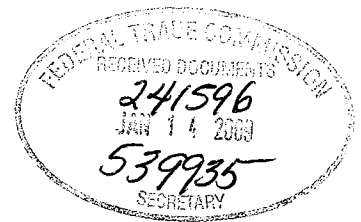


**ORIGINAL**



**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 MOTION  
FOR ENFORCEMENT OF SUBPOENA DUCES TECUM  
ISSUED TO NON-PARTY T.A.C.T. HOLDING COMPANY**

Respondent Whole Foods Market, Inc. ("Whole Foods") hereby moves to compel non-party T.A.C.T. Holding Company ("TACT"), the controlling shareholder of Trader Joe's Company (referred to collectively with TACT as "Trader Joe's"), to comply with the subpoena duces tecum served on it by Whole Foods, attached as Ex. 1 hereto.

**INTRODUCTION**

Trader Joe's continued pursuit of discredited objections is an unnecessary waste of judicial and party resources. Like non-parties New Seasons Markets, Inc. ("New Seasons") and Gelson's Markets ("Gelson's"), Trader Joe's should be compelled to produce weekly sales data responsive to Request 9(b) of the subpoena.

The weekly sales data sought by Whole Foods is critical to one of the central antitrust issues in this administrative action – the appropriate definition of the relevant market. The Federal Trade Commission (the "FTC" or "Commission") alleges that Whole Foods competed against only three other retailers in a narrow product market. Whole Foods needs the requested

weekly sales data in order to demonstrate that it competed against a large number of other retailers, including Trader Joe's.

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. 2, December 16, 2008 Order Denying New Seasons Market's Motion to Quash or Limit Subpoena Duces Tecum ("December 16, 2008 Order"), at 7 (emphases added). Similar to Trader Joe's 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' undue burden and 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. 3, 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").

Here, despite the ALJ's prior rulings on the issues of burden and confidentiality and observations regarding the relevance of Whole Foods' requests, Trader Joe's continues to withhold documents based on these same grounds.<sup>1</sup> Trader Joe's objections should be overruled,

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<sup>1</sup> Trader Joe's has informally advised Whole Foods that it does not possess any documents responsive to the other requests in the subpoena. *See* Ex. 4, 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 T.A.C.T. Holding Company ("Fishkin

and it should be compelled to produce its weekly sales data responsive to Request 9(b).

### **FACTUAL BACKGROUND**

Trader Joe's operates over 300 specialty retail grocery stores across the United States. On October 15, 2008, Whole Foods served a document subpoena on Trader Joe's, 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 geographic areas alleged in the Amended Complaint. See Ex. 1, Oct. 14, 2008 Subpoena Duces Tecum. The return date on the subpoena was November 5, 2008. Id. Only one of the nine requests in the subpoena is at issue here, as Trader Joe's maintains that it possesses documents responsive only to Request 9(b) (seeking the identification of total weekly store sales since January 1, 2006).<sup>2</sup>

With respect to Request 9(b), Trader Joe's objected on the grounds that "the burden of producing its highly confidential weekly sales information is unlikely to outweigh its likely benefit, and it is not reasonably calculated to lead to the discovery of admissible evidence." Ex. 5, TACT's Oct. 24, 2008 Responses and Objections, at 7. Trader Joe's did not explain, in its objections or subsequent discussions between counsel, why it would be burdensome to produce this information, which presumably exists on its computer systems, nor did it explain why it believes that the Protective Order would not adequately protect its confidential information.

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Statement") ¶ 6. This representation is not easily reconciled with its objection to searching for responsive documents on the ground that doing so would pose an undue burden. See Ex. 5, TACT's Oct. 24, 2008 Responses and Objections to Subpoena, at 2.

<sup>2</sup> Instead of producing documents, this ninth request alternatively allowed Trader Joe's to produce a spreadsheet. Id. at Request 9.

Instead, Trader Joe's stated that it would provide summaries of the "average sales for all Trader Joe's stores within each Geographic Area for the first half of 2006, 2007, and 2008." *Id.* at 7.

Counsel for Whole Foods and counsel for Trader Joe's met and conferred over a period of several weeks in an effort to resolve the objections. Ex. 4, Fishkin Statement ¶¶ 5-9. These discussions were tabled in anticipation of a ruling on the then-pending motion to quash filed by New Seasons, as it was expected that the ALJ's ruling on this motion would resolve the issues raised by Trader Joe's in its objections. Ex. 4, Fishkin Statement ¶ 7. On December 16, 2008, the ALJ denied New Seasons' motion. Ex. 2, December 16, 2008 Order. Counsel for Whole Foods immediately sent a copy of the Order to counsel for Trader Joe's, requesting that Trader Joe's withdraw its objections to the subpoena. Ex. 4, Fishkin Statement ¶ 8; Ex. 6, December 17, 2008 email. Counsel for Trader Joe's replied that it intended to stand on its objections and demanded that Whole Foods justify the relevance of Request 9(b), notwithstanding the ALJ's observation that the document requests seek information "relevant to one of the central antitrust issues in this proceeding . . . ." Ex. 2, Dec. 16, 2008 Order, at 7. *See* Ex. 4, Fishkin Statement ¶ 9; Ex. 6, December 22, 2008 email. This motion ensued.

## ARGUMENT

### **I. TRADER JOE'S SHOULD BE COMPELLED TO COMPLY WITH THE SUBPOENA**

#### **A. The Documents That Trader Joe's 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. 2, 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.”); Ex. 7, Respondent Whole Foods Market, Inc.’s Answer To Am. Compl. ¶ 35.

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 Trader Joe’s. The weekly sales data that Trader Joe’s is currently refusing to produce is critical to Whole Foods’ case, because it can be used to show how competitive interactions among Trader Joe’s, Whole Foods, Wild Oats and other supermarkets affect the sales of the others. For example, these data can be used to show that the opening of a new Whole Foods store took business away from a nearby Trader Joe’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 Trader Joe’s store, rather than exclusively benefiting Whole Foods.<sup>3</sup>

The summaries that Trader Joe’s offered to provide would not be useful to Whole Foods’ defense on this critical issue, since they would not allow Whole Foods to correlate sales figures with specific time periods and geographic areas for instances when Whole Foods stores were opened or that Wild Oats stores were closed. Without the weekly sales data being withheld by

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<sup>3</sup> The FTC has raised the issue of the effect on competitor sales by the openings and closings of Whole Foods and Wild Oats stores at nearly every deposition of a Whole Foods witness. Accordingly, Whole Foods requires the sales data of its competitors to refute the Commission’s allegations.

Trader Joe's, Whole Foods cannot properly defend itself against the Commission's allegations.

B. The ALJ has Rejected the Argument that Whole Foods' Document Requests Are Unduly Burdensome.

Trader Joe's burden objection should be overruled. The ALJ has resolved the issue of burden, overruling the objection made by New Seasons in response to an *identical* subpoena, finding that "[t]he burden to New Seasons to comply is not unduly burdensome and its confidential documents will be adequately protected under the Protective Order." Ex. 2, December 16, 2008 Order, at 7. The ALJ further noted that "[s]ome burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest." *Id.* at 4 (quoting FTC v. Dresser Indus., Inc., Misc. No. 77-44, 1977 U.S. Dist. LEXIS 16178, at \*13 (D.D.C. Apr. 26, 1977)).

The ALJ further noted that "[i]nconvenience to third parties may be outweighed by the public interest in seeking the truth in every litigated case." *Id.* (quoting Covey Oil Co. v. Continental Oil Co., 340 F.2d 993, 999 (10th Cir. 1965)). Moreover, the ALJ found that any burden was ameliorated by Whole Foods' agreement to limit its document requests from New Seasons to only higher level employees. See Ex. 2, December 16, 2008 Order, at 3-4. Whole Foods has agreed to similarly limit Trader Joe's subpoena. Ex. 4, Fishkin Statement ¶ 5.

Unlike New Seasons, Trader Joe's has not even attempted to substantiate its alleged burden. See Ex. 8, New Season's Motion to Quash or Limit, at 2-5. Trader Joe's has provided only a conclusory assertion that responding would be "unreasonable and burdensome." In any event, the argument that Whole Foods' document requests are unduly burdensome articulated by Trader Joe's in its objections has already been specifically addressed and rejected by the ALJ. Trader Joe's has provided no reason why, in light of the ALJ's Order denying New Seasons'

motion, it should be treated differently than other third parties.

C. The ALJ Has Twice Rejected Objections Based on Confidentiality.

Trader Joe's appears to object to producing its weekly sales data due to confidentiality concerns that have been rejected by the ALJ. See Ex. 5, TACT's Responses and Objections, at 3, 7. 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. 2, December 16, 2008 Order, at 6.<sup>4</sup> The ALJ echoed this sentiment in denying Gelson's motion to quash an identical subpoena, finding that the document requests were not anticompetitive and that the Protective Order sufficiently protected Gelson's confidential documents. See Ex. 3, December 23, 2008 Order. Any concerns that Trader Joe's has regarding production of its confidential documents have already been twice addressed – and rejected – by the ALJ.

**II. TRADER JOE'S HAS WAIVED ITS OBJECTIONS BY FAILING TO FILE A TIMELY MOTION FOR PROTECTION**

Trader Joe's objections should be overruled on the independent ground of its failure to file a timely motion to quash. As discussed above, there is no good faith basis for Trader Joe's to pursue its objections in light of the ALJ's December 16, 2008 Order. Under FTC rules and practice, if Trader Joe's wishes to pursue its objections, it, and not Whole Foods, bore the burden

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<sup>4</sup> The ALJ also found that Whole Foods' document requests were not anticompetitive, noting that "the fact that these documents may contain confidential and commercially sensitive information does not provide a basis to quash or limit the subpoena." Id. at 4.

of filing a timely motion. Trader Joe's 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 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). Because Trader Joe's is not a party to this action and did not purport to withhold documents on the basis of an evidentiary privilege, its failure to timely move to quash the subpoena results in a waiver of its objections.

### **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.*

**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>	)	
	)	

**[PROPOSED] ORDER GRANTING WHOLE FOODS MARKET,  
INC.'S MOTION FOR ENFORCEMENT OF SUBPOENA DUCES  
TECUM ISSUED TO NON-PARTY T.A.C.T. HOLDING COMPANY**

Upon due consideration of Whole Foods Market, Inc.'s ("Whole Foods") Motion for Enforcement of Subpoena Duces Tecum Issued to Third Party T.A.C.T. Holding Company ("Trader Joe's"), and any opposition thereto, it is hereby ORDERED that:

1. Whole Foods' Motion is GRANTED; and
2. Trader Joe's shall produce all documents and data responsive to Request 9(b) of Whole Foods' subpoena no later than ten days from the date of this Order.

IT IS SO ORDERED.

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

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

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Motion for Enforcement of Subpoena Duces Tecum Issued to Third Party T.A.C.T. Holding Company 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 E-Mail and First Class Mail:

Scott Reiter, Esq.  
O'Melveny & Myers LLP  
1625 Eye Street, N.W.  
Washington, D.C. 20006

Counsel for T.A.C.T. Holding Company

By E-Mail:

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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

Daniel Bane, CEO  
T.A.C.T. Holding Company  
800 S. Shamrock Avenue  
Monrovia, CA 91016

2. FROM

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION

This subpoena requires you to produce and permit inspection and copying of designated books, documents (as defined in Rule 3.34(b)), or tangible things - or to permit inspection of premises - at the date and time specified in Item 5, at the request of Counsel listed in Item 9, in the proceeding described in Item 6.

3. PLACE OF PRODUCTION OR INSPECTION

See Attachment A, Part II, No. 1

4. MATERIAL WILL BE PRODUCED TO

James A. Fishkin

5. DATE AND TIME OF PRODUCTION OR INSPECTION

November 5, 2008 at 10:00 am

6. SUBJECT OF PROCEEDING

In the Matter of Whole Foods Market Inc., et al, Docket No. 9324

7. MATERIAL TO BE PRODUCED

See Attachment A, Part III

8. ADMINISTRATIVE LAW JUDGE

Federal Trade Commission  
Washington, D.C. 20580

9. COUNSEL REQUESTING SUBPOENA

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

DATE ISSUED

October 3, 2008

SECRETARY'S SIGNATURE

Donald S. Clark

## GENERAL INSTRUCTIONS

### APPEARANCE

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

### MOTION TO LIMIT OR QUASH

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

### TRAVEL EXPENSES

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

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