UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

WHOLE FOODS MARKET, INC.'S RESPONSE IN OPPOSITION TO GELSON'S MARKETS' MOTION FOR PROTECTIVE ORDER OR IN THE ALTERNATIVE TO QUASH OR LIMIT SUBPOENA FROM WHOLE FOODS MARKET, INC.

PRELIMINARY STATEMENT

The motion filed by Gelson's Markets ("Gelson's") is based on identical reasoning to that contained in a motion to quash an identical subpoena filed several weeks ago by third party New Seasons Markets, Inc. ("New Seasons"). On December 16, 2008, the Administrative Law Judge ("ALJ") issued an Order overruling New Seasons' objections and denying its motion to quash. See Ex. 1, December 16, 2008 Order on New Seasons' Motion. Specifically, the ALJ found 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.

Id. at 7. This Order specifically rejected the argument that Gelson's now makes that the Protective Order in this matter is insufficient to protect its confidential documents. Accordingly, counsel for Whole Foods Market, Inc. ("Whole Foods") contacted counsel for Gelson's on December 16, 2008 and forwarded him a copy of the ALJ's Order. See Ex. 2, Fishkin Decl. ¶ 10.

Counsel for Whole Foods asked counsel for Gelson's, in light of the ALJ's ruling, to withdraw Gelson's current motion. Id. at ¶ 11. Regrettably, counsel for Gelson's refused to do so. Id. Whole Foods therefore files this memorandum to once again address the already discredited arguments raised by Gelson's.

INTRODUCTION

The motion by Gelson's rests mainly upon the unsupported and dubious premise that neither the Federal Trade Commission ("FTC" or "Commission") nor litigation counsel for Whole Foods can be ***trusted*** to abide by the Commission's protective order. Certainly, if Gelson's argument is deemed sufficient, ***any*** other subpoenaed non-party in this or ***any*** Commission action seeking to resist a subpoena would need only to assert that they "fear" that counsel for the party issuing the subpoena will not abide by the protective order.[1] The outside counsel's eyes only protective order issued by the Commission is sufficient to protect all party and non-party confidential documents, including Gelson's, and the motion to quash should be denied.

The dispute on this motion involves only two Gelson's documents, both responsive to the document subpoena served by Whole Foods. The documents -- a 2007 real estate site study that reflects Gelson's consideration of Whole Foods (responsive to Request no. 5), and a document reflecting Gelson's weekly sales since 2006 (responsive to Request no. 9(b)) -- are highly relevant to the critical issue of relevant antitrust market in this proceeding. Gelson's, which in its motion describes itself a "competitor" of Whole Foods, does not claim that there would be an undue (or any) burden to produce them. Rather, it claims that it should be permitted to withhold the documents because the protective order issued by the Commission is not strong enough.

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[1] Whole Foods has served 92 identical subpoenas on other non-party grocery

Under that order, in addition to the ALJ and the Commission itself, only outside counsel for Whole Foods and its experts may have access to documents designated as confidential under the order. Ex. 3, October 10, 2008 Protective Order. ***No*** Whole Foods employee, even its in-house counsel, can have ***any*** access to Gelson's confidential information under the existing protective order.[2] Like New Seasons, Gelson's calls into question both counsel for Whole Foods and the Commission's ability to keep confidential information entrusted to it by third parties. Like New Seasons, Gelson's "support" for this argument consists of irrelevant and discredited smears against Whole Foods, and pointing to an instance where an FTC lawyer ***accidentally*** failed to properly redact material in a Whole Foods document submitted in an August 2007 filing. If accepted, Gelson's argument could undermine the Commission's ability to obtain third party information in future investigations and litigations, and prevent respondents like Whole Foods from defending themselves.

Indeed, the documents sought by Whole Foods from Gelson's are critical to its defense against the complaint brought by the FTC. In order to properly defend itself, Whole Foods needs to be able to show that it competes with a variety of other non parties such as Gelson's (which concedes that Whole Foods is its competition). See Oct. 14, 2008 Subpoena Duces Tecum (Ex. 1 to Gelson's Market's Motion To Quash ("Gelson's Br.")). The documents that Gelson's refuses to produce go directly to this question. For example, the weekly sales data would reflect how the opening or closing of a Whole Foods or Wild Oats store impacted Gelson's sales.

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establishments. Of these, approximately 60 recipients have thus far fully or partially complied.

2 See, e.g., Westbrook v. Charlie Sciara & Son Produce, Co., Civ. A. No. 07-2657, 2008 U.S. Dist. LEXIS 24649, at *11 (W.D. Tenn. Mar. 27, 2008) ("In general, courts utilize 'attorneys eyes only' protective orders when especially sensitive information is at issue or the information is to be provided to a competitor.").

Gelson's unsupported attacks on Whole Foods' alleged "anticompetitive conduct" have no bearing on this discovery motion. Whole Foods has no other effective means than the subpoena process to obtain from its non-party competitors necessary information to its defense. As discussed more fully below, Gelson's has failed to carry its substantial burden on this motion, and the motion should be denied.

FACTUAL BACKGROUND

Gelson's operates eighteen grocery markets in the Southern California area and describes Whole Foods as "one of its primary competitors." Gelson's Br. at 6. Whole Foods served a document subpoena on Gelson's, containing nine requests for documents that are identical to the requests served on the other 92 non-party competitor recipients. See Oct. 14, 2008 Subpoena Duces Tecum (Ex. 1 to Gelson's Br.).[3] Only two of those requests are at issue here. Gelson's maintains that it possesses documents responsive only to request 5 (seeking documents discussing Gelson's competition with other companies besides Whole Foods and Wild Oats) and 9(b) (seeking the identification of Gelson's total weekly store sales since January 1, 2006).[4] Id.

The return date on the subpoena was November 5, 2008, but Whole Foods granted Gelson's an extension to November 19, 2008. Id. at 2. Gelson's did not move to quash by November 19, 2008, but rather responded by letter that it was withholding documents responsive to Requests 5 and 9(b), and had no other responsive documents. See Nov. 19, 2008 letter (Ex. 3 to Gelson's Br.). Specifically, Gelson's stated that it was refusing to produce a "November 2007

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[3] Whole Foods' December 4, 2008 response to a similar motion to quash filed by New Seasons Markets, Inc. sets forth the nine document requests contained in the subpoena. See Whole Foods' Response at 4-5.

[4] Instead of producing documents, this ninth request alternatively allowed Gelson's to produce a spreadsheet. Id. at Request 9.

Site Study Wilshire Boulevard near Berkley Street, Santa Monica, CA, Performed by Pitney Bowes" which references Whole Foods, as well as weekly sales data for each of its stores in the relevant areas from January 1, 2006 to the present. Id. at 3. Gelson's claimed, without explanation, that "[d]isclosure of this information to a competitor, to the public, or to the Commission in any form oppresses Gelson's and risks significant harm to its commercial interests" and further stated its position that the protective order in place "does not go far enough to protect potential public disclosure given the sensitivity of the information." Id. at 3-4.

Over the past several weeks, counsel for Whole Foods conferred with counsel for Gelson's in an attempt to compromise, offering to reduce the number of stores for which weekly sales data was requested. See Ex. 2, Fishkin Decl. ¶ 8. Gelson's instead said that it would provide only ***summary*** sales data and only to the Administrative Law Judge ("ALJ") for *in camera* review, rather than to counsel for Whole Foods. See November 19, 2008 letter (Ex. 3 to Gelson's Br.); December 2, 2008 letter (Ex. 4 to Gelson's Br.). Gelson's filed the present motion on December 8, 2008.

ARGUMENT

I. GELSON'S BEARS A HEAVY BURDEN OF PERSUASION ON THIS MOTION

As the subpoenaed party resisting discovery pursuant to 16 C.F.R. § 3.31(d), Gelson's bears "[t]he burden of showing that the request[s] [are] unreasonable." In re Rambus, Inc., No. 9302, 2002 FTC LEXIS 90, at *9 (Nov. 18. 2002) (denying third party's motion to quash subpoena in FTC adjudicative proceeding). That burden is "heavy." In re Flowers Industries, Inc., No. 9148, 1982 FTC LEXIS 96, at *15 (Mar. 19, 1982) (denying motions to quash third-party subpoenas in FTC anti-merger action); accord FTC v. Texaco, Inc., 555 F.2d 862, 882

(D.C. Cir. 1977) (stating that "that burden is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose" and ordering compliance with subpoenas issued in FTC proceeding and reversing district court for modifying the requests to make them narrower).[5] Gelson's is unable to satisfy this heavy burden.

As far as counsel for Whole Foods is able to discern,[6] Gelson's claims in its motion that it should be allowed to withhold certain documents from discovery by counsel for Whole Foods due solely to the confidential nature of these documents. Essentially, Gelson's speculates that the protective order in this case would be insufficient to protect its confidential information, principally because neither counsel for Whole Foods and the Commission can be trusted to abide by the terms of the protective order issued by the Commission in this action. This argument is entirely without support, and should be rejected. The documents requested are central to the litigation, and the protective order in place here provides a high degree of protection.

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[5] It is further well-settled that "[t]hat burden is no less because the subpoena is directed at a non-party." Flowers Industries, 1982 FTC LEXIS 96, at *15; accord Rambus, 2002 FTC LEXIS 90, at *9 ("The burden is no less for a non-party."). Gelson's cites federal district court cases for the idea that courts sometimes consider "the fact of nonparty status" when ruling on a motion to quash a subpoena. See Gelson's Br. at 8 (citing Mycogen Plant Science, Inc. v. Monsanto Co., 164 F.R.D. 623, 628 (E.D. Pa. 1996) (quoting Katz v. Batavia Marine & Sporting Supplies, Inc., 984 F.2d 422, 424 (Fed. Cir. 1993))). Gelson's reliance on those cases is misplaced as those courts were interpreting the Federal Rules of Civil Procedure, while this FTC adjudicative proceeding is governed by the Commission's Rules of Practice. In any event, considering "the fact of nonparty status" is far from a settled practice in the federal courts, and many courts ignore one's non-party status when ruling on motions to quash. See, e.g., Castle v. Jallah, 142 F.R.D. 618 (E.D. Va. 1992); Composition Roofers Un. Local 30 Welfare Trust Fund v. Graveley Roofing Enters., Inc., 160 F.R.D. 70 (E.D. Pa. 1995). Indeed, the leading treatise on federal procedure "finds no basis for [a] distinction [between party and non-party status] in the [relevant] rule's language." Charles Alan Wright and Arthur R. Miller, 9A Federal Practice & Procedure § 2459 (2d ed. 2008).

[6] Counsel for Whole Foods is unable to discern the exact relief requested by Gelson's in its motion, as it failed to provide a proposed order as required by the Commission's Rules of Practice. See 16 C.F.R. § 3.22(b) (stating that all written motions must "attach a draft order

II. THE DOCUMENTS THAT GELSON'S REFUSES TO PRODUCE ARE CRITICAL TO WHOLE FOODS' DEFENSE

Gelson's seeks to deprive Whole Foods' counsel of documents that are central to Whole Foods' position on the appropriate definition of the relevant antitrust market. As Judge Friedman explained last year when considering whether to preliminarily enjoin the acquisition, the central issue in this case is the definition of the relevant product market: Whole Foods' position here is that Judge Friedman rightfully rejected the Commission's proposed definition last year as artificially narrow. 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. 4, Respondent Whole Foods Market, Inc.'s Answer To Am. Compl. ¶ 35.

To support its position, Whole Foods intends to demonstrate that it competes with many other food retailers, including Gelson's. The weekly sales data that Gelson's is currently refusing to produce is critical to Whole Foods' case, because it can be used to show how the opening or closing of a Whole Foods or Wild Oats store impacted Gelson's sales. For example, this data can be used to show that the opening of a new Whole Foods store took business away from a nearby Gelson'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 Gelson's store, rather than exclusively benefiting Whole Foods. The November 2007 site study currently withheld by Gelson's would similarly corroborate Whole Foods' position that Gelson's competes with Whole Foods, as it would evidence Gelson's considerations of Whole Foods as a competitor when

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containing the proposed relief").

determining the value of a potential Gelson's store.[7] The summaries that Gelson's offered to provide (only on an *in camera* basis) would not serve a similar purpose, since they would not allow Whole Foods to correlate sales figures with the specific time periods that Whole Foods stores were opened or that Wild Oats stores were closed.

Thus, the documents Whole Foods seeks go to the very heart of the Commission's case. It is against this backdrop that Gelson's motion must be evaluated.

III. GELSON'S COMPLAINTS ABOUT THE PROTECTIVE ORDER SHOULD BE REJECTED

A. The Outside Counsel Eyes' Only Order Would Provide Strong Protection to Gelson's Confidential Information.

Gelson's argues that the existing protective order issued by the Commission – which prohibits ***any*** Whole Foods employees, including inside counsel, from reviewing its documents – somehow cannot protect its confidential documents. This argument falls flat in the face of the "outside counsel eyes only" order that governs this action. "[P]rotective orders are routinely issued" to safeguard confidential information in Commission proceedings. See Coca-Cola Bottling, 1976 FTC LEXIS 33, at *3-5 (denying third party's motion to quash subpoena in FTC proceeding when the third party argued that the subpoena sought commercially sensitive documents). Thus, "'[t]he fact that information sought by a subpoena may be confidential does not excuse compliance.'" Rambus, 2002 FTC LEXIS 90, at *11 (denying third party's motion to quash subpoena on ground that the subpoena called for commercially sensitive documents); accord Flowers Industries, 1982 FTC LEXIS 96, at *6-12.

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[7] The FTC has raised the issue of the affect 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.

Under the protective order, Gelson's confidential documents ***cannot*** be disclosed to any Whole Foods employee, including in-house counsel. Ex. 3, October 10, 2008 Protective Order ¶ 7. The protective order also alleviates any concerns of Gelson's about its confidential documents being disclosed to the public at trial by allowing it a chance to object.[8] Should Whole Foods or the Commission intend to introduce a confidential Gelson's document at trial, counsel must "provide advance notice to [Gelson's] for purposes of allowing [it] to seek an order that the document . . . be granted *in camera* treatment." Id. at ¶ 10. The confidential document shall then receive that treatment "[u]ntil such time as the Administrative Law Judge rules otherwise." Id. See In re Basic Research, LLC, No. 9318, 2004 FTC LEXIS 272, at *6 (Aug. 18, 2004) (denying motion to quash narrowed subpoena in which subpoenaed party cited confidentiality concerns in part because "Respondents may file a motion for in camera treatment to prevent disclosure to the public of its [sic] confidential materials at the trial in this matter."); accord Kaiser Alum., 1976 FTC LEXIS 68, at *14. This advance notice provides protection to Gelson's, as well as any other non-party.

B. Gelson's Unsupported Speculation that Counsel Will Not Abide by the Order is Not a Legitimate Reason to Resist Discovery.

The thrust of Gelson's claim that the protective order is not strong enough is clear – Gelson's does not ***trust*** Whole Foods or the Commission to abide by the order. Gelson's first states that it "does not impute to Whole Foods' counsel any intent to violate the protective order." Gelson's Br. at 12; see also id. at 14 n.8 ("Gelson's has no reason to believe that the FTC

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[8] See also Rambus, 2002 FTC LEXIS 90, at *11 ("The protective order entered in this case ameliorates Mitsubishi's concerns [about producing confidential documents]."); accord Flowers Industries, 1982 FTC LEXIS 96, at *9; Dresser Industries, 1977 U.S. Dist. LEXIS 16178, at *15; Kaiser Alum.,1976 FTC LEXIS 68, at *13.

will intentionally disclose Gelson's confidential information in violation of statutory prohibitions or the protective order, and makes no such assertions here."). In the very next sentence, however, Gelson's makes that precise accusation, claiming that "[p]roviding Gelson's' most sensitive information to Whole Foods' outside counsel is not materially different from providing that information to Whole Foods itself." Id. at 12. Gelson's can only be saying that if it provides its confidential information to outside counsel for Whole Foods, counsel will turn around and share it with the client in direct violation of the protective order. Gelson's provides nothing more than speculation to support such an attack on counsel for Whole Foods (and the Commission).

Gelson's line of reasoning has been consistently rejected. See Coca-Cola Bottling, 1976 FTC LEXIS 33, at *5 ("[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)."); see also FTC v. Invention Submission Corp., 965 F.2d 1086, 1091 & n.3 (D.C. Cir. 1992) ("[T]he harm ISC alleges will only occur if we presume that the Commission will not abide by its representations – which, as we said, we are unprepared to do;" affirming district court's enforcement of subpoenas issued in Commission investigation). As these cases recognize, presuming noncompliance would undermine Commission proceedings, in that subpoena recipients could refuse to cooperate by simply citing fears that the parties would violate the protective order. In fact, New Seasons has already made a similar and equally unsupported argument in moving to quash an identical subpoena served on it by Whole Foods.[9]

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[9] Portions of Gelson's brief are lifted verbatim from that filed several weeks ago by New Seasons. See, e.g., New Seasons Market's Motion to Quash or Limit at 8 ("As noted above, although New Seasons is a non-party to this matter, the subpoena nonetheless seeks some of New Seasons' most proprietary and commercially sensitive information. If the information became public, or if it were disclosed to Whole Foods' competitive decision-makers, New Seasons would

C. The Protective Order Binds the Parties' Experts to Treat Documents as Confidential.

Gelson's related argument regarding experts also misses the mark. Gelson's posits that the parties' experts here should not be permitted to have access to its documents, as other industry players may at some later date hire these same experts who will somehow use this information against Gelson's. Gelson's Br. at 11. As an initial matter, Gelson's does not even attempt to explain how a 2007 site study or historical sales information would allow an expert to harm it in the future, even if one presumes the expert would violate the protective order. Moreover, Gelson's ignores that the protective order requires experts to return all confidential documents and "notes, memoranda, or other papers containing confidential information" at the end of their participation in the case. Ex. 3, October 10, 2008 Protective Order ¶ 12. Experts can access confidential information only if they are not an employee of Whole Foods or any subpoenaed third party and sign an agreement that they are bound by the protective order. Id. at ¶ 7.

This exact argument has been rejected by the courts, as if accepted, it would allow a party to effectively exercise veto power over its adversary's experts. In Advanced Semiconductor Materials Am. v. Applied Materials, Inc., No. 95-20169, 1996 U.S. Dist. LEXIS 21459, at *8 (N.D. Cal. Oct. 26, 1996), the Court observed:

> Applied's objection to Dr. Sherman is that, if Dr. Sherman is given access to Applied's confidential information, he will inevitably misuse that information if he consults for Applied's competitors in the future because the information will be in his head. However, this cannot be the standard to be applied. If it was, then a

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be irreparably damaged."); Gelson's Br. at 10 ("As noted above, although Gelson's is a non-party to this matter, the subpoena nonetheless seeks some of Gelson's most proprietary and commercially sensitive information. If the information became public, or if it were disclosed to Whole Foods' competitive decision-makers, Gelson's would be irreparably damaged.").

> litigant could successfully object to any active industry consultant in any high technology litigation, thereby giving it the power of veto over its adversary's choice of experts.

Id. at *8.[10] These cases recognize that because FTC cases are inherently expert- and trade-secret intensive, the precedent that Gelson's seeks would impede discovery in Commission proceedings. All recipients of subpoenas could attack the protective order (even if it is outside counsel eyes only) and refuse to comply with the subpoena by citing the same hypothetical, unsupported concerns as Gelson's.

Indeed, Gelson's makes no mention of any specific reason why any one expert in this particular action should be barred from seeing Gelson's information. See U.S. Gypsum Co. v. Lafarge North Am., Inc., No. 03-6027, 2004 U.S. Dist. LEXIS 3239, at *3 (N.D. Ill. Mar. 2, 2004) (stating that the party seeking to prevent an expert from viewing documents bears the burden of showing that the "expert is in a position that could allow the information to be used by competitors."). Simply hypothesizing that ***any*** expert may at some future point be in a position to share this information with competitors – as Gelson's does here – should not suffice for it to withhold the requested documents from Whole Foods' counsel.

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[10] The lone case cited by Gelson's in support of this argument does not even support it. There, the court ultimately found that the subpoenaed material was not essential to the requesting party's case. See Litton Indus., Inc. v. Chesapeake & Ohio Railway Co., 129 F.R.D. 528, 531 (E.D. Wis. 1990) ("This court is not persuaded that the records of Bay Shipbuilding in the areas other than ship construction are as essential to proof of damages as claimed by Litton."). This stands in stark contrast to the instant matter, where Gelson's documents are critical to determining the central issue of the relevant market. Moreover, the party requesting documents in Litton did so ***without*** a protective order yet being in place, forcing the Court to speculate as to the protections that the requested documents would receive. In this matter, Gelson's documents would be protected by an already established, attorneys' eyes only protective order.

D. Gelson's Provides No Legitimate Basis for its Request for a Modification of the Protective Order to Include a Fine.

Gelson's, parroting New Seasons, finally claims that the protective order is inadequate because it does not provide for a fixed monetary penalty to be paid by counsel for an inadvertent disclosure and to be paid directly to it. Gelson's Br. at 13 n.7. Gelson's similarly provides no authority to support its request, other than to note that in 2007 an FTC lawyer accidentally filed redacted Whole Foods documents that could, unbeknownst to that lawyer, be unredacted by the public using a computer program. Human beings make mistakes. If the possibility of a mistake were sufficient to resist civil discovery, there would be no civil discovery. If the protective order is violated – and counsel for Whole Foods intends to abide by it – the matter can be taken up with the Commission.[11] The Commission rightfully rejected the idea that a party that inadvertently discloses confidential information be forced to pay monetary compensation when this remedy was requested by New Seasons last year. See Ex. 6, June 26, 2007 Commission Order, at 1 n.1 ("Finally, [New Seasons] offers no authority to support its request that the Commission agree to pay 'damages' in the event of an inadvertent public disclosure of confidential business information, and the mere possibility of such disclosure provides no ground for quashing the CID.")

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[11] Gelson's mischaracterizes the order entered on July 6, 2007 by Judge Friedman. There, Judge Friedman was confronted with the issue of whether Whole Foods' outside counsel could share confidential business information of Whole Foods' competitors with Whole Foods' General Counsel, Roberta L. Lang. Judge Friedman ultimately granted access to Ms. Lang, but ordered the parties to amend the protective order to contain the language about a monetary fine should a party use confidential information for a competitive advantage. See Ex. 5, Docket No. 07-1021, Docket Entry 95, July 6, 2007 Opinion and Order (D.D.C. 2007), at 5. That order has no application here, where ***no*** Whole Foods employees (even in-house counsel) would be permitted to see Gelson's confidential documents. In fact, no case cited by Gelson's in support of its motion involves a court denying access to confidential documents to outside counsel responsible

The bottom line is that the protective order in this case contains a number of adequate safeguards to protect Gelson's confidential documents.

III. Gelson's Attacks on Whole Foods Are a Red Herring Calculated to Divert Attention from the Absence of Facts and Authority Supporting its Position

Like New Seasons, in an attempt to smear Whole Foods, Gelson's cites ***accusations*** of anticompetitive conduct against Whole Foods as a reason to quash the subpoena. See Gelson's Br. at 6-8. While Judge Friedman exhaustively reviewed the very evidence Gelson's cites last year and ruled ***in favor of*** Whole Foods, a discovery motion is not the context to litigate that evidence. Gelson's references to it constitute a bald attempt to divert attention from the absence of facts and authority supporting its position. Put simply, Gelson's cannot carry its heavy burden in this motion by offering nothing more than inappropriate, petty name-calling accusations against Whole Foods.

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for litigating the case at hand.

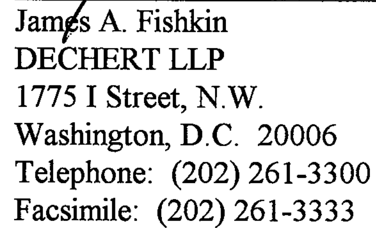
CONCLUSION

For the foregoing reasons, Gelson's motion should be denied.

Dated: December 19, 2008

Respectfully submitted,

By:



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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

[PROPOSED] ORDER DENYING GELSON'S MARKETS' MOTION FOR PROTECTIVE ORDER OR IN THE ALTERNATIVE TO TO QUASH OR LIMIT SUBPOENA FROM WHOLE FOODS MARKET, INC.

Upon due consideration of Gelson's Markets' Motion for Protective Order or in the Alternative to Quash or Limit Subpoena from Whole Foods Market, Inc., it is hereby ORDERED that:

1. Gelson's Markets' motion is DENIED; and

2. Within ten days of the entry of this order, Gelson's Markets shall COMPLY with the subpoena.

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 Response In Opposition to Gelson's Markets Motion for Protective Order or in the Alternative to Quash or Limit Subpoena and the Proposed Order was served on December 19, 2008, on the following persons by the indicated method:

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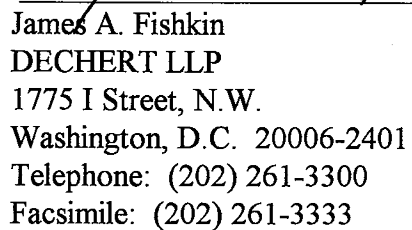
By: 

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EXHIBIT 1

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.

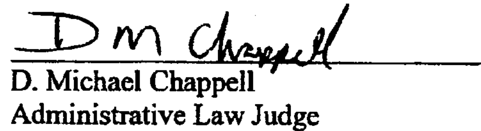
In light of the limitations set forth below and the confidentiality provisions of the Protective Order, enforcement of the subpoenas, as limited by this Order, is not unreasonable or oppressive.

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 2

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

Declaration of James A. Fishkin

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 50 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 on Gelson's Markets ("Gelson's"). That subpoena is attached as Exhibit 1 to Gelson's Motion for a Protective Order or in the Alternative to Quash or Limit Subpoena from Whole Foods Market, Inc.

5. After service of that subpoena, on October 24, 2008, counsel for Gelson's, Daniel Herbst, Esq., asked me for an extension until November 19, 2008 to respond

to the subpoena, which I granted.

6. On November 20, 2008, I received Gelson's response to the subpoena dated November 19, 2008. After receiving this response, I called Mr. Herbst to discuss his objections and Gelson's refusal to provide a site survey and weekly store sales information. I reminded him of the provisions set forth in the protective order entered by the Federal Trade Commission ("FTC" or "Commission") and stressed that the protective order would afford Gelson's the highest level of protection in that no Whole Foods employee could have access to Gelson's confidential documents.

7. On December 2, 2008, I received a letter from Mr. Herbst, outlining an alternative offer to "avoid Court intervention." This letter contained an offer by Gelson's to submit *in camera* to the Administrative Law Judge ("ALJ") the "percentage of increase or decrease in the sales by Gelson's of organic products sold for the 3 month period(s) after the opening of a Whole Foods store for each Gelson's store in the same trade area, after January 1, 2006 and within the geographic markets outlined in the subpoena."

8. On December 5, 2008, I spoke with Mr. Herbst regarding his December 2nd letter. I explained to him the relevancy of Gelson's total weekly store sales data for each Gelson's store in the relevant areas and the site survey in order to properly analyze the FTC's allegations. I offered to limit the subpoena request for weekly store sales to each Gelson's store located within a six-mile radius of each Whole Foods or Wild Oats store that was open and located in the Los Angeles-Santa Monica-Brentwood and Pasadena relevant areas during the time period of January 1, 2006 to present and any other relevant areas where Gelson's may

operate stores. I explained that the six-mile radius is based on the FTC's claim to what may be a narrower relevant area within the relevant areas listed in the Amended Complaint.

9. On December 8, 2008, Mr. Herbst called to notify me that Gelson's would file a motion to quash the subpoena. I received a copy of this motion on December 9, 2008.

10. On December 16, 2008, I emailed to Mr. Herbst a copy of the ALJ's Order denying a motion to quash by New Seasons Market, Inc., and a copy of the FTC's memorandum dated December 16, 2008.

11. On December 17, 2008, I informed Mr. Herbst that this Order specifically discredited the argument advanced by Gelson's and asked Mr. Herbst to withdraw Gelson's motion. After further discussions, on both December 18, and December 19, 2008, Mr. Herbst told me that Gelson's would not withdraw its motion.

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 19th day of December, 2008.

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 3

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.

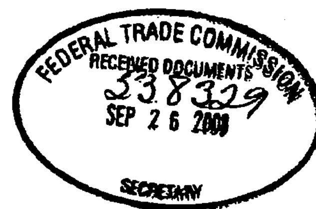
14. The provisions of this Protective Order, insofar as they restrict the communication and use of confidential discovery material, shall, without written permission of the submitter or further order of the Commission, continue to be binding after the conclusion of this proceeding.

By the Commission.

Donald S. Clark
Secretary

ISSUED: October 10, 2008

EXHIBIT 4



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	
	Docket No. 9324
WHOLE FOODS MARKET, INC.,	
a corporation.	**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: ______________________

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Of Counsel:

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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.
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EXHIBIT 5

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, Plaintiff, v. WHOLE FOODS MARKET, INC., and WILD OATS MARKETS, INC., Defendants.	Civil Action No. 07-1021 (PLF)

MEMORANDUM OPINION AND ORDER

This lawsuit was filed on June 6, 2007. The Federal Trade Commission ("FTC") seeks to enjoin Whole Foods Market, Inc. from acquiring Wild Oats Markets, Inc. This case is set to be litigated on a very fast track. See June 21, 2007 Case Management Order. On June 8, 2007, the Court signed an Interim Protective Order agreed upon by the parties. On June 11, 2007, defendant Whole Foods moved for the entry of a Final Protective Order. The FTC opposed the motion. In addition, a number of non-party grocery companies moved, and were permitted by the Court, to intervene for the limited purpose of opposing Whole Foods' motion. The dispute centered around what access, if any, Roberta L. Lang, Esq., Whole Foods' General Counsel, should have to confidential business information of Whole Foods' competitors during the course of this litigation.

The Interim Protective Order had a two-tiered designation system for confidential

information. The Interim Protective Order precludes *any* access by in-house counsel to so-called "Restricted Confidential Discovery Material." See Interim Protective Order, entered June 8, 2007, Definitions, ¶¶ 4, 16. Under that Order, Ms. Lang was not entitled to see the "Restricted" material, only outside counsel was. See id., Terms and Conditions of Protective Order, ¶¶ 2, 3.

On June 29, 2007, the FTC and the defendants were able to resolve their differences with respect to the Final Protective Order, and they filed a joint motion for the entry of a Final Protective Order, which is now before the Court.[1] The proposed protective order agreed to by the FTC and the defendants eliminates the distinction between "Restricted Confidential Discovery Material" and "Confidential Discovery Material." See Proposed Protective Order, Definitions, ¶ 4. It provides that Ms. Lang may have access to some but not all "Confidential Discovery Material," specifically "only to unredacted draft and final versions of pleadings, deposition and hearing transcripts, and expert reports, but shall not have access to any accompanying exhibits or underlying discovery materials to the extent those exhibits or discovery materials have been designated 'Confidential'[.]" Proposed Protective Order, Terms and Conditions of Protective Order, ¶ 8(c). The Court understands this to mean that Ms. Lang may review draft and final versions of pleadings, motions and other briefs, deposition and hearing transcripts, and expert reports – including portions of such filings that quote or paraphrase "Confidential Discovery Material" – but may not see exhibits to such filings, depositions or reports or underlying discovery material designated as "Confidential." This proposal is opposed by a number of the intervening grocery companies, whose confidential

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[1] On July 2, 2007, the Court denied as moot Whole Foods' original motion for entry of a final protective order.

business information, previously produced to the FTC, is at issue. Specifically, each of the following intervenors filed a brief in opposition to the joint motion: Trader Joe's Company, Wegmans Food Markets, Inc., Supervalu, Inc., Publix Super Markets, Inc., Wal-mart Stores, Inc., H.E. Butt Grocery Company, Safeway, Inc., and Kroger Co.[2]

In connection with Whole Foods' original motion for entry of a final protective order, Ms. Lang submitted a sworn declaration. See Declaration of Roberta L. Lang , Ex. C to Whole Foods' Motion for Entry of a Final Protective Order ("Lang Decl."). She states:

> I do not participate in competitive decisionmaking at Whole Foods. I do not participate in any decisions about formulating or implementing strategies to compete with our competitors or any decisions about formulating or implementing pricing strategies. I am not involved in pricing decisions, selection of vendors, purchasing decisions, marketing, or other competition-related issues that are the subjects of confidential information in this case. I am also not involved in decisions about how much product to purchase at wholesale, the mix of products to carry, where to sell those products, or how to transport those products.

Lang Decl. ¶ 4. In addition, Ms. Lang stated in her sworn declaration that she will not make use of any confidential information, "directly or indirectly, for any purpose other than the defense of this action." Id. ¶ 15. She also "acknowledge[d] and agree[d] that [she is] subject to the jurisdiction of the Court and to its contempt powers." Id. ¶ 14. Finally, she volunteered "to remain subject to the Court's jurisdiction at all times, including after this litigation is concluded." Id.

Magistrate Judge Facciola recently confronted a similar situation in Intervet, Inc. v. Merial Ltd., 241 F.R.D. 55 (D.D.C. 2007). As he explained there:

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[2] The Trader Joe's brief was joined or adopted by each of the other intervenors to file an opposition brief.

> [T]he courts have precluded access to confidential information from those who can be described as competitive decision-makers. The "leading authority" is U.S. Steel Corp. v. United States, 730 F.2d 1465 (Fed. Cir. 1984). In that case, the Federal Circuit said:
>
> > The parties have referred to involvement in "competitive decisionmaking" as a basis for denial of access. The phrase would appear serviceable as shorthand for a counsel's activities, association, and relationship with a client that are such as to involve counsel's advice and participation in any or all of the client's decisions (pricing, product design, etc.) made in light of similar or corresponding information about a competitor.
>
> Id. at 1468 n.3.
>
> Thus, U.S. Steel would preclude access to information to anyone who was positioned to advise the client as to business decisions that the client would make regarding, for example, pricing, marketing, or design issues when that party granted access has seen how a competitor has made those decisions. E.g., Brown Bag Software, 960 F.2d [1465, 1471 (9th Cir. 1992)] (counsel could not be expected to advise client without disclosing what he knew when he saw competitors' trade secrets as to those very topics); Matsushita Elec. Indus. Co v. United States, 929 F.2d 1577, 1579-80 (Fed. Cir. 1991) (determination by agency forbidding access was arbitrary when lawyer precluded from access testified that he was not involved in pricing, technical design, selection of vendors, purchasing and marketing strategies); Volvo Penta of the Americas, Inc. v. Brunswick Corp., 187 F.R.D. 240, 242 (E.D. Va. 1999) (competitive decision-making involves decisions "that affect contracts, marketing, employment, pricing, product design" and other decisions made in light of similar or corresponding information about a competitor); Glaxo Inc. v. Genpharm Pharm., Inc., 796 F. Supp. 872, 876 (E.D.N.C. 1992) (improper to preclude inhouse counsel from access to confidential information because he gave no advice to his client about competitive decisions such as pricing, scientific research, sales, or marketing).

Intervet, Inc. v. Merial Ltd., 241 F.R.D. at 57-58 (footnotes omitted). Because there was no

evidence before Magistrate Judge Facciola in Intervet that the in-house counsel was a "competitive decision-maker," or "involved in competitive decision-making," he allowed her to have access to the materials in question. See id. at 58; see also United States v. Sungard Data Systems, 173 F.Supp.2d 20, 21 (D.D.C. 2001) (Facciola, J.) (allowing access by in-house counsel to confidential information); cf. Brown Bag Software v. Symantec Corp., 960 F.2d at 1471 (affirming order allowing access only by an independent consultant, rather than by in-house counsel).

Applying these principles, based on her declaration the Court is unable to conclude that Ms. Lang is involved in competitive decision-making, despite the intervenors' arguments to the contrary. In addition, as in other cases, the pace of the instant litigation makes any other preventative measures impracticable. Accordingly, the Court will grant the joint motion for entry of a final protective order, with one addition. In an abundance of caution, as Magistrate Judge Facciola did in each of the cases in which he allowed in-house counsel to have access to confidential information, the Court will order the parties to amend the proposed protective order so that it contains the following penalty provision, as an added incentive against inadvertent misuse of any confidential information that Ms. Lang will be privy to. The penalty provision shall state:

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

With these principles and protections in mind, it is hereby

ORDERED that the [77] joint motion for entry of a Final Protective Order is GRANTED, with the modifications described herein. The parties shall submit a modified proposed Final Protective Order in accordance with this Memorandum Opinion and Order to the Court on or before Monday, July 9, 2007. When signed by the Court, the Final Protective Order shall supersede the Interim Protective Order entered on June 8, 2007.

SO ORDERED.

/s/
PAUL L. FRIEDMAN
United States District Judge

DATE: July 6, 2007

EXHIBIT 6

Office of the Secretary

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

June 26, 2007

VIA FACSIMILE AND EXPRESS MAIL

New Seasons Market
c/o Robert D. Newell, Esquire
Davis Wright Tremaine LLP
1300 S. W. Fifth Ave. – Suite 2300
Portland, OR 97201

Re: *New Seasons Markets's ("NSM") Petition to Quash or Limit Civil Investigative Demand ("NSM's Petition")*, File No. 071-0114

Dear Mr. Newell:

This letter advises you of the disposition of NSM's Petition to quash or limit specifications of the Civil Investigative Demand ("CID") issued to it on April 24, 2007. Because NSM's Petition was filed after the deadline by which it had to be filed, the Commission denies NSM's Petition.[1] Pursuant to 16 C.F.R. § 2.7(e), NSM is ordered to comply with the CID on or before July 3, 2007 at 5:00 p.m. E.D.T.

This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission's delegate. *See* 16 C.F.R. § 2.7(d)(4). Petitioner has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.[2]

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[1] Reaching the merits of NSM's Petition would not change this result. NSM provided no factual basis for its claims of burden. *See Federal Trade Commission v. Rockefeller*, 591 F.2d 182, 190 (2nd Cir. 1979) (Petitioner must show that compliance would "unduly disrupt or seriously hinder" its daily operations). Further, NSM's claim that information regarding the facts of its grocery store operations in one overlap market are beyond the scope of this investigation of a retail grocery store merger is simply frivolous. *Federal Trade Commission v. Whole Foods Market, Inc., et al*, Docket No. 1:07-cv-01021 (D.D.C. June 6, 2007), Complaint at ¶ 35, available at: http://www.ftc.gov/os/caselist/0710114/070605complaint.pdf (alleging geographic markets defined by a six mile circle around each store). Finally, NSM offers no authority to support its request that the Commission agree to pay "damages" in the event of an inadvertent public disclosure of confidential business information, and the mere possibility of such disclosure provides no ground for quashing the CID.

[2] This letter decision is being delivered by facsimile and express mail. The facsimile copy is being provided as a courtesy. Computation of the time for appeal, therefore,

The CID at issue was signed and issued to NSM on April 24, 2007, returnable on April 30, 2007, Petition at 1, and was served on NSM on April 25, 2007. NSM states that "the FTC has granted multiple extensions, ultimately extending the time to respond to June 15, 2007." *Id.* NSM did not seek, nor was it granted, however, an extension of time within which to file a petition to quash or limit a CID. The time for filing a petition to quash, absent an extension of time granted pursuant to and in conformity with 16 C.F.R. § 2.7(d)(3), is the earlier of the date for compliance with the CID or 20 days after service. In the case of this CID, a petition to quash should have been filed no later than the earlier of April 30th (initial compliance date) or May 15th (twenty days after service). NSM claims to have received extensions of the return date for its CID until June 15th.[3] Extending only the return date, however, still would make May 15th the latest permissible date for filing a petition to quash. An extension of the time to comply does not automatically extend the time within which a petition to quash must be filed. *Compare* 16 C.F.R. § 2.7(c) *with* 16 C.F.R. § 2.7(d)(3). Linking the two extensions together might provide both the means and the incentive to delay investigations unnecessarily. NSM has offered no reason for filing its petition out of time, nor did it seek leave to file its petition out of time. Accordingly,

IT IS ORDERED THAT NSM's Petition be, and it hereby is, **DENIED.**

IT IS FURTHER ORDERED THAT NSM shall respond to the CID on or before July 3, 2007 at 5:00 p.m. E.D.T.

By Direction of the Commission.

Donald S. Clark
Secretary

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should be calculated from the date you received the original by express mail. In accordance with the provisions of 16 C.F.R. § 2.7(f), the timely filing of a request for review of this matter by the full Commission shall not stay the return date established by this decision.

[3] The CID expressly provides that all modifications "must be agreed to in writing by the Commission representative." CID at 3. Further, pursuant to 16 C.F.R. § 2.7(c), all such amendments regarding the manner and timing of compliance for this CID required approval by at least an Assistant Director of the Bureau of Competition. The last written approval of an extension of the time within which to comply that was signed by an Assistant Director only extended the return date to May 29, 2007. The Commission has reason to believe that two additional extensions of the deadline for compliance were approved by an Assistant Director. However, while the next to the last request for an extension, until June 5th, was addressed by an email message, the final request for an extension, until June 15th, was addressed only orally. The CID by its own terms does not permit oral modifications. Accordingly, the last arguably cognizable extension only extended the time for compliance until June 5th, not until June 15th. Thus, even if the Commission assumes, contrary to the evidence, that each extension validly approved included both an extension pursuant to 16 C.F.R. §§ 2.7(c) (extension of compliance date) and an extension pursuant to 16 C.F.R. § 2.7(d)(3) (extension of time within which to file a petition to quash), NSM's Petition was due on or before June 5, 2007.