ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

WHOLE FOODS MARKET, INC.'S RESPONSE IN OPPOSITION TO NEW SEASONS MARKET'S MOTION TO QUASH OR LIMIT SUBPOENA FROM WHOLE FOODS MARKET, INC.

INTRODUCTION

The motion to quash by New Seasons Market, Inc. ("New Seasons") is based upon conclusory claims of undue burden that are addressed entirely to straw men that it has concocted, and on irrelevant attempts to smear Whole Foods Market, Inc. ("Whole Foods"). As discussed more fully below, New Seasons has failed to carry its substantial burden on this motion, and therefore the motion should be denied.

New Seasons ignores the fact that compliance with the subpoena to which it objects is necessitated by the complaint filed by the Federal Trade Commission ("FTC") which alleges that Whole Foods' acquisition of Wild Oats lessens competition in a product market limited to "premium natural and organic supermarkets" and in geographic markets as small as approximately five or six miles in radius from these stores or as large as a metropolitan area. In order to properly defend itself on the critical question of the definition of the relevant markets, Whole Foods served subpoenas duces tecum on 93 of its non-party competitors, including New Seasons, with whom Whole Foods competes in the Portland, Oregon area. See October 13, 2008

Subpoena Duces Tecum (attached as Exhibit 1 to New Seasons Market's Motion To Quash ("New Seasons' Br.")). Whole Foods has no other effective means to obtain information from its non-party competitors necessary for its defense. Of the 93 identical subpoenas Whole Foods has served, over 50 recipients have thus far fully or partially complied. Except for New Seasons, no recipient of a subpoena has moved to quash.

New Seasons, for its part, does not contest the subpoena on relevance grounds. Rather, it claims that compliance with the third, fourth, seventh, and eighth requests in the subpoena would unduly burden it, and that the "outside counsel eyes only" protective order entered by the Federal Trade Commission (the "Commission" or the "FTC") here would provide inadequate protection for its confidential documents. These arguments may sound familiar, as they are the same as those rejected in New Seasons' failed motion to quash the Commission's Civil Investigative Demand last year in this matter. See Ex. 1, June 26, 2007 Commission Order. This motion should meet the same fate.

On the issue of burden, New Seasons says that compliance with Whole Foods' subpoena would require it to search the files of "over 300 employees," including employees in each of its nine grocery stores (and spend some $250,000-500,000 in the process, figures that are entirely unsupported in the motion). New Seasons' Br., at 3-4. The reality is quite to the contrary. During meet and confer telephone discussions (which New Seasons stretched out over several weeks before abruptly filing this motion), counsel for Whole Foods represented that New Seasons need ***not*** 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***. Ex. A, Declaration of James A. Fishkin ("Fishkin Decl.") ¶¶ 10-11. Whole Foods even invited

New Seasons to identify the appropriate senior-level employees based on their area of responsibility whose files would be searched in an effort to reduce the burden. Id. ¶ 11. To comply with the subpoena, then, New Seasons would presumably only have to search a handful of employees' files at its headquarters. New Seasons does not even attempt to show why a search this narrow could be unduly burdensome, but rather directs its arguments solely to the fallacy that Whole Foods is asking it to turn its company upside down.

The confidentiality concerns raised by New Seasons are equally contrived. New Seasons claims that it fears that if it makes a production here, Whole Foods may use its documents to gain a competitive advantage. This is a classic red herring. The protective order issued by the Commission in this matter is an "outside counsel eyes only" protective order, meaning that ***only*** outside counsel for Whole Foods and its experts may see New Seasons' documents designated as confidential under the order. No Whole Foods employee, even its in-house counsel, can have any access to New Seasons' confidential information. This is effectively the strictest type of protective order used in civil litigation. See, e.g., Westbrook v. Charlie Sciara & Son Produce, Co., Civ. A. No. 07-2657, 2008 U.S. Dist. LEXIS 24649, at *11 (W.D. Tenn. Mar. 27, 2008) ("In general, courts utilize 'attorneys eyes only' protective orders when especially sensitive information is at issue or the information is to be provided to a competitor."). The confidentiality concerns raised by New Seasons are thus more than adequately addressed by the protective order.

The documents sought by Whole Foods are critical to the one of the central antitrust issues in this administrative action – the appropriate definition of the relevant market. The burden to New Seasons to comply would at most be slight, and its confidential documents would be protected under the most stringent protective order available in civil litigation. Because New

Seasons' arguments are so unavailing, it resorts to smearing Whole Foods with references to allegations of "anticompetitive conduct" that have been rejected in court, and have no bearing on this discovery motion. The motion should be denied.

FACTUAL BACKGROUND

New Seasons operates nine full-line supermarkets in the Portland, Oregon area. According to the Commission, New Seasons is one of only three other premium natural and organic supermarkets – the other two being Wild Oats and Earth Fare – that competed with Whole Foods in 2007 in the United States. FTC v. Whole Foods Market, Inc., 502 F. Supp. 2d 1, 15 (D.D.C. 2007). Whole Foods' position is that New Seasons is just one of a plethora of other supermarkets and retail food stores that it competes fiercely against for customers.

The subpoena served on New Seasons on October 14, 2008 contains nine document requests 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. In those requests, Whole Foods seeks documents:

- that New Seasons produced to the Commission or relate to communications with the Commission, see October 13, 2008 Subpoena Duces Tecum, at Requests 1-2 (attached as Exhibit 1 to New Seasons' brief);
- discussing Whole Foods' acquisition of Wild Oats and competition by New Seasons with Whole Foods and Wild Oats, id. at Requests 3-4;
- discussing New Seasons' competition with other companies besides Whole Foods and Wild Oats, id. at Request 5;
- discussing New Seasons' efforts to sell more natural and organic products by, among other things, renovating its stores and increasing shelf space allocated to those products, id. at Requests 6-8; and
- identifying each New Seasons store and that store's total weekly sales since

January 1, 2006.[1] Id. at Request 9.

Because the Commission has taken the position that, in 2007, New Seasons was one of just two competitors of Whole Foods and Wild Oats, the documents Whole Food seeks will bear heavily on the definition of the relevant product market in this case.

The return date on the subpoena was November 4, 2008. Id. at 1. On October 22, New Seasons requested a two-week extension to respond to the subpoena, which Whole Foods granted. See Ex. 2, October 22, 2008 Letter. On November 6, 2008, New Seasons requested a second two-week extension, and Whole Foods also granted that second request. See Ex. 3, Nov. 7, 2008 Email.

On three occasions – November 4, November 6, and November 20 – Whole Foods' counsel spoke with New Seasons' counsel in an effort informally to resolve New Seasons' concerns about the subpoena. See Ex. A, Fishkin Decl. ¶ 7. Those three conversations lasted approximately 1.5 hours in total. Id. New Seasons did not (and still does not) contest the relevance of the requests in the subpoena; rather, it raised concerns over the alleged burden to comply, as well as concerns over having to produce what it claimed are confidential documents.

In response to these concerns, Whole Foods' counsel offered substantially to limit Whole Foods' requests in an effort to reduce any burden. Contrary to what is suggested in paragraph four of New Seasons' "Statement of Counsel," Whole Foods' counsel stated not only that Whole Foods would accept documents of "'high level' members of New Seasons' management team," id. ¶ 10, but also that Whole Foods would accept just the "high-level" documents of those "high-level" executives. Id. Whole Foods' counsel also invited New Seasons to identify the members

[1] Instead of producing documents, this ninth request alternatively allowed New Seasons to

of its senior management team who were likely to have such high-level documents. Id. ¶ 11. Moreover, Whole Foods' counsel offered to limit Whole Foods' requests only to those high-level employees who work at New Seasons' Portland, Oregon ***headquarters***, meaning that New Seasons would not have to search any files at its stores. Id. ¶ 12. In response to New Seasons' confidentiality concerns, counsel for Whole Foods pointed out that the protective order entered by the Commission in this matter on October 10, 2008 would afford it the highest level of protection in that no Whole Foods employees, even in-house counsel, could have access to New Seasons' confidential documents under the order. Id. See also October 10, 2008 Protective Order ¶ 7 (attached as Exhibit 1 to New Seasons' brief).

It appeared that progress had been made in light of Whole Foods' concessions, and that the parties would work out their differences. Counsel for New Seasons stated that he would consider the substantially narrowed subpoena and get back to counsel for Whole Foods. Id. Unfortunately, counsel for New Seasons reneged on that promise, and instead filed this motion.

ARGUMENT

In its motion, New Seasons claims it would be an undue burden to respond to the third, fourth, seventh, and eighth requests of the subpoena, and that moreover, the entire subpoena should be quashed because the FTC protective order in this case is inadequate. Neither of these arguments withstands scrutiny.

---

produce a spreadsheet. Id. at Request 9.

I. New Seasons Has Failed To Demonstrate, and Cannot Demonstrate, that the Subpoena Is Unduly Burdensome

As the subpoenaed party, New Seasons bears "[t]he burden of showing that the request[s] [are] unreasonable." In re Rambus, Inc., No. 9302, 2002 FTC LEXIS 90, at *9 (Nov. 18. 2002) (denying third party's motion to quash subpoena in FTC adjudicative proceeding). Moreover, that burden is "heavy." In re Flowers Industries, Inc., No. 9148, 1982 FTC LEXIS 96, at *15 (Mar. 19, 1982) (denying motions to quash third-party subpoenas in FTC anti-merger action); accord FTC v. Texaco, Inc., 555 F.2d 862, 882 (D.C. Cir. 1977) (cited on page 4 of New Seasons' brief) ("[T]hat burden is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose;" ordering compliance with subpoenas issued in FTC proceeding and reversing district court for modifying the requests to make them narrower).[2] New Seasons cannot satisfy this heavy burden.

[2] It is further well-settled that "[t]hat burden is no less because the subpoena is directed at a non-party." Flowers Industries, 1982 FTC LEXIS 96, at *15; accord Rambus, 2002 FTC LEXIS 90, at *9 ("The burden is no less for a non-party."). New Seasons cites three federal district court cases for the idea that courts sometimes consider "the fact of nonparty status" when ruling on a motion to quash a subpoena. See, e.g., New Seasons' Br., at 8. New Seasons' reliance on those cases is misplaced as those courts were interpreting the Federal Rules of Civil Procedure, while this FTC adjudicative proceeding is governed by the Commission's Rules of Practice. See Echostar Comm. Corp. v. News Corp., 180 F.R.D. 391, 394 (D. Colo. 1998) (cited on pages 2-3 of New Seasons' brief), Katz v. Batavia Marine & Sporting Supplies, Inc., 984 F.2d 422, 424 (Fed. Cir. 1993) (cited on page 4 of New Seasons' brief), and Mycogen Plant Science, Inc. v. Monsanto Co., 164 F.R.D. 623, 628 (E.D. Pa. 1996) (cited on page 8 of New Seasons' brief). In any event, considering "the fact of nonparty status" is far from a settled practice in the federal courts, and many courts ignore one's non-party status when ruling on motions to quash. See, e.g., Castle v. Jallah, 142 F.R.D. 618 (E.D. Va. 1992); Composition Roofers Un. Local 30 Welfare Trust Fund v. Graveley Roofing Enters., Inc., 160 F.R.D. 70 (E.D. Pa. 1995). Indeed, the leading treatise on federal procedure "finds no basis for [a] distinction [between party and non-party status] in the [relevant] rule's language." Charles Alan Wright and Arthur R. Miller, 9A Federal Practice & Procedure § 2459 (2d ed. 2008).

A. Whole Foods' Subpoena Seeks Highly Relevant Information

Since as far back as the 1970s, "[t]he practice of the Commission has been to uphold subpoenas duces tecum upon a showing . . . that the requested information is generally relevant to the issues raised by the pleadings." In re Kaiser Alum. & Chem. Corp., No. 9080, 1976 FTC LEXIS 68, at *4 (Nov. 12, 1976) (denying motion to quash third-party subpoenas as unduly burdensome in FTC anti-merger proceeding when the requests bore a "general relevancy to the defenses raised by [the respondent]."). [3] New Seasons does not dispute that the documents sought in the third, fourth, seventh, and eighth requests are relevant. Nor could it, as the requested documents go to the very heart of the Commission's case.

As Judge Friedman explained last year when considering whether preliminarily to enjoin the acquisition, the central issue in this case is the definition of the relevant product market:

> [I]f the relevant product market is, as the FTC alleges, a product market of "premium natural and organic supermarkets" consisting only of the two defendants and two other non-national firms, there can be little doubt that the acquisition of the second largest firm in the market by the largest firm in the market will tend to harm competition in that market. If, on the other hand, the defendants are merely differentiated firms operating within the larger relevant product market of "supermarkets," the proposed merger will not tend to harm competition.

Whole Foods, 502 F. Supp. 2d at 8; see also Ex. 4, Am. Compl. ¶ 35 (describing relevant product

---

[3] See also Commission Rule of Practice § 3.31(c)(1) (16 C.F.R. § 3.31(c)(1)) (allowing one "to obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to [its own] defenses . . . ."); Rambus, 2002 FTC LEXIS 90, at *5 (denying third party's motion to quash subpoena as unduly burdensome when "[p]utting the subpoena along side the pleadings demonstrate[d] that Rambus's subpoena [sought] documents that may be reasonably expected to yield relevant information."); In re R.R. Donnelly & Sons Co., No. 9243, 1991 FTC LEXIS 272, at * 1 (June 12, 1991) (denying third party's motion to quash subpoena as unduly burdensome when ALJ found that the documents "may reasonably be expected to yield [relevant] information . . . .") (internal quotation marks omitted).

market as "the operation of premium natural and organic supermarkets."). According to the Commission, only four premium natural and organic supermarkets operated in the United States in 2007, one of whom was New Seasons. See, e.g., Ex. 5, Plaintiff FTC's Proposed Findings of Fact ¶ 614 ("The only other PNOS [besides Whole Foods and Wild Oats] are Earth Fare in North Carolina and New Seasons in Portland, Oregon.").[4]

Requests three and four, for instance, seek documents that discuss Whole Foods' acquisition of Wild Oats and competition by New Seasons with Whole Foods and Wild Oats. Similarly, requests seven and eight seek documents discussing New Seasons' efforts to sell more natural and organic products. Because the Commission theorizes that New Seasons, Whole Foods, and Wild Oats competed in a unique product market, the documents Whole Foods seeks all bear heavily on the Commission's theory. Thus, the bottom line is that, not only are the documents Whole Foods seeks generally relevant, but those documents go to the very heart of the Commission's case. It is against this backdrop that New Seasons' claims of undue burden must be evaluated.

B. New Seasons Has Failed to Support its Claim of Undue Burden

New Seasons' entire undue burden argument is based on a flawed premise and, consequently, is grossly exaggerated. It complains that it would have to spend some $250,000-500,000 to "search, process, review and produce responsive documents from more than 300

[4] Whole Foods' position is that Judge Friedman rightfully rejected the Commission's proposed definition last year as artificially narrow. See Whole Foods, 502 F. Supp. 2d at 34 ("[T]he relevant product market in this case is not premium natural and organic supermarkets . . . as argued by the FTC but . . . at least all supermarkets."); Ex. 6, Respondent Whole Foods Market, Inc.'s Answer To Am. Compl. ¶ 35.

employees" – including "merchandisers, buyers, store managers, and department managers." New Seasons' Br., at 3-4. The $250-500,000 figure, itself entirely unsupported, is based on a premise that New Seasons would have to search 300 employee files. As discussed above, this is simply not the case. Whole Foods has agreed to limit its third, fourth, seventh, and eighth requests only to senior management employees at New Seasons' headquarters, and that New Seasons need not search any of its stores or store-level employees. While New Seasons refuses to tell counsel for Whole Foods who its senior employees at headquarters are, it is reasonable to assume that only a handful of individuals would possess responsive documents at headquarters.

In any event, it is well-settled that a subpoena "seeking relevant data will not be quashed on the grounds that the burden is imposed on a third party, especially where the party initiating the subpoena has expressed a willingness to mitigate whatever burden may exist by ***negotiation and compromise***." In re General Motors Corp., No. 9077, 1977 FTC LEXIS 18, at *1 (Nov. 25, 1977) (emphasis added) (denying motion to quash third-party subpoena that would allegedly "require a substantial expenditure of time and money").[5] Here, Whole Foods has made a number of compromise proposals designed to limit the burden to New Seasons. Ex. A, Fishkin Decl. ¶¶

[5] Accord Rambus, 2002 FTC LEXIS 90, at *10 (denying motion to quash third-party subpoena when burden argument was "undermined by the fact that Rambus ha[d] been willing to alleviate the burden through compromise."); Donnelly, 1991 FTC LEXIS 272, at *2 (denying motion to quash third-party subpoena when burden argument was undermined by "counsel's offer to modify some of the subpoena's specifications."); Flowers Industries, 1982 FTC LEXIS 96, at *14 (denying motions to quash third-party subpoenas as unduly burdensome when "Flowers ha[d] negotiated reasonable modifications designed to alleviate these difficulties and ha[d] offered to do so with movants."); Texaco, 555 F.2d at 882 (reasoning that "the alleged burdensomeness of [the] subpoena was 'substantially mitigated' during the course of extensive negotiations with Commission attorneys."); Kaiser Alum., 1976 FTC LEXIS 68, at *19 (denying motions to quash narrowed third-party subpoenas in FTC anti-merger proceeding as unduly burdensome when the respondent "negotiated reasonable modifications designed to alleviate these difficulties and has offered to do so with movants.").

9-12.

After stringing Whole Foods along for weeks, New Seasons finally claims that the subpoena creates an undue burden because New Seasons is "head[ing] into the critical holiday season." New Seasons' Br., at 4. Any timing issue is of New Seasons' own creation, given its delay tactics here. In any event, New Seasons does not submit any evidence to support the notion that its holiday store operations would be affected by having to search for narrow categories of documents from a handful of custodians at headquarters.

Indeed, New Seasons' claims of cost and burden are entirely unsupported and conclusory. For instance, New Seasons does not provide any detail to support its hefty cost estimate. See New Seasons' Br., Decl. of Brian Rohter ¶¶ 1-6, Statement of Counsel 1-5. Therefore, even if Whole Foods had not drastically narrowed its requests, its motion ***still*** would not satisfy New Seasons' heavy burden. Kaiser Alum., 1976 FTC LEXIS 68, at *18 (emphasizing that a "general, unsupported claim [of burden] is not persuasive."). Last year, a very similar New Seasons motion to quash the Commission's CID in this case was rejected because, among other reasons, New Seasons "provided no factual basis for its claims of burden." See Ex. 1, June 26, 2007 Commission Order, at 1. New Seasons' claims of undue burden this time around are equally bereft of support.[6] In sum, New Seasons' claims of undue burden should be rejected.

[6] New Seasons' burden argument is further undermined by the fact that of the 96 total companies on whom Whole Foods served subpoenas, half of which have already fully or partially complied, only it has filed a motion to quash based on undue burden. See Texaco, 555 F.2d at 883 ("[W]e cannot ignore the fact that those gas producers who complied with the subpoenas were able to submit the required data without undue effort."). Accord FTC v. Dresser Industries, Inc., 1977 U.S. Dist. LEXIS 16178, at *14 (D.C. Dist. Apr. 26, 1977) (affirming ALJ's denial of motion to quash modified subpoena in FTC anti-merger action when "all the other companies which were subpoenaed, including those with subpoenas virtually identical to that of Dresser, have agreed to

II. The Protective Order Addresses New Seasons' Concerns Regarding Confidential and Commercially Sensitive Information

New Seasons also advances the curious argument that the existing protective order issued by the Commission – which prohibits ***any*** Whole Food employees, including inside counsel, from reviewing its documents – somehow cannot protect its confidential documents. This argument would carry no weight in the face of a standard protective order, and it is particularly unavailing in the face of the "outside counsel eyes only" order that governs this action. See Coca-Cola Bottling, 1976 FTC LEXIS 33, at *3-5 (denying third party's motion to quash subpoena in FTC proceeding when the third party argued that the subpoena sought commercially sensitive documents). Thus, "'[t]he fact that information sought by a subpoena may be confidential does not excuse compliance.'" Rambus, 2002 FTC LEXIS 90, at *11 (denying third party's motion to quash subpoena on ground that the subpoena called for commercially sensitive documents); accord Flowers Industries, 1982 FTC LEXIS 96, at *6-12.

The stringent protective order entered in this case ameliorates any concerns of New Seasons that confidential documents will be disclosed to Whole Foods' employees. "[P]rotective orders are routinely issued" to safeguard confidential information in Commission proceedings. Coca-Cola Bottling, 1976 FTC LEXIS 33, at *4.[7] Here, the protective order protects

---

comply, a fact which strains the credibility of Dresser's claim of unreasonable burden."); In re Coca-Cola Bottling Comp. of New York, Inc., No. 8992, 1976 FTC LEXIS 33, at *6 (Dec. 7, 1976) (denying third party's motion to quash subpoena in FTC administrative proceeding on burden grounds and emphasizing that "respondent has managed to secure compliance by the vast majority of the 70-odd recipients of the subpoena (including both large and small companies)."); Flowers, 1982 FTC LEXIS 96, at *12 (denying motions to quash third-party subpoenas in anti-merger action and underscoring that "[m]ost of the other subpoenaed bakers have chosen to comply with the subpoenas directed to them.").

[7] See also Rambus, 2002 FTC LEXIS 90, at *11 ("The protective order entered in this case

confidential documents of third parties such as New Seasons through a number of safeguards. Most importantly, the protective order allows disclosing confidential documents only to an extremely restricted group, such as your Honor, the Commission, outside counsel for Whole Foods, and expert witnesses. See Oct. 10, 2008 Protective Order ¶ 7 (attached as Exhibit 1 to New Seasons' brief). Thus, New Seasons' confidential documents ***cannot*** be disclosed to any Whole Foods employee. Id.

The protective order also alleviates any concerns of New Seasons about its confidential documents being disclosed to the public. Should Whole Foods or the Commission intend to introduce a confidential New Seasons document at trial, counsel must "provide advance notice to [New Seasons] for purposes of allowing [it] to seek an order that the document . . . be granted *in camera* treatment." October 10, 2008 Protective Order ¶ 10. The confidential document shall then receive that treatment "[u]ntil such time as the Administrative Law Judge rules otherwise." Id. See Basic Research, 2004 FTC LEXIS 272, at *6 (denying motion to quash narrowed subpoena in which subpoenaed party cited confidentiality concerns in part because "Respondents may file a motion for in camera treatment to prevent disclosure to the public of its [sic] confidential materials at the trial in this matter."); accord Kaiser Alum., 1976 FTC LEXIS 68, at *14. This advance notice provides protection to New Seasons, as well as any other non-party.

The implication of New Seasons' claim that the protective order is not strong enough is

---

ameliorates Mitsubishi's concerns [about producing confidential documents]."); In re Basic Research, LLC A.G. Waterhouse, No. 9318, 2004 FTC LEXIS 272, at *6 (Aug. 18, 2004) ("The provisions of the Protective Order adequately protect the confidential documents of third parties through a number of safeguards;" compelling third parties to produce documents requested in subpoena as narrowed within ten days of order); accord Flowers Industries, 1982 FTC LEXIS 96, at *9; Dresser Industries, 1977 U.S. Dist. LEXIS 16178, at *15; Kaiser Alum.,1976 FTC LEXIS 68, at *13.

clear – New Seasons does not trust Whole Foods to abide by the order. This line of reasoning has been rejected. See Coca-Cola Bottling, 1976 FTC LEXIS 33, at *5 ("[A]bsent a showing to the contrary, one has to assume that the protective order will work, especially in light of the extensive use of the device in Commission litigation (in cases frequently involving experts)."); see also FTC v. Invention Submission Corp., 965 F.2d 1086, 1091 & n.3 (D.C. Cir. 1992) (cited on page 4 of New Seasons' brief) ("[T]he harm ISC alleges will only occur if we presume that the Commission will not abide by its representations – which, as we said, we are unprepared to do;" affirming district court's enforcement of subpoenas issued in Commission investigation). Indeed, presuming noncompliance would undermine Commission proceedings, in that subpoena recipients could refuse to cooperate by simply citing fears that the parties would violate the protective order.

New Seasons finally suggests that the protective order is inadequate because it does not provide for a fixed monetary penalty on counsel if the order were to be violated. The Commission rightfully rejected that precise argument from New Seasons last year. See Ex. 1, June 26, 2007 Commission Order, at 1 n.1: "Finally, [New Seasons] offers no authority to support its request that the Commission agree to pay 'damages' in the event of an inadvertent public disclosure of confidential business information, and the mere possibility of such disclosure provides no ground for quashing the CID." Unsurprisingly, New Seasons has not offered any authority this time around either. If the protective order is violated – and counsel for Whole Foods intends to abide by it – the matter can be taken up with the Commission.[8]

[8] New Seasons mischaracterizes the order entered on July 6, 2007 by Judge Friedman. There, Judge Friedman was confronted with the issue of whether Whole Foods' outside counsel could share confidential business information of Whole Foods' competitors with Whole Foods' General Counsel, Roberta L. Lang. Judge Friedman ultimately granted access to Ms. Lang, but ordered the parties to amend the protective order to contain the language about a monetary fine should a

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

III. New Seasons' Attack on Whole Foods Is a Red Herring Calculated to Divert Attention from the Absence of Facts and Authority Supporting its Position

In its brief, in an attempt to smear Whole Foods, New Seasons cites ***accusations*** of anticompetitive conduct against Whole Foods as a reason to quash the subpoena. See New Seasons' Br., at 6-7. While Judge Friedman exhaustively reviewed the very evidence New Seasons cites last year and ruled ***in favor of*** Whole Foods, a discovery motion is not the context to litigate that evidence. New Seasons' references to it constitute a bald attempt to divert attention from the absence of facts and authority supporting its position.

---

party use confidential information for a competitive advantage. See Ex. 7, Docket No. 07-1021, Docket Entry 95, July 6, 2007 Opinion and Order (D.D.C. 2007), at 5. That order has no application here, where ***no*** Whole Foods employees (even in-house counsel) would be permitted to see New Seasons' confidential documents.

CONCLUSION

For the foregoing reasons, New Seasons' motion should be denied.

Dated: December 4, 2008

Respectfully submitted,

By: 

James A. Fishkin
Kevin T. Kerns
Luke A. E. Pazicky
DECHERT LLP
1775 I Street, N.W.
Washington, D.C. 20006
Telephone: (202) 261-3300
Facsimile: (202) 261-3333

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 DENYING NEW SEASONS MARKET'S MOTION TO QUASH OR LIMIT SUBPOENA FROM WHOLE FOODS MARKET, INC.

Upon due consideration New Seasons Market's Motion To Quash or Limit Subpoena from Whole Foods Market, Inc., it is hereby ORDERED that:

1. New Seasons Market's motion is DENIED; and

2. Within ten days of the entry of this order, New Seasons Market shall COMPLY with the subpoena.

IT IS SO ORDERED.

Date: _____

_____
D. Michael Chappell
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response In Opposition to New Seasons Market's Motion to Quash or Limit Subpoena and the Proposed Order was served this December 4, 2008, 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 E-Mail and First Class Mail:

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

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

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

Attorney for Whole Foods Market, Inc.

EXHIBIT A

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

Declaration of James A. Fishkin

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

1. I am one of the attorneys for Whole Foods Market, Inc. ("Whole Foods") in the above-captioned matter.

2. In October, 2008, Whole Foods served subpoenas duces tecum on 93 of its non-party competitors.

3. Of the 93 companies that were subpoenaed, over 50 have so far fully or partially complied by producing documents or stating that they possess no responsive documents.

4. On October 14, 2008, Whole Foods served a subpoena duces tecum on New Seasons Market, Inc. ("New Seasons"). That subpoena is attached as Exhibit 1 to New Seasons' Motion To Quash or Limit Subpoena from Whole Foods Market, Inc.

5. After service of that subpoena, on October 22, 2008, counsel for New Seasons, Kevin Kono, Esq., asked me for a two-week extension to respond to the subpoena, which I granted.

6. On November 6, 2008, Mr. Kono requested a second two-week extension,

which I also granted.

7. On November 4, November 6, and November 20, I spoke with counsel for New Seasons, Robert Newell, Esq., in an effort to resolve New Seasons' concerns about the subpoena informally. In total, those three conversations lasted approximately 1.5 hours.

8. During those three conversations, Mr. Newell never contested the relevance of the requests in the subpoena; rather, he raised concerns over the alleged burden to comply, as well as concerns about producing what he claimed are confidential documents under the terms of the Protective Order.

9. In response to those concerns, I offered to limit the requests in the subpoena substantially.

10. First, I stated that Whole Foods would accept "high-level" documents from the files of "high-level" members of New Seasons' management team.

11. Second, I invited Mr. Newell to identify the members of New Seasons' senior management team who were likely to possess responsive high-level documents, something Mr. Newell declined.

12. Third, I offered to limit Whole Foods' requests only to those high-level employees who work at New Seasons' Portland, Oregon headquarters, and I explained that Whole Foods sought no documents from the files located at any of New Seasons' stores or from store-level employees.

13. With respect to New Seasons' confidentiality concerns, I explained that the Protective Order entered by the Commission would afford New Seasons the highest level of

protection in that no Whole Foods employee could have access to New Seasons' confidential documents.

14. After the conversation I had with Mr. Newell on November 20, 2008, my understanding was that both sides were close to resolving New Seasons' concerns. Mr. Newell made no mention of intending to file the motion to quash that New Seasons filed on November 24, 2008.

15. I had one additional conversation with Mr. Newell on November 25, 2008 to discuss his motion to quash and the terms of the Protective Order. I also again extended my prior offer to reduce the burden of 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 4th day of December, 2008.

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

Attorney for Whole Foods Market, Inc.

EXHIBIT 1

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

Office of the Secretary

June 26, 2007

VIA FACSIMILE AND EXPRESS MAIL

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

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

Dear Mr. Newell:

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

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

---

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

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

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

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

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

By Direction of the Commission.

Donald S. Clark
Secretary

---

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

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

EXHIBIT 2

LAWYERS

Davis Wright Tremaine LLP

ANCHORAGE BELLEVUE LOS ANGELES NEW YORK PORTLAND SAN FRANCISCO SEATTLE SHANGHAI WASHINGTON, D.C.

KEVIN H. KONO
Direct (503) 778-5331
kevinkono@dwt.com

SUITE 2300
1300 SW 5TH AVENUE
PORTLAND, OR 97201

TEL (503) 241-2300
FAX (503) 778-5499
www.dwt.com

October 22, 2008

Via Facsimile and First-Class Mail

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

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

Dear Mr. Fishkin:

This letter confirms our discussion of earlier today regarding the subpoena you issued to New Seasons Markets in *In the Matter of Whole Foods Market, Inc.*, FTC Docket No. 9324. That subpoena calls for a response date of November 4, 2008, and a deadline, based on the date and method of service, of October 27, 2008 to move to quash or limit the subpoena. In our conversation, you agreed to extend both deadlines by two weeks. Under our agreement, the new due date to respond to the subpoena is November 18, 2008 and the new due date to file a motion to quash or limit the subpoena is November 10, 2008. If your understanding of our agreement differs, please contact me immediately.

Based on this agreed-upon extension, we plan to file an Unopposed Motion to Extend the Time to Move to Quash or Limit before the end of the week. By requesting the extensions discussed herein, New Seasons does not waive any objections to the subpoena, including without limitation objections to the manner of service. Thank you for your professional courtesies.

Very truly yours,

Davis Wright Tremaine LLP

Kevin H. Kono

KHK:me

EXHIBIT 3

Pazicky, Luke

From: Fishkin, James
Sent: Wednesday, November 26, 2008 12:30 PM
To: Kerns, Kevin; Pazicky, Luke
Subject: FW: Whole Foods - New Seasons subpoena

From: Newell, Bob [mailto:bobnewell@DWT.COM]
Sent: Thursday, November 06, 2008 4:58 PM
To: Fishkin, James
Cc: Kono, Kevin; Coffey, Linda
Subject: Whole Foods - New Seasons subpoena

Dear Jim,

This will confirm our telephone conversation this morning in which you graciously agreed to another two week extension on the deadlines for response to or filing a motion to quash your subpoena. As I indicated, we are working with our client to determine what they have and will get back to you as soon as we're able to discuss the matter in greater detail. Thank you again for your professional courtesies.

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

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

EXHIBIT 4

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	)	
	)	**Docket No. 9324**
WHOLE FOODS MARKET, INC.,	)	
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 5

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION	)	
	)	
Plaintiff,	)	
	)	Civ. No. 07-cv-01021 - PLF
v.	)	
	)	**PUBLIC VERSION**
WHOLE FOODS MARKET, INC.	)	
	)	
and	)	
	)	
WILD OATS MARKETS, INC.	)	
	)	
Defendants.	)	

PLAINTIFF FEDERAL TRADE COMMISSION'S
PROPOSED FINDINGS OF FACT

Dated: August 3, 2007

JEFFREY SCHMIDT
Director

KENNETH L. GLAZER
Deputy Director

Bureau of Competition
Federal Trade Commission
600 Pennsylvania Ave, N.W.
Washington, DC 20580

WILLIAM BLUMENTHAL
General Counsel
Federal Trade Commission
600 Pennsylvania Ave, N.W.
Washington, DC 20580

MICHAEL J. BLOOM
RICHARD B. DAGEN (D.C. Bar No. 388115)
THOMAS J. LANG (D.C. Bar No. 452398)
CATHARINE M. MOSCATELLI (D.C. Bar No. 418510)
MICHAEL A. FRANCHAK

Federal Trade Commission
601 New Jersey Ave., N.W.
Washington, DC 20001
(202) 326-2475 (direct dial)
(202) 326-2284 (facsimile)
mjbloom@ftc.gov

by conventional supermarkets or other food retailers is unlikely. The Hartman Study reported that:

> It is our belief that WFM will not encounter significant, if any, competition from leading mainstream retailers (Safeway, Wal-Mart, Costco, etc.) entry into organics.
> Most other major retailers lack the ability to consistently generate authentic, high-quality food experiences. PX02508 at 026 (bold in original).

[redacted]; *accord* Odak IH (JX 37) at 77:18-78:23.

614. Expansion by other PNOS into the relevant geographic markets is also unlikely. The only other PNOS are Earth Fare in North Carolina and New Seasons in Portland, Oregon. Mackey IH (JX 28) at 132:4-6; Murphy Report (PX02878) ¶ 120.

615. [redacted] entered against Whole Foods in [redacted], albeit unsuccessfully. Although record evidence suggests that Earth Fare's entry generated pro-competitive price and quality responses from Whole Foods, it was ultimately unsuccessful from [redacted] point of view. Murphy Report (PX02878) ¶ 118.

616. [redacted] closed its [redacted] store in [redacted] Given its experience in [redacted], it is an open question whether [redacted] would be willing to enter against Whole Foods in the future. Murphy Report (PX02878) ¶ 119; PX01006 at 004 ("We have heard from management at [redacted] that . . . their coming to [redacted] was probably a mistake.").

617. New Seasons is also unlikely to enter any of the relevant geographic markets. New Seasons founder Brian Rohter was quoted as saying that New Seasons does not plan to expand beyond the Portland, Oregon, area. PX04647 at 003; Murphy Report (PX02878) ¶ 120.

3. *De Novo* Entry Would Not Be Sufficient to Defeat a Price Increase

618. *De novo* entry would unlikely be "of a character and magnitude that it would 'deter or counteract the competitive effects of concern.'" Commentary on the Horizontal Merger Guidelines (PX01341) at 46, *quoting* Merger Guidelines (PX01310) §3.0. Whole Foods' documents establish how long it takes to develop the authenticity and integrity of a PNOS brand. Its Project Goldmine deal valuation workbooks anticipate Whole Foods fully retaining the volumes diverted from closed Wild Oats stores for a period of [redacted] years. Murphy Rebuttal Report (PX02884) ¶ 39.

EXHIBIT 6

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

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

RESPONSES TO THE FTC'S ALLEGATIONS

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

1. Whole Foods admits the allegations in Paragraph 1.

2. Whole Foods admits the allegations in Paragraph 2.

3. Whole Foods denies the allegations in Paragraph 3.

4. Whole Foods admits that Mr. Mackey made the statements quoted in Paragraph 4.

5. Whole Foods admits the allegations in Paragraph 5, except to the extent that Paragraph 5 contains legal conclusions to which no response is required.

6. Whole Foods admits the allegations in Paragraph 6.

7. Whole Foods admits that it is in the process of operating certain former Wild Oats Markets, Inc. ("Wild Oats") stores as Whole Foods stores but denies the remainder of the allegations in Paragraph 7.

8. Whole Foods admits the allegations in Paragraph 8.

9. Whole Foods lacks knowledge or information sufficient to admit or deny any allegations in Paragraph 9, except to the extent this Paragraph contains legal conclusions to which no response is required.

10. Whole Foods admits that on June 7, 2007, United States District Court Judge Paul L. Friedman of the United States District Court for the District of Columbia issued a consent Order granting the Commission's motion for a temporary restraining Order. Whole Foods admits that on August 16, 2007, Judge Friedman issued an order that denied the Commission's request for a preliminary injunction and, on August 23, 2007, the United States Court of Appeals for the District of Columbia Circuit issued an order that denied the Commission's emergency motion for an injunction pending appeal. Whole Foods admits that it consummated the acquisition of Wild Oats on August 28, 2007. Whole Foods admits that on July 29, 2008, the United States Court of Appeals for the District of Columbia Circuit issued three opinions and its judgment, which speak for themselves. Whole Foods denies the remainder of the allegations in Paragraph 10, except to the extent this Paragraph contains legal conclusions to which no response is required.

11. Whole Foods denies the allegations in Paragraph 11 to the extent that Paragraph 11 purports to define an industry standard term for "natural foods."

12. Whole Foods denies the allegations in Paragraph 12 to the extent that Paragraph 12 purports to define the term "organic foods" in any way other than foods that meet the requirements of the United States Department of Agriculture's Organic Food Production Act of 1990.

13. Paragraph 13 contains legal conclusions to which no response is required.

14. Whole Foods denies the allegations in Paragraph 14.

15. Whole Foods admits that the statements quoted in Paragraph 15 were made, but denies the remainder of the allegations in that Paragraph.

16. Whole Foods admits that the statements quoted in Paragraph 16 were made, but denies the remainder of the allegations in that Paragraph.

17. Whole Foods admits that the statement quoted in Paragraph 17 was made, but denies the remaining allegations in that Paragraph.

18. Whole Foods denies the allegations in Paragraph 18.

19. Whole Foods denies the allegations in Paragraph 19.

20. Whole Foods denies the allegations in Paragraph 20.

21. Whole Foods admits that the statements quoted in Paragraph 21 were made, but denies the remainder of the allegations in that Paragraph.

22. Whole Foods admits that the statements quoted in Paragraph 22 were made, but denies the remainder of the allegations in that Paragraph.

23. Whole Foods admits that the statement quoted in Paragraph 23 was made, but denies the remaining allegations in that Paragraph.

24. Whole Foods admits that the statements quoted in Paragraph 24 were made, but denies the remainder of the allegations in that Paragraph.

25. Whole Foods admits that the statements quoted in Paragraph 25 were made, but denies the remainder of the allegations in that Paragraph.

26. Whole Foods denies the allegations in Paragraph 26.

27. Whole Foods denies the allegations in Paragraph 27.

28. Whole Foods denies the allegations in Paragraph 28.

29. Whole Foods admits the allegations in the first sentence of Paragraph 29. Whole Foods admits that approximately 70% of its sales in fiscal 2006 were from perishable products, but denies this allegation with respect to Wild Oats.

30. Whole Foods denies the allegations in Paragraph 30.

31. Whole Foods denies the allegations in Paragraph 31.

32. Whole Foods admits the allegations in the first sentence of Paragraph 32. Whole Foods denies the remainder of the allegations in Paragraph 32.

33. Whole Foods admits that Mr. Mackey made the statements quoted in Paragraph 33, but denies all remaining allegations in Paragraph 33.

34. Whole Foods denies the allegations in Paragraph 34.

35. Whole Foods denies the allegations in Paragraph 35, except to the extent this Paragraph contains legal conclusions to which no response is required.

36. Whole Foods denies the allegations in Paragraph 36, except to the extent this Paragraph contains legal conclusions to which no response is required.

37. Whole Foods denies the allegations in Paragraph 37.

38. Whole Foods denies the allegations in Paragraph 38.

39. Whole Foods denies the allegations in Paragraph 39, including each of its subparts, except to the extent that Paragraph 39, including any subparts, contains legal conclusions to which no response is required.

40. Whole Foods denies, admits, and responds to Paragraph 40 of the Amended Complaint, as set forth in the preceding paragraphs of this Answer.

41. Paragraph 41 contains legal conclusions to which no response is required.

42. Whole Foods denies, admits, and responds to Paragraph 42 of the Amended Complaint, as set forth in the preceding paragraphs of this Answer.

43. Paragraph 43 contains legal conclusions to which no response is required.

DEFENSES

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

1. The Amended Complaint fails to state a claim upon which relief can be granted.

2. Granting the relief sought is contrary to the public interest.

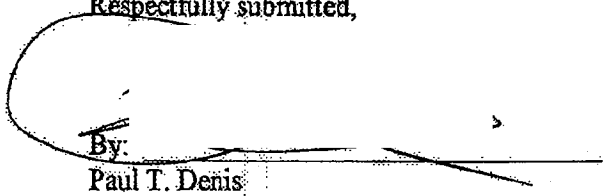
3. Efficiencies and other pro-competitive benefits resulting from the merger outweigh any and all proffered anticompetitive effects.

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

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

Dated: September 26, 2008

Respectfully submitted,



By:

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.

Of Counsel:

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

CERTIFICATE OF SERVICE

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

By Hand Delivery and Email:

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

By Hand Delivery and E-Mail:

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

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

Complaint Counsel

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

Attorneys for Whole Foods Market, Inc.

EXHIBIT 7

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OPINION AND ORDER

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

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

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

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

---

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

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

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

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

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

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

---

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

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

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

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

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

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

With these principles and protections in mind, it is hereby

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

SO ORDERED.

/s/
PAUL L. FRIEDMAN
United States District Judge

DATE: July 6, 2007