides New Seasons with no
15 protection whatsoever with respect to what the FTC does with New Seasons' confidential
16 information outside the confines of this proceeding.

17 For that, New Seasons apparently must rely on statutory and regulatory
18 prohibitions against the release of its confidential information. There is no question that the FTC
19 has a statutory and regulatory obligation to maintain the confidentiality of New Seasons'
20 financial information. The problem is that, notwithstanding the prohibitions against disclosure,
21 New Seasons has no remedy if the FTC destroys New Seasons' business by disclosing its
22 confidential information. Without a penalty provision of the nature described above, or the

23
24

25 ⁴ New Seasons would request the additional modification that any such fine be payable to New Seasons if
26 its information were disclosed.

1 FTC's agreement to make New Seasons whole in the event of disclosure, New Seasons has
2 absolutely no protection against the FTC's inadvertent disclosure.⁵

3 Moreover, the possibility of improper FTC disclosures is real.

4 Evidence introduced in the district court demonstrated that in the
5 past the Commission has made inappropriate disclosures, and the
6 trial judge noted a number of instances where informal
7 arrangements for confidential treatment of proprietary information
8 were not strictly honored. He described the disclosures in one case
9 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.

10 *Wearly v. F.T.C.*, 616 F.2d 662, 664 (3rd Cir. 1980) (internal quotations and citations omitted).

11 In a recent case in which there was both a protective order and the statutory protections in place,
12 the FTC posted on its website exhibits to a filing that it did not intend to make public. *See In the*
13 *Matter of Basic Research, L.L.C. et al.*, Fed. Trade Comm'n Docket No. 9318. Although the
14 FTC disputed, after the disclosure, whether the designation of the documents at issue as
15 "confidential" and "restricted confidential, attorney eyes only" was proper, there is no question
16 that the FTC negligently made those confidential materials available to the public via its website.
17 There is also no question that, despite its error, which the respondents asserted resulted in the
18 public disclosure of its trade secret and confidential financial information, the FTC offered no
19 remedy other than its "deep regret."

20 Indeed, the FTC has already publicly disclosed confidential information in this
21 very matter. The FTC publicly filed a document that it had "redacted" through by blackening
22 out text electronically. However, that text – which contained trade secret information – remained
23 in the document, and could be easily copied, pasted, viewed, and published, which the

24 _____
25 ⁵ New Seasons has no reason to believe that the FTC will intentionally disclose New Seasons'
26 confidential information in violation of statutory prohibitions or the protective order, and makes
no such assertion here.

1 Associated Press did. The information then was widely disseminated, as a direct result of the
2 FTC's carelessness and apparent failure to take seriously the protection of the confidential
3 information. New Seasons' concern about inadvertent disclosure is not exaggerated or
4 unfounded. The likelihood of disclosure is real. New Seasons should not be required to provide
5 the detailed, confidential information the subpoena demands without a protective order that
6 prohibits the FTC from disclosing information New Seasons considers to be confidential and
7 requires the disclosing party to make New Seasons financially whole if there is a breach of the
8 protective order.

9 **III. CONCLUSION**

10 For the foregoing reasons, New Seasons' motion should be granted and the
11 subpoena should be quashed or limited as to requests three through nine.

12 DATED this 21 day of November, 2008.

13 Respectfully submitted,

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