

**ORIGINAL**



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

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

**WHOLE FOODS MARKET, INC.'S MEMORANDUM IN SUPPORT OF MOTIONS  
FOR ENFORCEMENT OF SUBPOENAS DUCES TECUM ISSUED TO  
ENTIRELY NON-COMPLIANT NON-PARTIES**

Respondent Whole Foods Market, Inc. ("Whole Foods") submits this memorandum in support of its motions to compel the enforcement of subpoenas duces tecum issued to the following fourteen non-parties (collectively, the "Non-Parties") who have failed to respond in any way to the subpoena:

- Ada's Natural Foods ("Ada's");
- Amazing Grace Whole Foods ("Amazing Grace");
- B&R Stores, Inc. ("B&R");
- Ball's Food Stores, Inc. ("Ball's");
- Burger's Supermarket, Inc. ("Burger's");
- HOW's Market ("HOW's");
- Jerry's Famous Deli, Inc. ("Jerry's");
- King Ranch Market ("King Ranch");
- Miles Market ("Miles");
- P&S Foods (d/b/a Shur-Sav Markets) ("P&S");

- Raley's;
- Straub's Fine Foods ("Straubs");
- ValuDiscount, Inc. (d/b/a ValuMarket) ("ValuDiscount"); and
- Zupan's Market ("Zupan's").

### **INTRODUCTION**

In October 2008, Whole Foods served a document subpoena on the fourteen Non-Parties, containing nine requests for documents that are identical to the requests served on the other 77 other non-party competitor recipients. See Appendix in Support of Motions for Enforcement of Subpoenas Duces Tecum Issued To Entirely Non-Compliant Non-Parties ("Supporting Appendix"), Ex. A-1 to A-14. The return dates for the subpoenas were November 4, 2008 (B&R, Ball's, HOW's, P&S, Raley's, and ValuDiscount), November 5, 2008 (Amazing Grace, Burger's, Jerry's, Straub's, and Zupan's), and November 6, 2008 (Ada's, King Ranch, and Miles). Whole Foods also provided each of these Non-Parties with a copy of the protective order entered by the Commission that governs this proceeding. Id.

Although the return dates passed more than two months ago, none of the Non-Parties has objected to the subpoena, moved to quash, or produced documents or data. Counsel for Whole Foods has attempted to contact the Non-Parties in good faith to secure their compliance. See Supporting Appendix, Ex. B, Whole Foods Market, Inc.'s Rule 3.22(f) Statement of Jim A. Fishkin in Support of Motions for Enforcement of Subpoenas Duces Tecum Issued to Entirely Non-Compliant Non-Parties ¶¶ 4-12; Supporting Appendix, Ex. C, Whole Foods Market, Inc.'s Rule 3.22(f) Statement of Gorav Jindal in Support of Motions for Enforcement of Subpoenas Duces Tecum Issued to Entirely Non-Compliant Non-Parties ¶¶ 4-8. The Non-Parties have

either ignored Whole Foods or simply refused to comply. Id.

By not moving to quash or limit the subpoenas, or serving objections, the Non-Parties have waived any objections to the subpoena that they might have had. The Non-Parties should therefore be directed to produce responsive documents and data within ten days of this Court's order. See In re Matter of Evanston Northwestern Healthcare Corp., Dkt. No. 9315, 2004 WL 2380499, at \*1 (F.T.C. Sept. 22, 2004) (granting motion to compel non-party to produce documents responsive to respondent's subpoena duces tecum within ten days of Court's order). Had the Non-Parties timely objected, such objections would have been futile. The documents and data requested in the subpoenas are crucial to Whole Foods' defense in the current action, and the ALJ has already ruled that the requests are not unduly burdensome, and that the protective order adequately protects non-parties. The Non-Parties should be directed to produce documents and data responsive to the subpoena.

### **ARGUMENT**

As the subpoenaed party, each subpoena recipient carries "[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). Here, the Non-Parties have made no attempt whatsoever to carry their burden, and by not timely<sup>1</sup> moving to quash or otherwise objecting to the subpoena, the Non-Parties have waived their objections. See In re Lehigh Portland Cement Co., 73 F.T.C. 1252 (Apr. 6, 1958) (affirming an ALJ's denial of a non-party's motion to quash a subpoena in a Commission

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<sup>1</sup> See 16 C.F.R. § 3.34(c) ("Any motion by the subject of a subpoena to limit or quash the subpoena shall be filed within the earlier of ten (10) days after service thereof or the time for compliance therewith.").

proceeding on the ground that it had not been timely filed).<sup>2</sup>

As the ALJ observed in the December 16 Order denying New Seasons' motion,

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

Supporting Appendix, Ex. D, December 16, 2008 Order Denying New Seasons' Motion to Quash or Limit Subpoena Duces Tecum, at 7. The documents and information requested here are the same as those requests of New Seasons. All of the document and data requests contained in the subpoena are designed to elicit information that would aid Whole Foods in demonstrating that the Commission's proposed definition of the relevant market is artificially narrow. Without the information requested in the subpoena, Whole Foods cannot properly defend itself against the Commission's allegations.

Whole Foods requests that the Non-Parties be compelled to comply with the subpoena.

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<sup>2</sup> Moreover, the ALJ's prior rulings have addressed objections that the Non-Parties could have made. See Supporting Appendix, Ex. D, December 16, 2008 Order Denying New Seasons Market's Motion to Quash or Limit Subpoena Duces Tecum (rejecting a non-party's undue burden, confidentiality, and anticompetitiveness objections to an identical subpoena); Supporting Appendix, Ex. E, December 23, 2008 Order Denying Gelson's Markets' Motion for a Protective Order or in the Alternative To Quash or Limit the Subpoena (rejecting another non-party's anticompetitiveness and confidentiality objections to an identical subpoena).

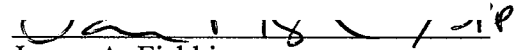
**CONCLUSION**

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

Dated:

Respectfully submitted,

By:

  
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*Attorneys for Whole Foods Market, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Memorandum in Support of Motions for Enforcement of Subpoenas Duces Tecum Issued To Entirely Non-Compliant Non-Parties was served on January 14, 2009, on the following persons by the indicated method:

By Hand Delivery and Email:

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

By Hand Delivery and Email:

The Honorable D. Michael Chappell  
Chief Administrative Law Judge  
600 Pennsylvania Avenue, N.W.  
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By First Class Mail:

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General Counsel  
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Miles Farmers Market  
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Solon, OH 44139

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P&S Foods (d/b/a Shur-Sav Markets)  
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University City, MO 63130

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President and CEO  
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West Sacramento, CA 95605

Jennifer Crabb  
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Raley's  
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Straub's Fine Foods  
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Clayton, MO 63105

Greg Neumann  
President  
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Zupan's Market  
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*Attorneys for Whole Foods Market, Inc.*

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	)	
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**[PROPOSED] ORDER GRANTING WHOLE FOODS MARKET, INC.'S MOTION FOR  
ENFORCEMENT OF SUBPOENA DUCES TECUM ISSUED TO  
NON-PARTY ADA'S NATURAL FOODS**

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

1. Whole Foods' Motion is GRANTED; and
2. Ada's Natural Foods shall produce documents and data responsive to the subpoena no later than ten days from the date of this Order.

IT IS SO ORDERED.

Date: \_\_\_\_\_

\_\_\_\_\_  
D. Michael Chappell  
Administrative Law Judge

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Motion for Enforcement of Subpoena Duces Tecum Issued to Non-Party Ada's Natural Foods was served on January 14, 2009, on the following persons by the indicated method:

**By Hand Delivery and Email:**

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

**By Hand Delivery and Email:**

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

**By First Class Mail:**

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*Attorney for Whole Foods Market, Inc.*

**UNITED STATES OF AMERICA  
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<b>In the Matter of</b>	)	
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<b>a corporation.</b>	)	<b>Public</b>
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**WHOLE FOODS MARKET, INC.’S MOTION FOR ENFORCEMENT OF SUBPOENA  
DUCES TECUM ISSUED TO NON-PARTY AMAZING GRACE WHOLE FOODS**

On October 14, 2008, Whole Foods Market, Inc. (“Whole Foods”) served a subpoena duces tecum via overnight mail delivery on non-party Amazing Grace Whole Foods (“Amazing Grace”). While the subpoena had a return date of November 5, 2008, Amazing Grace has failed to object, move to quash, or otherwise respond to the subpoena. Consequently, pursuant to Commission Rule of Practice 3.38(a), Whole Foods hereby moves for enforcement of the subpoena, and Amazing Grace should be compelled to produce whatever responsive documents and data that are in its possession. The grounds for this motion are presented in the accompanying Memorandum in Support of Motions for Enforcement of Subpoenas Duces Tecum Issued To Entirely Non-Compliant Non-Parties and Appendix in Support of Motions for Enforcement of Subpoenas Duces Tecum Issued To Entirely Non-Compliant Non-Parties, which are incorporated by reference.



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

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**In the Matter of**

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

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**Docket No. 9324**

**Public**

**[PROPOSED] ORDER GRANTING WHOLE FOODS MARKET, INC.'S MOTION FOR  
ENFORCEMENT OF SUBPOENA DUCES TECUM ISSUED TO  
NON-PARTY AMAZING GRACE WHOLE FOODS**

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

1. Whole Foods' Motion is GRANTED; and
2. Amazing Grace Whole Foods shall produce documents and data responsive to the subpoena no later than ten days from the date of this Order.

IT IS SO ORDERED.

Date: \_\_\_\_\_

\_\_\_\_\_  
D. Michael Chappell  
Administrative Law Judge

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Motion for Enforcement of Subpoena Duces Tecum Issued to Non-Party Amazing Grace Whole Foods was served on January 14, 2009, on the following persons by the indicated method:

By Hand Delivery and Email:

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

By Hand Delivery and Email:

The Honorable D. Michael Chappell  
Chief Administrative Law Judge  
600 Pennsylvania Avenue, N.W.  
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*Attorney for Whole Foods Market, Inc.*

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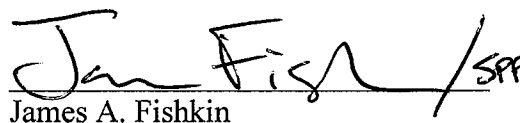
**Docket No. 9324**

**Public**

**WHOLE FOODS MARKET, INC.'S MOTION FOR ENFORCEMENT OF SUBPOENA  
DUCES TECUM ISSUED TO NON-PARTY B&R STORES, INC.**

On October 13, 2008, Whole Foods Market, Inc. ("Whole Foods") served a subpoena duces tecum via overnight mail delivery on non-party B&R Stores, Inc. ("B&R"). While the subpoena had a return date of November 4, 2008, B&R has failed to object, move to quash, or otherwise respond to the subpoena. Consequently, pursuant to Commission Rule of Practice 3.38(a), Whole Foods hereby moves for enforcement of the subpoena, and B&R should be compelled to produce whatever responsive documents and data that are in its possession. The grounds for this motion are presented in the accompanying Memorandum in Support of Motions for Enforcement of Subpoenas Duces Tecum Issued To Entirely Non-Compliant Non-Parties and Appendix in Support of Motions for Enforcement of Subpoenas Duces Tecum Issued To Entirely Non-Compliant Non-Parties, which are incorporated by reference.

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