



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

Docket No. 9324
PUBLIC

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

PRELIMINARY STATEMENT

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

See Ex. 1, December 16, 2008 Order on New Seasons’ Motion. Specifically, the ALJ found that

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

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

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

INTRODUCTION

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

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

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

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

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

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

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

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

FACTUAL BACKGROUND

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

Gelson's seeks to deprive Whole Foods' counsel of documents that are central to Whole Foods' position on the appropriate definition of the relevant antitrust market. As Judge Friedman explained last year when considering whether to preliminarily enjoin the acquisition, the central issue in this case is the definition of the relevant product market: Whole Foods' position here is that Judge Friedman rightfully rejected the Commission's proposed definition last year as artificially narrow. See FTC v. Whole Foods Market, Inc., 502 F. Supp. 2d 1, 34 (D.D.C. 2007) (“[T]he relevant product market in this case is not premium natural and organic supermarkets . . . as argued by the FTC but . . . at least all supermarkets.”); Ex. 4, Respondent Whole Foods Market, Inc.'s Answer To Am. Compl. ¶ 35.

To support its position, Whole Foods intends to demonstrate that it competes with many other food retailers, including Gelson's. The weekly sales data that Gelson's is currently refusing to produce is critical to Whole Foods' case, because it can be used to show how the opening or closing of a Whole Foods or Wild Oats store impacted Gelson's sales. For example, this data can be used to show that the opening of a new Whole Foods store took business away from a nearby Gelson's store, and not just a Wild Oats store. Whole Foods can also use such data to show that the closing of a Wild Oats store caused an uptick in sales at a nearby Gelson's store, rather than exclusively benefiting Whole Foods. The November 2007 site study currently withheld by Gelson's would similarly corroborate Whole Foods' position that Gelson's competes with Whole Foods, as it would evidence Gelson's considerations of Whole Foods as a competitor when

containing the proposed relief”).

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

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

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

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

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

⁷ The FTC has raised the issue of the affect on competitor sales by the openings and closings of Whole Foods and Wild Oats stores at nearly every deposition of a Whole Foods witness. Accordingly, Whole Foods requires the sales data of its competitors to refute the Commission's allegations.

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

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

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

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

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

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

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

