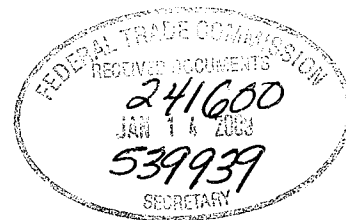


ORIGINAL



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 MOTION FOR ENFORCEMENT OF SUBPOENA DUCES TECUM ISSUED TO NON-PARTY EREWHON NATURAL FOODS MARKET**

Respondent Whole Foods Market, Inc. (“Whole Foods”) hereby moves to compel non-party Erewhon Natural Foods Market (“Erewhon”) to comply with the subpoena duces tecum served on it by Whole Foods, attached as Exhibit 1 hereto.

**INTRODUCTION**

Erewhon has refused to produce its weekly sales data responsive to Request 9(b) on the ground that it is “only one store and privately held. We do not give away our sales figure [sic].” Ex. 2, November 4, 2008 Letter. This is not a cognizable objection. Like non-parties New Seasons Markets, Inc. (“New Seasons”) and Gelson’s Markets (“Gelson’s”), Erewhon should be compelled to produce weekly sales data responsive to Request 9(b) of the subpoena. See In re Matter of Evanston Northwestern Healthcare Corp., Dkt. No. 9315, 2004 WL 2380499, at \*1 (F.T.C. Sept. 22, 2004) (granting motion to compel non-party to produce documents responsive to respondent’s subpoena duces tecum within ten days of Court’s order).

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 Erewhon.

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. 3, December 16, 2008 Order Denying New Seasons Market’s Motion to Quash or Limit Subpoena Duces Tecum, at 7 (“December 16, 2008 Order”) (emphases added). Similar to Erewhon 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’ 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. 4, 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”).

While New Seasons and Gelson’s objected to the subpoena and filed motions to quash, Erewhon has not only failed to move to quash the subpoena, but it has failed to even lodge a proper objection to it; therefore, Erewhon’s position is untenable, and it should be given ten days to produce documents responsive to Request 9(b).

## FACTUAL BACKGROUND

Erewhon operates a natural foods retail market in Los Angeles, CA. On October 15, 2008, Whole Foods served a document subpoena on Erewhon, 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 relevant areas alleged in the Amended Complaint. See Ex. 1, Oct. 14, 2008 Subpoena Duces Tecum. Whole Foods also provided Erewhon with a copy of the protective order entered by the Commission in this proceeding. Id. The return date on the subpoena was November 5, 2008. Id.

On October 16, 2008, counsel for Whole Foods spoke with Erewhon's Vice President, Libby De Silva, in an attempt to secure Erewhon's compliance with the subpoena. See Ex. 5, 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 Erewhon Natural Foods Market ("Fishkin Statement") ¶ 5. Following that conversation, on November 4, 2008, Erewhon stated in a letter that it possessed no documents responsive to Requests 1 through 8 of the subpoena. See Ex. 2, Nov. 4 Letter. The letter indicates that Erewhon possesses documents responsive to Request 9(b), but simply refuses to produce them, because Erewhon "is only one store and privately held. We do not give away our sales figure [sic]." Id.<sup>1</sup> This motion ensued.

---

<sup>1</sup> Instead of producing documents, this ninth request alternatively allowed Erewhon to produce a spreadsheet. Ex. 1, Oct. 14, 2008 Subpoena Duces Tecum, at Request 9.

## ARGUMENT

### I. **EREWHON SHOULD BE COMPELLED TO COMPLY WITH THE SUBPOENA**

#### A. The Documents That Erewhon 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. 3, 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."); compare also Ex. 6, Am. Complaint ¶ 35 (alleging that the relevant product market consists of "the operation of premium natural and organic supermarkets") with Ex. 7, Respondent Whole Foods Market, Inc.'s Answer To Am. Compl. ¶ 35 (denying that proposed definition of the relevant product market).

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 Erewhon. The weekly sales data that Erewhon is currently refusing to produce can be used to show how competitive interactions among Erewhon, Whole Foods, Wild Oats and other supermarkets in Los Angeles – one of the geographic areas at issue in this proceeding – affect the sales of the others. For example, these data can be used to show that the opening of a new Whole Foods store in Los Angeles took business away from a nearby Erewhon 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 in Los Angeles caused an uptick in sales at a nearby Erewhon store, rather than exclusively benefiting Whole Foods.<sup>2</sup> Thus, the documents Whole Foods seeks are highly relevant.

B. Erewhon Has Waived Any Objections It Might Have By Failing To File a Timely Motion for Protection.

At the outset, Erewhon has failed to present a valid objection to Request 9(b). Unlike certain other non-parties who have refused to produce documents or data in response to Request 9(b), Erewhon did not object on grounds of relevance or burden or state that it is concerned about the adequacy of the protective order entered by the Commission to protect the confidential information of non-parties. Instead, Erewhon's professed reason for refusing to produce documents or data in response to Request 9(b) is that it is "only one store and privately held. We do not give away our sales figure [sic]." Ex. 2, November 4, 2008 Letter, at 1. Merely because Erewhon is one privately owned store that does not routinely give away its sales data, in other words, does not legally entitle it to disregard a valid subpoena duces tecum issued in an FTC adjudicative proceeding.

By filing no motion to quash Request 9(b), moreover, Erewhon has waived any objections it might have. Under FTC rules and practice, if Erewhon wished to make and pursue any objections, it, and not Whole Foods, bore the burden of filing a timely motion. Erewhon 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

---

<sup>2</sup> 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.

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). Erewhon’s failure to timely move to quash the subpoena results in a waiver of any objections *it might* have.

C. Any Confidentiality Concern Erewhon Might Have Was Addressed by the ALJ.

If Erewhon has concerns over the confidentiality of its sales data, those concerns have been addressed by the ALJ. 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. 3, December 16, 2008 Order, at 6.<sup>3</sup> The ALJ therefore found that “New Seasons has not made an adequate showing to support its argument that the Protective Order will not protect it.” *Id.*; see also Ex. 4, December 23, 2008 Order, at 5 (“The *in camera* procedure in Part III adjudication and the Protective Order entered by the Commission in this case adequately protect Gelson’s confidential information from disclosure.”).

---

<sup>3</sup> 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.

Hence, any concerns that Erewhon might have about producing its confidential documents have already been twice addressed – and rejected – by the ALJ.

## **CONCLUSION**

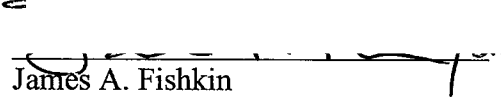
For the foregoing reasons, Whole Foods' motion should be granted.



Dated: January 14, 2009

Respectfully submitted,

By:

  
James A. Fishkin

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

Kevin T. Kerns  
Luke A.E. Pazicky  
Evan W. Davis  
DECHERT LLP  
Cira Centre  
2929 Arch Street  
Philadelphia, PA 19104  
Telephone: (215) 994-4000  
Facsimile: (215) 994-2222

*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 EREWHON NATURAL FOODS MARKET**

Upon due consideration of Whole Foods Market, Inc.'s ("Whole Foods") Motion for Enforcement of Subpoena Duces Tecum Issued to Non-Party Erewhon Natural Foods Market ("Erewhon"), and any opposition thereto, it is hereby ORDERED that:

1. Whole Foods' Motion is GRANTED; and
2. Erewhon shall produce all documents 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 Non-Party Erewhon Natural Foods Market 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 First Class Mail:**

Libby De Silva  
Erewhon Natural Foods Market  
7660-B Beverly Blvd.  
Los Angeles, CA 90036

Vice President for Erewhon Natural Foods Market

**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)

<b>1. TO</b> Libby DeSilva Erewhon Natural Foods 7660-B Beverly Blvd. Los Angeles, CA 90036	<b>2. FROM</b>  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.

<b>3. PLACE OF PRODUCTION OR INSPECTION</b>  See Attachment A, Part II, No. 1	<b>4. MATERIAL WILL BE PRODUCED TO</b> James A. Fishkin  <b>5. DATE AND TIME OF PRODUCTION OR INSPECTION</b> November 5, 2008 at 10:00 am
---	---

<b>6. SUBJECT OF PROCEEDING</b>  In the Matter of Whole Foods Market Inc., et al, Docket No. 9324
---

<b>7. MATERIAL TO BE PRODUCED</b>  See Attachment A, Part III
---

<b>8. ADMINISTRATIVE LAW JUDGE</b>  Federal Trade Commission Washington, D.C. 20580	<b>9. COUNSEL REQUESTING SUBPOENA</b>  James A. Fishkin, Esq. Dechert LLP 1775 I Street, NW Washington, DC 20006-2401
--	--

<b>DATE ISSUED</b> <i>October 3, 2008</i>	<b>SECRETARY'S SIGNATURE</b> <i>Donald S. Clark</i>
--	--

### 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:

Libby DeSilva  
Erewhon Natural Foods  
7660-B Beverly Blvd.  
Los Angeles, CA 90036

**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**



**Store**  
7660-A Beverly Blvd.  
Los Angeles  
California 90036  
(323) 937-0777  
FAX: (323) 937-2281

**Office**  
7660-B Beverly Blvd.  
Los Angeles  
California 90036  
(323) 937-6465  
FAX: (323) 937-6705  
website: [erewhonmarket.com](http://erewhonmarket.com)  
e-mail: [erewhonmarket@yahoo.com](mailto:erewhonmarket@yahoo.com)

November 4, 2008

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

Dear James:

Please find below our response of the documentation request on the Subpoena Duces Tecum:

- III
1. None; does not apply to us.
  2. None; does not apply to us.
  3. None; does not apply to us.
  4. None. There are two Whole Foods within a 1.5-mile radius of our store.
  5. None. We cannot compete with them.
  6. None. Our store has been in operation for more than 30 years and we do not do any market studies or analyses.
  7. None. We are just a mom-and-pop store and we do not operate like any corporate entity does. We increase shelf space as we see fit without any formal planning.
  8. None. Again, if and when we improve any part of our store, it is done informally.
  9. We are only one store and privately held. We do not give away our sales figure.

I hope this answers all your requests.

Sincerely,

Libby De Silva  
Vice President



# SUBPOENA DUCES TECUM

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

1. TO

Libby DeSilva  
Erewhon Natural Foods  
7660-B Beverly Blvd.  
Los Angeles, CA 90036

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.



# **EXHIBIT 3**

**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 (9<sup>th</sup> 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 (9<sup>th</sup> 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.

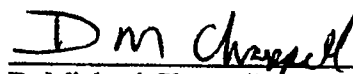
In light of the limitations set forth below and the confidentiality provisions of the Protective Order, enforcement of the subpoenas, as limited by this Order, is not unreasonable or oppressive.

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 4**

**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 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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

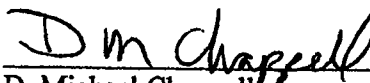
confidential information into evidence, Gelson's may file a motion for *in camera* treatment for documents it feels should be withheld from the public record. In Commission proceedings, requests for *in camera* treatment must show that the public disclosure of the documentary evidence will result in 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 5**

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

<b>In the Matter of</b>	)	
<b>WHOLE FOODS MARKET, INC., a corporation.</b>	)	<b>Docket No. 9324</b>
	)	
	)	<b>Public</b>
	)	

**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  
EREWHON NATURAL FOODS MARKET**

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 proceeding, on Erewhon Natural Foods Market ("Erewhon"). The return data for the subpoena was November 5, 2008. That subpoena and protective order are attached as Exhibit 1 to Whole Foods' motion.
5. On October 16, 2008, I spoke with Libby De Silva, Vice President for Erewhon, in a good faith attempt to secure Erewhon's compliance with

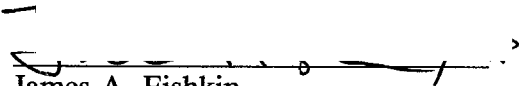


the subpoena.

6. On November 4, 2008, Ms. De Silva responded to the subpoena. Ms. De Silva stated that Erewhon possessed no documents responsive to Requests 1 through 8 of the subpoena. Ms. De Silva further stated that Erewhon refused to produce weekly sales data responsive to Request 9(b) of the subpoena.

7. Since receiving Ms. De Silva's letter, I have heard and received nothing from Erewhon, and it has failed to formally object, move to quash, or otherwise respond to the subpoena.

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 6**

**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.,	)	Docket No. 9324
a corporation.	)	PUBLIC

**AMENDED COMPLAINT**

**I. INTRODUCTION**

Whole Foods Market, Inc.'s ("Whole Foods") acquisition of Wild Oats Markets, Inc. ("Wild Oats"), is likely to have substantially lessened competition and continues to substantially lessen competition, thereby causing significant harm to consumers. This merger, involving the two leading operators of premium natural and organic supermarkets, may increase prices and reduce quality and services in a number of geographic markets throughout the United States. Whole Foods' Chief Executive Officer John Mackey bluntly advised his Board of Directors of the purpose of this acquisition: "By buying [Wild Oats] we will . . . avoid nasty price wars in Portland (both Oregon and Maine), Boulder, Nashville, and several other cities which will harm [Whole Foods'] gross margins and profitability. By buying [Wild Oats] . . . we eliminate forever the possibility of Kroger, Super Value, or Safeway using their brand equity to launch a competing national natural/organic food chain to rival us. . . . [Wild Oats] may not be able to defeat us but they can still hurt us . . . . [Wild Oats] is the only existing company that has the brand and number of stores to be a meaningful springboard for another player to get into this space. Eliminating them means eliminating this threat forever, or almost forever."

To prevent this consumer harm, the Federal Trade Commission ("Commission"), pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, having reason to believe that Respondent Whole Foods and Wild Oats entered into an agreement pursuant to which Whole Foods acquired the voting securities of Wild Oats, that such agreement violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that such acquisition violates Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its Amended Complaint, stating its charges as follows:

## **II. THE PARTIES AND JURISDICTION**

### **Whole Foods Market, Inc.**

1. Respondent Whole Foods is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 550 Bowie Street, Austin, Texas 78703.
2. Established in 1980, Whole Foods operates approximately 260 premium natural and organic supermarkets in more than 37 states and the District of Columbia.
3. Whole Foods is the largest operator of premium natural and organic supermarkets in the United States.
4. According to Whole Foods' Chief Executive Officer John Mackey, Whole Foods is "a company that is authentically committed to its mission of natural/organic/healthy foods. Its core customers recognize this authenticity and it creates a customer loyalty that will not be stolen away by conventional markets who sell the same products. Whole Foods has created a 'brand' that has real value for millions of people."
5. Whole Foods is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

## **III. THE ACQUISITION**

6. On February 21, 2007, Whole Foods and Wild Oats executed an agreement whereby Whole Foods proposed to acquire all of the voting securities of Wild Oats through WFMI Merger Co., a wholly-owned subsidiary of Whole Foods (the "Acquisition"). The purchase was effected through a tender offer for all shares of Wild Oats common stock. The total cost of the Acquisition was approximately \$671 million in cash and assumed debt.
7. Respondent Whole Foods is in the process of merging Wild Oats into Whole Foods; closing numerous Wild Oats stores; selling several Wild Oats stores; and operating the remainder as Whole Foods stores.
8. On June 5, 2007, the Commission authorized the commencement of an action under Section 13(b) of the Federal Trade Commission Act to seek a temporary restraining order and a preliminary injunction barring the Acquisition during the pendency of administrative proceedings to be commenced by the Commission pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b).

9. In authorizing the commencement of this action, the Commission determined that a temporary restraining order and a preliminary injunction were in the public interest and that it had reason to believe that the Acquisition would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act because the Acquisition likely would substantially lessen competition in the relevant markets alleged in the complaint.
10. On June 7, 2007, United States District Court Judge Paul L. Friedman of the United States District Court for the District of Columbia issued an Order granting the Commission's motion for temporary restraining order. On August 16, 2007, Judge Friedman 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 denied the Commission's emergency motion for an injunction pending appeal. As a result, Whole Foods' acquisition of Wild Oats was consummated on August 28, 2007. On July 29, 2008, the United States Court of Appeals for the District of Columbia Circuit reversed the district court's conclusion that the Commission failed to show a likelihood of success in this proceeding and remanded the matter back to the district court to address the equities.

#### IV. NATURE OF COMPETITION

11. "Natural foods" are foods that are minimally processed and largely or completely free of artificial ingredients, preservatives, and other non-naturally occurring substances.
12. "Organic foods" are foods that are produced using: agricultural practices that promote healthy ecosystems; no genetically engineered seeds or crops, sewage sludge, long-lasting pesticides or fungicides; healthy and humane livestock management practices including use of organically grown feed, ample access to fresh air and the outdoors, and no antibiotics or growth hormones; and food processing that protects the healthfulness of the organic product, including the avoidance of irradiation, genetically modified organisms, and synthetic preservatives.
13. Pursuant to the United States Department of Agriculture's ("USDA") Organic Foods Production Act of 1990 (the "Organic Rule"), all products labeled "organic" must be certified by a federally accredited certifying agency as satisfying USDA standards for organic foods. The Organic Rule further requires that retailers of products labeled "organic" use handling, storage, and other practices to protect the integrity of organically-labeled products; including: preventing commingling of organic and non-organic ("conventional") products; protecting organic products from contact with prohibited substances; and maintaining records that document adherence to the USDA requirements.

14. Premium natural and organic supermarkets offer a distinct set of products and services to a distinct group of customers in a distinctive way, all of which significantly distinguish premium natural and organic supermarkets from conventional supermarkets and other retailers of food and grocery items ("Retailers").
15. Premium natural and organic supermarkets are not simply outlets for natural and organic foods. Whole Foods' Chief Executive Officer John Mackey acknowledged that "Whole Foods isn't primarily about organic foods. It never has been. Organic foods is only one part of its highly successful business model." In announcing its fourth quarter results for 2006, Whole Foods stated that "Whole Foods Market is about much more than just selling 'commodity' natural and organic products. We are a lifestyle retailer and have created a unique shopping environment built around satisfying and delighting our customers." Specifically, Mr. Mackey has said that "[s]uperior quality, superior service, superior perishable product, superior prepared foods, superior marketing, superior branding, and superior store experience working together are what makes Whole Foods so successful." "[P]eople who think organic foods are the key don't understand the business model. . . ."
16. To begin with, premium natural and organic supermarkets focus on perishable products, offering a vast selection of very high quality fresh fruits and vegetables (including exotic and hard-to-find items) and other perishables. As Whole Foods stated in its 2006 annual report, "We believe our heavy emphasis on perishable products differentiates us from conventional supermarkets and helps us attract a broader customer base." Whole Foods' Chief Executive Officer John Mackey has also emphasized the importance of high quality perishable foods to Whole Foods' business model: "This [produce, meat, seafood, bakery, prepared foods] is over 70% of Whole Foods total sales. Wal-Mart doesn't sell high quality perishables and neither does Trader Joe's while we are on the subject. That is why Whole Foods coexists so well with [Trader Joe's] and it is also why Wal-Mart isn't going to hurt Whole Foods."
17. Relative to conventional supermarkets and most other Retailers, premium natural and organic supermarkets target shoppers who are, in the words of the Respondent or Wild Oats, "affluent, well educated, health oriented, quality food oriented people. . . ." The core shoppers of premium natural and organic supermarkets have a preference for natural and organic products, and premium natural and organic supermarkets offer an extensive selection of natural and organic products to enable those shoppers to purchase substantially all of their food and grocery requirements during a single shopping trip.
18. Premium natural and organic supermarkets are differentiated from other Retailers in that premium natural and organic supermarkets offer more amenities and service venues; higher levels of service and more knowledgeable service personnel; and special features such as in-store community centers.

19. Premium natural and organic supermarkets promote a lifestyle of health and ecological sustainability, to which a significant portion of their customers are committed. Through the blending together of these elements and others, premium natural and organic supermarkets strive to create a varied and dynamic experience for shoppers, inviting them to make the premium natural and organic supermarket a destination to which shoppers come not merely to shop, but to gather together, interact, and learn, often while enjoying shared eating and other experiences. Premium natural and organic supermarkets expend substantial resources on developing a brand identity that connotes this blend of elements, and especially the qualities of trustworthiness (*viz.*, that all products are natural, that products labeled “organic” are properly labeled, that the store’s suppliers practice humane animal husbandry, and that the store’s actions are ecologically sound) and qualitative superiority to other Retailers.
20. Relative to most other Retailers, premium natural and organic supermarkets’ products often are priced at a premium reflecting not only product quality and service, but the marketing of a lifestyle to which their customers aspire.
21. As Whole Foods’ Chief Executive Officer John Mackey has acknowledged, “Safeway and other conventional retailers will keep doing their thing – trying to be all things to all people . . . . They can’t really effectively focus on Whole Foods Core Customers without abandoning 90% of their own customers. . . . Whole Foods core customers will not abandon them because Safeway has made their stores a bit nicer and is selling some organic foods. Whole Foods knows their core customers well and serves them far better than any of their potential competitors do.”
22. Mr. Mackey has also said that “[a]ll those [conventional supermarkets and club stores] you named have been selling organic foods for many years now. The only thing ‘new’ is that they are now beginning to sell private label organic foods for the first time. However, they’ve been selling organic produce and organic milk for many years now. Doing so has never hurt Whole Foods.”
23. Wild Oats’ 2006 10K filed with the Securities and Exchange Commission noted: “Despite the increase in natural foods sales within conventional supermarkets, [Wild Oats] believe[s] that conventional supermarkets still lack the concentration on a wide variety of natural and organic products, and emphasis on service and consumer education that our stores offer.”
24. Premium natural and organic supermarkets are also very different from mass-merchandisers, such as Wal-Mart and Target. According to Mr. Mackey, “Wal-Mart does a particularly poor job selling perishable foods. Whole Foods quality is better, its customer service is far superior, and the store ambience and experience it provides its customers is fun, entertaining and educational . . . .”



25. With respect to Trader Joe's, Mr. Mackey stated: "TJ's is a completely different concept than WFMI. WFMI's business is all about perishables – fresh produce, fresh seafood, fresh meat, in store delis, juice bars, and bakeries. WFMI has stated that more than 50% of their sales are in these categories of products – categories which TJ's doesn't even have. TJ's is primarily a discount private label company with a large wine selection."
26. Unlike other natural and organic product retailers, premium natural and organic supermarkets offer an extensive selection of natural and organic products to enable shoppers to purchase substantially all of their food and grocery requirements during a single shopping trip. As a result, premium natural and organic supermarkets are appreciably larger than other natural and organic retailers in square footage, number of products offered, inventory for each product offered, and annual dollar sales.
27. Prior to the Acquisition, Whole Foods and Wild Oats, respectively, were the largest and second largest operators of premium natural and organic supermarkets in the United States.
28. Prior to the Acquisition, Whole Foods and Wild Oats were the only two nationwide operators of premium and natural organic supermarkets in the United States.
29. Consumers spent a combined total of \$6.5 billion in fiscal 2006 at Whole Foods and Wild Oats. Approximately 70% of that total was spent on perishable products, such as produce, meat, seafood, baked goods, and prepared foods.
30. Prior to the Acquisition, Whole Foods and Wild Oats were one another's closest competitors in 22 geographic markets. Consumers in these markets have reaped price and non-price benefits of competition between Whole Foods and Wild Oats. The markets where the two competed head to head are: Albuquerque, NM; Boston, MA; Boulder, CO; Hinsdale, IL (suburban Chicago); Evanston, IL (suburban Chicago); Cleveland, OH; Colorado Springs, CO; Columbus, OH; Denver, CO; West Hartford, CT; Henderson, NV; Kansas City-Overland Park, KS; Las Vegas, NV; Los Angeles-Santa Monica-Brentwood, CA; Louisville, KY; Omaha, NE; Pasadena, CA; Phoenix, AZ; Portland, ME; Portland, OR; Santa Fe, NM; and St. Louis, MO.
31. Over the last five years prior to the Acquisition, Whole Foods targeted markets for entry where, in Whole Foods' words, Wild Oats enjoyed a "monopoly." Consumers in those markets benefitted from the new competition in those markets.
32. Prior to the Acquisition, there were other geographic markets in which only one or the other is present. In many of these markets, Wild Oats or Whole Foods planned, but for the Acquisition, to enter and offer direct and unique competition to the other. Each developed expansion plans that targeted the other's "monopoly" markets, as Whole Foods

describes it. These markets include: Palo Alto, CA; Fairfield County, CT; Miami Beach, FL; Naples, FL; Nashville, TN; Reno, NV; and Salt Lake City, UT.

33. Whole Foods' Mr. Mackey has said that "Whole Foods has taken significant market share from OATS wherever they have opened competing stores – Boulder, Santa Fe, Denver, Boca Raton, Ft. Lauderdale, and St. Louis." Each of the parties, in anticipation of entry by the other, has engaged in aggressive price and non-price competition that conveys to shoppers benefits that go well beyond the benefits resulting from the presence or threatened entry in those geographic markets of other retailers. In addition, when Whole Foods or Wild Oats expected the other to enter one of its markets, it planned substantial improvements in quality, including renovations, expansions, and competitive pricing. As Mr. Mackey explained upon Whole Foods' entry into Nashville: "At least Wild Oats will likely improve their store there in anticipation of Whole Foods eventually opening and [customers will] benefit from that." Prior to the Acquisition, neither company responded in the same way to competition from conventional supermarkets or other Retailers.
34. Prior to the Acquisition, consumers benefitted directly from the price and quality competition between Whole Foods and Wild Oats. These benefits will be lost in the markets where the two competed before the Acquisition and they will not occur in those markets where each had planned to expand.

#### **V. RELEVANT MARKETS**

35. A relevant product market in which to analyze the effects of the Acquisition is the operation of premium natural and organic supermarkets.
36. A relevant geographic market in which to analyze the effects of the Acquisition is an area as small as approximately five or six miles in radius from premium natural and organic supermarkets or as large as a metropolitan area.

#### **VI. ENTRY CONDITIONS**

37. Entry or repositioning into the operation of premium natural and organic supermarkets is time-consuming, costly, and difficult. As a result, entry or repositioning into the operation of premium natural and organic supermarkets in the relevant geographic markets is unlikely to occur or to be timely or sufficient to prevent or defeat the anticompetitive effects of the Acquisition.

#### **VII. ANTICOMPETITIVE EFFECTS**

38. The relevant markets are highly concentrated and are significantly more concentrated after the Acquisition. Premium natural and organic supermarkets' primary competitors are other premium natural and organic supermarkets. Shoppers with preferences for

premium natural and organic supermarkets are not likely to switch to other retailers in response to a small but significant non-transitory increase in premium natural and organic supermarket prices.

39. The Acquisition is likely to have substantially lessened competition and continues to substantially lessen competition in the following ways, among others:
- a. the Acquisition has already eliminated one of only two or three premium natural and organic supermarkets and has substantially increased concentration in the operation of premium natural and organic supermarkets in the relevant geographic markets, each of which already is highly concentrated;
  - b. the Acquisition has already eliminated substantial and effective price and non-price competition between Whole Foods and Wild Oats in the operation of premium natural and organic supermarkets in the relevant geographic markets, substantially reducing or eliminating competition in the operation of premium natural and organic supermarkets in each of those geographic areas;
  - c. the Acquisition has already eliminated one of only two or three premium natural and organic supermarkets in each of the relevant geographic markets, tending to create a monopoly in the operation of premium natural and organic supermarkets in each of those geographic areas;
  - d. the Acquisition has already eliminated the only existing company that can serve as a meaningful springboard for a conventional supermarket operator to enter the market for premium natural and organic supermarkets in each of the relevant geographic markets, tending to create a monopoly in the operation of premium natural and organic supermarkets in each of those geographic areas;
  - e. the Acquisition has already eliminated Whole Foods' closest competitor in geographic and product space in each of the relevant geographic areas, resulting in the loss of direct and unique price and non-price competition that conveys to shoppers benefits that go well beyond the benefits resulting from the presence or threatened entry of other retailers;
  - f. the Acquisition has already resulted in the closing of numerous Wild Oats stores, reducing or eliminating consumer choice in premium natural and organic supermarkets, and will result in the closing of additional Wild Oats stores and further disposition of assets;
  - g. the Acquisition has already enabled the combined Whole Foods/Wild Oats to exercise market power unilaterally; and

- h. the Acquisition has already eliminated potential competition in numerous parts of the United States.

### **VIII. VIOLATIONS CHARGED**

#### **COUNT I – ILLEGAL ACQUISITION**

40. The allegations contained in paragraphs 1-39 are repeated and realleged as though fully set forth here.
41. Whole Foods' acquisition of Wild Oats is likely to have substantially lessened competition and continues to substantially lessen in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

#### **COUNT II – ILLEGAL ACQUISITION AGREEMENT**

42. The allegations contained in paragraphs 1-41 are repeated and realleged as though fully set forth here.
43. Whole Foods, through the Agreement with Wild Oats as described in paragraph 6, has engaged in unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

### **NOTICE**

Notice is hereby given to the Respondent that the sixteenth day of February 2009, at 10 a.m. is hereby fixed as the time, and Federal Trade Commission offices, 600 Pennsylvania Ave., N.W., Washington, D.C. 20580, as the place when and where a hearing will be had on the charges set forth in this Amended Complaint, at which time and place you will have the right under the Federal Trade Commission Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the Amended Complaint.

Pending further order of the Commission, the Commission will retain adjudicative responsibility for this matter. *See* § 3.42(a) of the Commission's Rules of Practice for Adjudicative Proceedings. The Commission hereby allows you until September 26, 2008, to file either an answer or a dispositive motion. If you file a dispositive motion within that time, your time for filing an answer is extended until 10 days after service of the Commission's order on such motion. If you do not file a dispositive motion within that time, you must file an answer.

An answer in which the allegations of the Amended Complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the Amended Complaint or, if you are

without knowledge thereof, a statement to that effect. Allegations of the Amended Complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the Amended Complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the Amended Complaint and, together with the Amended Complaint, will provide a record basis on which the Commission or the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under § 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings and the right to appeal the initial decision to the Commission under § 3.52 of said Rules.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the Amended Complaint and shall authorize the Commission or the Administrative Law Judge, without further notice to you, to find the facts to be as alleged in the Amended Complaint and to enter an initial decision containing such findings, appropriate conclusions, and order.

Unless otherwise directed, further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Ave., N.W. Room 532, Washington, D.C. 20580. The final prehearing conference shall be held at that location, at 10:00 a.m. on a date to be determined. The parties shall meet and confer prior to the final prehearing conference regarding trial logistics, any designated deposition testimony, and proposed stipulations of law, facts, and authenticity.

#### **NOTICE OF CONTEMPLATED RELIEF**

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the acquisition of Wild Oats by Whole Foods challenged in this proceeding violates Section 7 of the Clayton Act, as amended, the Commission may order such relief against Respondent as is supported by the record and is necessary and appropriate, including, but not limited to:

1. An order preventing Whole Foods from consolidating any Wild Oats stores into the Whole Foods system, to the extent such consolidation has not occurred at the time of the Commission's decision;
2. An order preventing Whole Foods from selling or disposing of any owned or leased property that had been used as a Wild Oats store in any geographic market, or a Whole Foods store in any relevant geographic market;
3. An order preventing Whole Foods from discontinuing the use of the Wild Oats name at any store being operated as Wild Oats at the time of the Commission's decision;

4. Re-establishment of Wild Oats stores, with Whole Foods stores added as necessary, along with any associated or necessary assets in a manner that creates a group or system of stores that may be available for divestiture, including, but not limited to, re-opening closed Wild Oats stores, re-naming Wild Oats stores that had been changed to the Whole Foods name, reversing any consolidation of Wild Oats stores into the Whole Foods system and re-establishing the Wild Oats system, and re-establishing Wild Oats' distribution arrangements, private label products and supplier relationships;
5. The divestiture of Wild Oats stores, and Whole Foods stores, and any other associated or necessary assets, including the Wild Oats name, distribution systems or assets, and supplier relationships, in a manner that restores Wild Oats as a viable, independent competitor in the relevant markets, with the ability to offer such services as Wild Oats had offered prior to its acquisition by Whole Foods;
6. Maintenance of the Wild Oats stores pending divestiture, including operating the stores in the ordinary course and maintaining the inventory of the stores, the hours of operation of the stores and of each department in the stores;
7. Appointment of a monitor, or a divestiture trustee, to assure that the Wild Oats, Whole Foods, and related assets are re-established and divested within the time set forth in the Commission's decision;
8. A requirement that, for a period of time, Whole Foods provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of its operations with any other company providing the operation of premium and natural organic supermarkets;
9. A requirement for Whole Foods to file periodic compliance reports with the Commission; and
10. Any other relief appropriate to correct or remedy the anticompetitive effects of the transaction or to restore Wild Oats as a viable, independent competitor in the relevant markets.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this Amended Complaint to be signed by the Secretary and its official seal to be affixed hereto, at Washington, D.C., this eighth day of September, 2008.

By the Commission.

Donald S. Clark  
Secretary

# **EXHIBIT 7**

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

2008 SEP 26 PM 4: 12

DOCUMENT PROCESSING

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,

*Of Counsel:*

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

By. 

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.*