

Federal Trade Commission (the “FTC” or “Commission”) alleges that Whole Foods competed against only three other retailers in a narrow product market. Whole Foods needs the requested weekly sales data in order to demonstrate that it competed against a large number of other retailers, including Erewhon.

The ALJ has previously ruled that counsel for Whole Foods is entitled to other retailers’ weekly sales data. On December 16, 2008, the ALJ denied a motion by New Seasons to quash an identical Whole Foods subpoena, observing that

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

Ex. 3, December 16, 2008 Order Denying New Seasons Market’s Motion to Quash or Limit Subpoena Duces Tecum, at 7 (“December 16, 2008 Order”) (emphases added). Similar to Erewhon here, New Seasons objected to producing weekly sales data responsive to Request 9(b) of Whole Foods’ subpoena. *Id.* at 4. The ALJ specifically overruled New Seasons’ confidentiality objections and ordered New Seasons to produce these documents as well as documents responsive to all other requests. *Id.* at 7. The ALJ similarly rejected confidentiality objections made by Gelson’s and ordered it to produce data responsive to Request 9(b). *See* Ex. 4, Dec. 23, 2008 Order Denying Gelson’s Markets’ Motion for a Protective Order or in the Alternative To Quash or Limit the Subpoena (“December 23, 2008 Order”).

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

FACTUAL BACKGROUND

Erewhon operates a natural foods retail market in Los Angeles, CA. On October 15, 2008, Whole Foods served a document subpoena on Erewhon, containing nine requests for documents that are identical to the requests in the other 92 subpoenas Whole Foods served on other food retailers (both large and small) it competes against throughout most of the relevant areas alleged in the Amended Complaint. See Ex. 1, Oct. 14, 2008 Subpoena Duces Tecum. Whole Foods also provided Erewhon with a copy of the protective order entered by the Commission in this proceeding. Id. The return date on the subpoena was November 5, 2008. Id.

On October 16, 2008, counsel for Whole Foods spoke with Erewhon's Vice President, Libby De Silva, in an attempt to secure Erewhon's compliance with the subpoena. See Ex. 5, Whole Foods Market, Inc.'s Rule 3.22(f) Statement of James A. Fishkin in Support of Motion for Enforcement of Subpoena Duces Tecum Issued to Non-Party Erewhon Natural Foods Market ("Fishkin Statement") ¶ 5. Following that conversation, on November 4, 2008, Erewhon stated in a letter that it possessed no documents responsive to Requests 1 through 8 of the subpoena. See Ex. 2, Nov. 4 Letter. The letter indicates that Erewhon possesses documents responsive to Request 9(b), but simply refuses to produce them, because Erewhon "is only one store and privately held. We do not give away our sales figure [sic]." Id.¹ This motion ensued.

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

ARGUMENT

I. EREWHON SHOULD BE COMPELLED TO COMPLY WITH THE SUBPOENA

A. The Documents That Erewhon Refuses to Produce Are Critical to Whole Foods' Defense.

Request 9(b) seeks information that is not only relevant, but pivotal to Whole Foods' defense. As the ALJ observed in the December 16 Order denying New Seasons' motion, "[t]he documents sought by Whole Foods are relevant to one of the central antitrust issues in this proceeding – the appropriate definition of the relevant market." Ex. 3, December 16, 2008 Order, at 7. Judge Friedman took a similar view last year when considering whether to preliminarily enjoin the acquisition. See FTC v. Whole Foods Market, Inc., 502 F. Supp. 2d 1, 34 (D.D.C. 2007) ("[T]he relevant product market in this case is not premium natural and organic supermarkets . . . as argued by the FTC but . . . at least all supermarkets."); compare also Ex. 6, Am. Complaint ¶ 35 (alleging that the relevant product market consists of "the operation of premium natural and organic supermarkets") with Ex. 7, Respondent Whole Foods Market, Inc.'s Answer To Am. Compl. ¶ 35 (denying that proposed definition of the relevant product market).

Whole Foods' position in this litigation is that Judge Friedman rightfully rejected the Commission's proposed definition last year as artificially narrow. To support its position, Whole Foods intends to demonstrate that it competes with many other food retailers, including Erewhon. The weekly sales data that Erewhon is currently refusing to produce can be used to show how competitive interactions among Erewhon, Whole Foods, Wild Oats and other supermarkets in Los Angeles – one of the geographic areas at issue in this proceeding – affect the sales of the others. For example, these data can be used to show that the opening of a new Whole Foods store in Los Angeles took business away from a nearby Erewhon store, and not just

a Wild Oats store. Whole Foods can also use such data to show that the closing of a Wild Oats store in Los Angeles caused an uptick in sales at a nearby Erewhon store, rather than exclusively benefiting Whole Foods.² Thus, the documents Whole Foods seeks are highly relevant.

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

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

By filing no motion to quash Request 9(b), moreover, Erewhon has waived any objections it might have. Under FTC rules and practice, if Erewhon wished to make and pursue any objections, it, and not Whole Foods, bore the burden of filing a timely motion. Erewhon did not file the required motion, however, and instead is forcing Whole Foods to incur the expense associated with seeking court enforcement of the subpoena. See 16 C.F.R. § 3.34(c) ("Any

² The FTC has raised the issue of the effect on competitor sales by the openings and closings of Whole Foods and Wild Oats stores at nearly every deposition of a Whole Foods witness. Accordingly, Whole Foods requires the sales data of its competitors to refute the Commission's allegations.

motion by the subject of a subpoena to limit or quash the subpoena shall be filed within the earlier of ten (10) days after service thereof or the time for compliance therewith.”); 16 C.F.R. § 3.37 (permitting objections to be filed only in response to document requests served by “any party . . . on another party) (emphasis added); 16 C.F.R. § 3.38A (obviating the need for the recipient of a subpoena to file a timely motion to quash only when it withholds responsive material due to an evidentiary privilege). Erewhon’s failure to timely move to quash the subpoena results in a waiver of any objections *it might* have.

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

If Erewhon has concerns over the confidentiality of its sales data, those concerns have been addressed by the ALJ. The ALJ has now *twice* found that the Protective Order issued in this case is sufficient to protect the confidentiality of these documents, noting that “[t]he Protective Order prohibits any Whole Foods employees, including inside counsel, from reviewing the documents produced by non-parties. In addition, the Protective Order and the Commission’s Rules governing *in camera* treatment of confidential information prohibit disclosure of highly confidential documents.” Ex. 3, December 16, 2008 Order, at 6.³ The ALJ therefore found that “New Seasons has not made an adequate showing to support its argument that the Protective Order will not protect it.” *Id.*; see also Ex. 4, December 23, 2008 Order, at 5 (“The *in camera* procedure in Part III adjudication and the Protective Order entered by the Commission in this case adequately protect Gelson’s confidential information from disclosure.”).

³ The ALJ also found that Whole Foods’ document requests were not anticompetitive, noting that “the fact that these documents may contain confidential and commercially sensitive information does not provide a basis to quash or limit the subpoena.” *Id.* at 4.

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

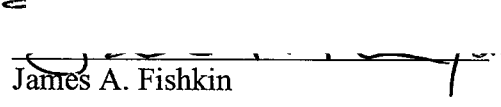
CONCLUSION

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

Dated: January 14, 2009

Respectfully submitted,

By:


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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 Motion for Enforcement of Subpoena Duces Tecum Issued to Non-Party Erewhon Natural Foods Market was served on January 14, 2009, on the following persons by the indicated method:

By Hand Delivery and Email:

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

By Hand Delivery and Email:

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

By First Class Mail:

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

Vice President for Erewhon Natural Foods Market

By E-Mail:

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600 Pennsylvania Avenue, N.W.
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Attorney for Whole Foods Market, Inc.

EXHIBIT 1



SUBPOENA DUCES TECUM

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

1. TO Libby DeSilva Erewhon Natural Foods 7660-B Beverly Blvd. Los Angeles, CA 90036	2. FROM UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION
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This subpoena requires you to produce and permit inspection and copying of designated books, documents (as defined in Rule 3.34(b)), or tangible things - or to permit inspection of premises - at the date and time specified in Item 5, at the request of Counsel listed in Item 9, in the proceeding described in Item 6.

3. PLACE OF PRODUCTION OR INSPECTION See Attachment A, Part II, No. 1	4. MATERIAL WILL BE PRODUCED TO James A. Fishkin 5. DATE AND TIME OF PRODUCTION OR INSPECTION November 5, 2008 at 10:00 am
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6. SUBJECT OF PROCEEDING In the Matter of Whole Foods Market Inc., et al, Docket No. 9324

7. MATERIAL TO BE PRODUCED See Attachment A, Part III

8. ADMINISTRATIVE LAW JUDGE Federal Trade Commission Washington, D.C. 20580	9. COUNSEL REQUESTING SUBPOENA James A. Fishkin, Esq. Dechert LLP 1775 I Street, NW Washington, DC 20006-2401
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DATE ISSUED <i>October 3, 2008</i>	SECRETARY'S SIGNATURE <i>Donald S. Clark</i>
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GENERAL INSTRUCTIONS

APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed with the Secretary of the Federal Trade Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 9, and upon all other parties prescribed by the Rules of Practice.

TRAVEL EXPENSES

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to counsel listed in Item 9 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from counsel listed in Item 9.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served: (check the method used)

in person.

by registered mail.

by leaving copy at principal office or place of business, to wit:

.....
.....
.....
.....

on the person named herein on:

.....
(Month, day, and year)

.....
(Name of person making service)

.....
(Official title)

ATTACHMENT A

DOCUMENTS TO BE PRODUCED PURSUANT TO SUBPOENA DUCES TECUM

I. Definitions

For the purposes of these Requests for Documents, the following definitions apply:

A. The term "Whole Foods" shall mean Whole Foods Market, Inc., and its predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and all directors, officers, employees, agents and representatives thereof.

B. The term "Wild Oats" shall mean Wild Oats Markets, Inc., the entity acquired by Whole Foods on August 28, 2007, and its predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and all directors, officers, employees, agents, and representatives thereof.

C. The terms "you" and "your" refer to the entity or person to whom this Subpoena is directed, and all predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and including all store formats, brands, and banners under which any of the foregoing operate, and all directors, officers, employees, agents and representatives thereof.

D. The terms "Commission" refers to the Federal Trade Commission and its commissioners, bureau directors, counsel, staff, and employees.

E. "Documents" as used herein shall mean every original and every non-identical copy of any original of all mechanically written, handwritten, typed or printed material, electronically stored data, microfilm, microfiche, sound recordings, films, photographs, videotapes, slides, and other physical objects or tangible things of every kind and description containing stored information, including but not limited to, transcripts, letters, correspondence, notes, memoranda, tapes, records, telegrams, electronic mail, facsimiles, periodicals, pamphlets,

