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ORIGINAL

BEFORE THE UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

Docket No. 9324

PUBLIC

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

Oral Argument Requested

Pursuant to 16 C.F.R. § 3.34(c), New Seasons Market, Inc. ("New Seasons") hereby moves to quash or limit the subpoena issued to it by Whole Foods Market, Inc. for the reasons set forth below.¹

I. INTRODUCTION

The Federal Trade Commission ("FTC") has brought an administrative adjudicative proceeding against Whole Foods Market, Inc. ("Whole Foods") to challenge the lawfulness of Whole Foods' acquisition of Wild Oats Markets, Inc. ("Wild Oats"). In connection with that proceeding, Whole Foods issued a subpoena to New Seasons by mail on or

¹ A copy of the subpoena is attached hereto as Exhibit 1.

1 *Corp. v. News Corp.*, 180 F.R.D. 391, 394 (D. Colo. 1998) (non-party status is “a factor which
2 weighs against disclosure”). Each of these requests seeks “all documents” relating to a generally
3 described category of documents from January 1, 2006 to the present:

4 3. All documents relating to Whole Foods’ acquisition of
5 Wild Oats, including documents discussing the effect of the merger
on you.

6 4. All documents discussing competition with Whole Foods
7 or Wild Oats, including responses by you to a new Whole Foods or
8 Wild Oats store and responses by you to prices, promotions,
product selection, quality, or services at Whole Foods or Wild Oats
stores.

9 * * *

10 7. All documents relating to your plans to increase the shelf
11 space at your stores allocated to natural and organic products, the
number of natural and organic products sold in your stores, or the
12 sales of natural or organic products in your stores.

13 8. All documents discussing your plans to renovate or
14 improve your stores to sell additional natural and organic products
or to open stores emphasizing natural and organic products.

15 Whole Foods’ counsel has stated that Whole Foods is willing to limit these requests for “all
16 documents” to “all documents” generated by “high level” New Seasons’ employees. While this
17 restriction somewhat narrows the number of documents that might be responsive, it does not
18 materially alter the burden associated with producing them. New Seasons still must wade
19 through all of its documents from a nearly three-year period to identify whether any documents
20 “relate” to the merger, or “discuss” competition, or “relate” to plans for expansion.

21 Likewise, counsel’s proposed “high level” restriction for ultimate production does
22 not materially reduce the burden. These requests require New Seasons to search the documents
23 of its merchandisers, buyers, store managers, and department managers to determine whether
24 there are responsive documents. New Seasons’ management team comprises over 300
25 employees. Because of the way New Seasons is structured, it is difficult to determine how to
26 draw the line regarding who is a “high level” employee. For example, an assistant department

1 manager responsible for buying meat may need to communicate with an assistant store manager
2 and a merchandising manager about daily or weekly stocking decisions affected by Whole
3 Foods' competition. The subpoena demands production of such communications. Accordingly,
4 New Seasons still must search through all of its emails to determine whether the sender or
5 recipient was "high level" and whether the email is responsive. To search, process, review and
6 produce responsive documents from more than 300 employees, each with their own New
7 Seasons email account, would cost New Seasons between \$250,000-500,000 based on the
8 estimate it has received.

9 Moreover, because the largest portion of New Seasons' sales are in the natural
10 and organic product category, requests seven and eight necessarily cover all documents relating
11 to nearly all New Seasons plans relating to shelf space, expansion, renovation, or increased sales.
12 As written, requests seven and eight would include any document created in the last three years
13 having anything to do with any merchandising plans. Diverting the resources necessary to
14 accomplish this search and review would significantly disrupt and hinder New Seasons normal
15 business operations, particularly as New Seasons heads into the critical holiday season. Rohter
16 Declaration ¶ 4. *See F. T. C. v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) (investigative
17 subpoenas that "unduly disrupt or seriously hinder normal operations of a business" may be
18 unduly burdensome or unreasonably broad); *Fed. Trade Comm'n v. Invention Submission Corp.*,
19 965 F.2d 1086, 1090 (reasonable conditions and restrictions on production in response to a civil
20 investigative demand are appropriate if the demand is unduly burdensome). The fact that New
21 Seasons is not a party to this litigation but is merely caught in the crossfire heightens the
22 impropriety of this burdensome subpoena. *See Katz v. Batavia Marine & Sporting Supplies,*
23 *Inc.*, 984 F.2d 422, 424 (Fed. Cir. 1993) ("[T]he fact of nonparty status may be considered by the
24 court in weighing the burdens imposed in the circumstances.").

25 Further, the burden to New Seasons of responding to Whole Foods' subpoena
26 must be weighed against the fact that the subpoena to New Seasons is peripheral to and only a

1 very small part of the dispute between Whole Foods and the FTC. New Seasons is owned and
2 operated locally in Portland, Oregon, and has no stores outside of this local market. It is only
3 one of several grocery chains in the Portland market. Any information New Seasons could
4 provide will have no impact on the multitude of other geographic areas involved in this
5 proceeding.

6 Despite the relative insignificance of New Seasons' information, Whole Foods'
7 subpoena asks New Seasons to search through nearly three years of emails and other documents
8 to identify a broad range of documents that include virtually all of New Seasons' plans for
9 expansion of its physical space as well as all plans to increase "the sales of natural or organic
10 products in [its] stores." Particularly given that New Seasons is not the subject of the FTC's
11 complaint (and leaving aside the absolute need to protect the confidentiality of the information),
12 requests three, four, seven and eight should be quashed or limited as unduly burdensome.

13 **B. The subpoena should be quashed or limited because the subpoena itself is**
14 **anti-competitive.**

15 Requests three through nine of the subpoena should be quashed because they are
16 themselves inherently anti-competitive. Those requests ask New Seasons to provide its most
17 confidential and commercially sensitive information to Whole Foods. Indeed, the subpoena asks
18 that New Seasons give to one of its primary competitors detailed information regarding the
19 lifeblood of New Seasons' business, including three years' worth of weekly sales information, its
20 strategic plans, and all documents relating to its plans to increase sales. In essence, Whole Foods
21 asks for the blueprint to New Seasons' success. New Seasons is a private company. It is not
22 required to release this information to anyone outside of the company. New Seasons diligently
23 protects this information, and does not disclose this information to anyone outside of the
24 company. Rohter Decl. ¶ 6. The competitive harm from disclosure of this information to Whole
25 Foods or the public is obvious. This information lies at the very core of New Seasons' business
26

1 and drives its competitive decision-making. This information – and its secrecy – is critical to
2 New Seasons’ existence and continued success.

3 Yet the subpoena would require New Seasons to turn this critical information over
4 to one of its primary competitors – a competitor accused of anti-competitive conduct and which
5 has a history of taking a predatory approach toward its competition.³ Whole Foods has an
6 admitted history of “systematically and relentlessly taking [a competitor’s] business away from
7 them one market after another.” See *FTC v. Whole Foods Market, Inc.*, Case No. 07-cv-01021-
8 PLF (D.D.C. Aug. 23, 2007) (“*Whole Foods Case*”), Public Version of the Expert Report of
9 Kevin M. Murphy, Ph.D, ¶ 36 (quoting Whole Food’s CEO John Mackey summarizing the
10 Whole Foods strategy in February 2005). Whole Foods does not simply want to compete with
11 other supermarkets – its model has long been premised on the elimination of its competitors. In
12 1998, “Jim Sud [an officer] of Whole Foods noted the importance of the ‘elimination of a
13 competitor in the marketplace, competition for sites, competition for acquisitions, and
14 operational economies of scale. We become the Microsoft of the natural foods industry.’”
15 Plaintiff Federal Trade Commission’s Proposed Findings of Fact (Public Version), ¶ 582. With
16 the trade secret information Whole Foods seeks from New Seasons, Whole Foods could
17 eliminate New Seasons as a competitor.

18 Indeed, Mr. Mackey declared that “Wild Oats needs to be removed from the
19 playing field[.]” Plaintiff Federal Trade Commission’s Proposed Findings of Fact (Public
20 Version), ¶ 38. According to Mr. Mackey, Whole Foods went about “systematically destroying
21 [Wild Oats’] viability as a business – market by market, city by city.” *Whole Foods Case*, Part 1
22 of Plaintiff’s Public Version of Its Corrected Brief on Its Motion for Preliminary Injunction, p. 6.
23 As Whole Foods’ Regional President Will Paradise succinctly stated: “[m]y goal is simply – I

24
25 ³ New Seasons recognizes that the protective order in this case limits disclosure of confidential
26 information to Whole Foods’ outside counsel, experts, consultants, and the like. The
shortcomings of the protective order are discussed in Section II.C below.

1 want to crush [Wild Oats] and am willing to spend a lot of money in the process.” *Id.* at 25
2 (alteration in original). To that end, Mr. Mackey said: “I believe that Whole Foods will continue
3 to aggressively enter their markets and will pressure and harass them at every opportunity.”
4 Plaintiff Federal Trade Commission’s Proposed Findings of Fact (Public Version), ¶ 585. Whole
5 Foods’ approach is to “really punish” their competitors “and make a statement about any
6 competition that thinks about competing with” Whole Foods. *Whole Foods Case*, Public
7 Version of the Supplemental Rebuttal Expert Report of Kevin M. Murphy, Ph.D, ¶ 2.

8 Whole Foods’ approach of “pressuring,” “harassing,” and “punishing”
9 competitors is not limited to Wild Oats. Earth Fare, a regional, thirteen-store natural and organic
10 food chain in the Southeast is perhaps most similarly situated to New Seasons. As Whole Foods’
11 chief operating officer A.C. Gallo reported to the Whole Foods Board of Directors:

12 In June we will have an [Earth Fare] market opening up about a
13 half-mile from our [redacted in original] store and expect some
14 fierce competition. We have been remodeling the [redacted in
original] store, getting it ready to show [Earth Fare] that it is a bad
idea to open up too close to us.

15 [Earth Fare] opened a store in [redacted in original] less than a
16 mile from our store at the beginning of [redacted in original]. We
17 responded by aggressively matching all of their prices and specials
and by doing a strong special program of our own.

18 We have heard from management at [Earth Fare] that they were
19 surprised by our aggressive pricing and that their coming to the
[redacted in original] was probably a mistake.

20 We are crushing [Earth Fare].... Our opening in [redacted in
original] dropped their store from about [redacted in original]. We
21 cannot see how this company is viable going forward, and I expect
the investors are going to take some drastic action soon.

22 Plaintiff Federal Trade Commission’s Proposed Findings of Fact (Public Version), ¶ 118
23 (internal citations omitted).

24 Whole Foods has approximately 270 stores. New Seasons has nine. New
25 Seasons has no reason to believe that Whole Foods would not relish the opportunity to do to
26 New Seasons what it did to Wild Oats and what it does its other competitors such as Earth Fare,

1 and Whole Foods has the size and resources to do it with the assistance of New Seasons' trade
2 secrets and other commercially sensitive information. Further, as a non-party to the dispute
3 between Whole Foods and the FTC, New Seasons is "particularly vulnerable." *Mycogen Plant*
4 *Science, Inc. v. Monsanto Co.*, 164 F.R.D. 623, 628 (E.D. Pa. 1996). "[T]he 'fact of non-party
5 status' is a 'significant factor' in the decision to require disclosure of trade secrets." *Id.* (quoting
6 *Katz, supra*, 984 F.2d at 424). Courts therefore have "a special responsibility to alleviate the risk
7 that the subpoenas present" because "courts should be concerned that litigation tactics not be
8 adopted with a view to improve a client's competitive position." *Id.* (internal quotation omitted).
9 That is particularly true where the requesting party, as here, openly engages in what is admittedly
10 aggressive, punitive competitive tactics which, depending on the outcome of this proceeding,
11 may in fact be unlawful.

12 The subpoena, even if arguably relevant to the FTC proceedings, is itself anti-
13 competitive. Whole Foods should not be allowed to obtain New Seasons' private, confidential,
14 highly sensitive information for any purpose.

15 **C. The subpoena should be quashed or limited because it asks New Seasons to**
16 **give its confidential, commercially sensitive information to a competitor**
17 **accused of anti-competitive conduct without providing an adequate**
18 **protective order.**

19 Finally, the subpoena should be quashed as to requests three through nine because
20 those requests seek New Seasons' confidential and commercially sensitive information without
21 adequate protection against disclosure or adequate remedies if the information is disclosed. As
22 noted above, although New Seasons is a non-party to this matter, the subpoena nonetheless seeks
23 some of New Seasons' most proprietary and commercially sensitive information. If the
24 information became public, or if it were disclosed to Whole Foods' competitive decision-makers,
25 New Seasons would be irreparably damaged. Following the Whole Foods merger with Wild
26 Oats, New Seasons is the only other large scale grocery chain in Portland, Oregon that focuses
on natural and organic products. The protective order presently in place in this case does not

1 adequately protect New Seasons' confidential information, and certainly fails to provide any
2 remedy to New Seasons if the protective order is violated.

3 First, a protective order is an inherently insufficient protection, particularly when
4 the confidential information of a non-party is involved. "There is a constant danger inherent in
5 disclosure of confidential information pursuant to a protective order. Therefore, the party
6 requesting disclosure must make a strong showing of need, especially when confidential
7 information from a non-party is sought." *Litton Indus., Inc. v. Chesapeake & Ohio Railway Co.*,
8 129 F.R.D. 528, 531 (E.D. Wis. 1990). This is particularly true where, as here, the protective
9 order allows outside experts and consultants to access the non-party's confidential information.
10 As the court in *Litton* warned:

11 Finally, this court is not sanguine that a protective order could be
12 constructed to sufficiently maintain the confidential nature of this
13 information. The information would, of course, have to be
14 disclosed to Litton's experts. Like all experts, these individuals,
15 often professors, are regularly called upon for assistance. This is
16 one of the things that makes them "experts." But once an expert
17 has digested this confidential information, it is unlikely that the
18 expert will forget. The expert's raison d'être is to assimilate
19 information in his or her chosen field and formulate that material
20 into various theories. The information obtained from Bay [the non-
21 party] will be added to the expert's repository of other information
22 for possible future use. Even with stern sanctions for unauthorized
23 disclosure, how does one practically police a protective order? If
24 the expert is called upon two years after this litigation to assist a
25 potential competitor in structuring its business, will he really be
26 able to compartmentalize all he or she has learned and not use any
of the information obtained from Bay?

20 *Id.* If New Seasons is compelled to disclose its trade secrets, notwithstanding any protective
21 order and the good faith efforts of the recipients, those trade secrets as a practical matter are no
22 longer under New Seasons' control and become available, whether specifically or in general
23 terms, to its competitors. The experts in this case will have New Seasons' confidential
24 information. They cannot unlearn it. Other competitors may hire those experts. Whole Foods
25 has not demonstrated and cannot demonstrate any need for New Seasons' confidential
26 information sufficient to overcome New Seasons' right, particularly as a private company, to

1 maintain the privacy of its trade secrets and other confidential information. *See id.* at 530 (“It is
2 incumbent upon [the requesting party] to show that its needs outweigh the burden and invasion
3 of corporate privacy that would result to ... a non-party to this action.”) (internal quotation
4 omitted).

5 Second, the protective order does not adequately protect New Seasons’
6 information. If either Whole Foods or the FTC chooses to introduce New Seasons’ confidential
7 information into evidence at the hearing in this matter, the protective order improperly places the
8 burden on New Seasons to protect its confidential information. The protective order requires
9 only that Whole Foods or the FTC provide notice to New Seasons of their intent to introduce
10 New Seasons’ confidential information into evidence. Protective Order, ¶ 10. The protective
11 order then places the burden on New Seasons to file a motion with the Administrative Law Judge
12 to show why the confidential information it was compelled to produce should not be made
13 public, and provides New Seasons only five days to do so. *Id.* If the Administrative Law Judge
14 denies that motion, New Seasons’ confidential information will be made public, even though
15 New Seasons considers it to be confidential and even though New Seasons is a private company
16 with no obligation to report its sales, market share, or other confidential information to anyone.
17 There should be an absolute requirement that New Seasons’ confidential information be kept
18 confidential, or at the very least that Whole Foods and the FTC have the burden of showing why
19 New Seasons’ confidential information should be made public, not the other way around.
20 Further, the five-day time period is insufficient to provide New Seasons with a fair opportunity
21 to protect its confidential information. The protective order should provide a period substantially
22 longer than five days for New Seasons to intervene to protect its confidential information from
23 public disclosure, and Whole Foods, as the party seeking New Seasons’ information, should be
24 required to pay New Seasons’ costs, including attorney fees, associated with any instance in
25 which New Seasons is required to intervene under the protective order.

26

1 Third, and most fundamentally, the protective order fails to provide an adequate
2 disincentive against or remedy for disclosure of New Seasons' confidential information. New
3 Seasons recognizes that, by its terms, the protective order does not permit the disclosure of
4 confidential information to anyone within Whole Foods (i.e. only to outside counsel and hired
5 experts). Protective Order, ¶ 7. New Seasons does not impute to Whole Foods' counsel any
6 intent to violate the protective order. But the scope of Whole Foods' role as outside counsel is
7 unknown. New Seasons does not know whether outside counsel in this matter provides ongoing
8 counseling to Whole Foods with respect to competitive decision-making. If that is the case, then
9 providing New Seasons' most sensitive information to Whole Foods' outside counsel is not
10 materially different than providing that information to Whole Foods itself. In any event, any
11 disclosure of New Seasons' information, whether directly to Whole Foods or indirectly through
12 public disclosure, would cause New Seasons irreparable competitive harm. Yet the protective
13 order relies meagerly on the bare prohibition against disclosure. That is not enough.

14 The United States District Court for the District of Columbia agrees. In the
15 injunction proceeding in this matter, the District Court recognized the importance of a significant
16 hammer hanging over the heads of the parties and their lawyers "as an added incentive against
17 inadvertent misuse of any confidential information[.]" *Whole Foods Case*, July 6, 2007
18 Memorandum Opinion and Order, p. 5. Accordingly, "[i]n an abundance of caution," the court
19 required the following penalty provision:

20 Any violation of this Order will be deemed a contempt and
21 punished by a fine of \$250,000. This fine will be paid individually
22 by the person who violates this Order. Any violator may not seek
23 to be reimbursed or indemnified for the payment the violator has
24 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.

25 *Id.* Just as the district court found in the *Whole Foods Case*, is not enough to rely on notions of
26 ethical restraints and professionalism, particularly to protect against inadvertent disclosure.

1 While New Seasons has no reason to doubt the professionalism or ethics of the lawyers involved
2 in this proceeding, there can be no doubt that, as a practical matter, those in possession of New
3 Seasons' confidential information would take greater measures to protect that information if
4 faced with a substantial personal fine like that set forth in the district court's protective order.⁴
5 The lack of any penalty provision in the protective order renders it inadequate, and New Seasons
6 should not be required to produce its confidential information without an adequate protective
7 order.

8 Further, the FTC will also receive all materials produced in response to Whole
9 Foods' subpoena. Notwithstanding the limitations imposed on Whole Foods, the protective
10 order has a gaping hole with respect to the FTC. The protective order provides that the FTC is to
11 use the information only for purposes of the present proceeding, except that the FTC "may use or
12 disclose confidential material as provided by its Rules of Practice; Sections 6(f) and 21 of the
13 Federal Trade Commission Act; or any other legal obligation imposed upon the Commission."
14 Protective Order, ¶ 8. In other words, the protective order provides New Seasons with no
15 protection whatsoever with respect to what the FTC does with New Seasons' confidential
16 information outside the confines of this proceeding.

17 For that, New Seasons apparently must rely on statutory and regulatory
18 prohibitions against the release of its confidential information. There is no question that the FTC
19 has a statutory and regulatory obligation to maintain the confidentiality of New Seasons'
20 financial information. The problem is that, notwithstanding the prohibitions against disclosure,
21 New Seasons has no remedy if the FTC destroys New Seasons' business by disclosing its
22 confidential information. Without a penalty provision of the nature described above, or the
23
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25 ⁴ New Seasons would request the additional modification that any such fine be payable to New Seasons if
26 its information were disclosed.

1 FTC's agreement to make New Seasons whole in the event of disclosure, New Seasons has
2 absolutely no protection against the FTC's inadvertent disclosure.⁵

3 Moreover, the possibility of improper FTC disclosures is real.

4 Evidence introduced in the district court demonstrated that in the
5 past the Commission has made inappropriate disclosures, and the
6 trial judge noted a number of instances where informal
7 arrangements for confidential treatment of proprietary information
8 were not strictly honored. He described the disclosures in one case
9 as an evasion, and a violation of the spirit of (an) order. Although
legitimate investigation should not be unduly delayed, we agree
with the district judge that the unfortunate disclosures by the FTC
of confidential information are the kind of governmental behavior
that simply cannot be countenanced.

10 *Wearly v. F.T.C.*, 616 F.2d 662, 664 (3rd Cir. 1980) (internal quotations and citations omitted).

11 In a recent case in which there was both a protective order and the statutory protections in place,
12 the FTC posted on its website exhibits to a filing that it did not intend to make public. *See In the*
13 *Matter of Basic Research, L.L.C. et al.*, Fed. Trade Comm'n Docket No. 9318. Although the
14 FTC disputed, after the disclosure, whether the designation of the documents at issue as
15 "confidential" and "restricted confidential, attorney eyes only" was proper, there is no question
16 that the FTC negligently made those confidential materials available to the public via its website.
17 There is also no question that, despite its error, which the respondents asserted resulted in the
18 public disclosure of its trade secret and confidential financial information, the FTC offered no
19 remedy other than its "deep regret."

20 Indeed, the FTC has already publicly disclosed confidential information in this
21 very matter. The FTC publicly filed a document that it had "redacted" through by blackening
22 out text electronically. However, that text – which contained trade secret information – remained
23 in the document, and could be easily copied, pasted, viewed, and published, which the

24 _____
25 ⁵ New Seasons has no reason to believe that the FTC will intentionally disclose New Seasons'
26 confidential information in violation of statutory prohibitions or the protective order, and makes
no such assertion here.

1 Associated Press did. The information then was widely disseminated, as a direct result of the
2 FTC's carelessness and apparent failure to take seriously the protection of the confidential
3 information. New Seasons' concern about inadvertent disclosure is not exaggerated or
4 unfounded. The likelihood of disclosure is real. New Seasons should not be required to provide
5 the detailed, confidential information the subpoena demands without a protective order that
6 prohibits the FTC from disclosing information New Seasons considers to be confidential and
7 requires the disclosing party to make New Seasons financially whole if there is a breach of the
8 protective order.

9 **III. CONCLUSION**

10 For the foregoing reasons, New Seasons' motion should be granted and the
11 subpoena should be quashed or limited as to requests three through nine.

12 DATED this 21 day of November, 2008.

13 Respectfully submitted,

14 **DAVIS WRIGHT TREMAINE LLP**

15
16 By _____

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

1. TO Brian Rohter Chief Executive Officer New Seasons Market 2004 North Vancouver Street Portland, OR 92227	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 <hr/> 5. DATE AND TIME OF PRODUCTION OR INSPECTION November 4, 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
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7. MATERIAL TO BE PRODUCED See Attachment A, Part III
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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,

brochures, circulars, advertisements, leaflets, reports, research studies, test data, working papers, drawings, maps, sketches, diagrams, blueprints, graphs, charts, diaries, logs, manuals, agreements, contracts, rough drafts, analyses, ledgers, inventories, financial information, bank records, receipts, books of account, understandings, minutes of meetings, minute books, resolutions, assignments, computer printouts, purchase orders, invoices, bills of lading, written memoranda or notes of oral communications, and any other tangible thing of whatever nature.

F. The terms "relate to," "related to," "relating to," "in relation to," and "concerning" shall mean mentioning, comprising, consisting, indicating, describing, reflecting, referring, evidencing, regarding, pertaining to, showing, discussing, connected with, memorializing or involving in any way whatsoever the subject matter of the request, including having a legal, factual or logical connection, relationship, correlation, or association with the subject matter of the request. A document may "relate to" or an individual or entity without specifically mentioning or discussing that individual or entity by name.

G. The terms "and" and "or" have both conjunctive and disjunctive meanings.

H. The terms "communication" and "communications" shall mean all meetings, interviews, conversations, conferences, discussions, correspondence, messages, telegrams, facsimiles, electronic mail, mailgrams, telephone conversations, and all oral, written and electronic expressions or other occurrences whereby thoughts, opinions, information or data are transmitted between two or more persons.

I. The term "Transaction" shall mean the acquisition of Wild Oats by Whole Foods that occurred on August 28, 2007.

J. The term "Geographic Area" shall mean the following metropolitan areas:

1. Albuquerque, NM;
2. Boston, MA;

3. Boulder, CO;
4. Hinsdale, IL (suburban Chicago);
5. Evanston, IL (suburban Chicago);
6. Cleveland, OH;
7. Colorado Springs, CO;
8. Columbus, OH
9. Denver, CO;
10. West Hartford, CT;
11. Henderson, NV;
12. Kansas City-Overland Park, KS;
13. Las Vegas, NV;
14. Los Angeles-Santa Monica-Brentwood, CA;
15. Louisville, KY;
16. Omaha, NE;
17. Pasadena, CA;
18. Phoenix, AZ;
19. Portland, ME;
20. Portland, OR;
21. St. Louis, MO;
22. Santa Fe, NM;
23. Palo Alto, CA;
24. Fairfield County, CT;
25. Miami Beach, FL;
26. Naples, FL;
27. Nashville, TN;
28. Reno, NV; and
29. Salt Lake City, UT.

II. Instructions

1. Submit all documents, including information or items in the possession of your staff, employees, agents, representatives, other personnel, or anyone purporting to act on your behalf, by the date listed in Item 5 on the Subpoena Duces Tecum form, to:

James A. Fishkin
Dechert LLP
1775 I Street, NW
Washington, D.C. 20016

In the alternative, under FTC Rule 3.34(b), 16 C.F.R. § 3.34(b), you must produce and permit inspection and copying of the designated books, documents (as defined in Rule 3.34(b)), or

tangible things – or to permit inspection of the premises – at the date and time specified in Item 5, at the request of Counsel listed in Item 9, on the Subpoena Duces Tecum form.

2. If an objection is made to any request herein, all documents and things responsive to the request not subject to the objection should be produced. Similarly, if any objection is made to production of a document, the portion(s) of that document not subject to the objection should be produced with the portion(s) objected to redacted and indicated clearly as such. Otherwise, no communication, document, file, or thing requested should be altered, changed, or modified in any respect. All communications, documents, and files shall be produced in full and unexpurgated form, including all attachments and enclosures either as they are kept in your ordinary course of business or organized to correspond with those requests. No communication, document, file, or thing requested should be disposed of or destroyed.

3. If you object to any request, or otherwise withhold responsive information because of the claim of privilege, work product, or other grounds:

- a. Identify the Request for Documents to which objection or claim of privilege is made;
- b. Identify every Document withheld, the author, the date of creation, and all recipients;
- c. Identify all grounds for objection or assertion of privilege, and set forth the factual basis for assertion of the objection or claim of privilege;
- d. Identify the information withheld by description of the topic or subject matter, the date of the communication, and the participants; and
- e. Identify all persons having knowledge of any facts relating to your claim of privilege.

4. Your responses should reflect all knowledge, information, and documents in your possession, custody, or control, and includes, unless otherwise specifically indicated, your counsel, staff, employees, agents, representatives, other personnel, or anyone purporting to act on your behalf.

5. Your response to the document request should include any document created, prepared or received from January 1, 2006 to the present.

6. Any questions regarding this subpoena should be directed to James A. Fishkin at 202-261-3421 or Gorav Jindal at 202-261-3435.

III. Requests For Documents

Please provide the following:

1. All documents you have provided to the Commission in connection with (a) the Transaction or any investigation of the Transaction; (b) *FTC v. Whole Foods Market, Inc.*, Civil Action No. 1:07-CV-01021-PLF (D.D.C. 2007); or (c) this matter, which is *In re Whole Foods Market, Inc.*, FTC Docket No. 9324.
2. All documents relating to any communications you have had with the Commission in connection with (a) the Transaction; (b) *FTC v. Whole Foods Market, Inc.*, Civil Action No. 1:07-CV-01021-PLF (D.D.C. 2007); or (c) this matter, which is *In re Whole Foods Market, Inc.*, FTC Docket No. 9324.
3. All documents relating to Whole Foods' acquisition of Wild Oats, including documents discussing the effect of the merger on you.
4. All documents discussing competition with Whole Foods or Wild Oats, including responses by you to a new Whole Foods or Wild Oats store and responses by you to

prices, promotions, product selection, quality, or services at Whole Foods or Wild Oats stores.

5. All market studies, strategic plans or competitive analyses relating to competition in each Geographic Area, including documents discussing market shares.
6. All market studies, strategic plans or competitive analyses relating to the sale of natural and organic products, including the sale of natural and organic products in your stores.
7. All documents relating to your plans to increase the shelf space at your stores allocated to natural and organic products, the number of natural and organic products sold in your stores, or the sales of natural or organic products in your stores.
8. All documents discussing your plans to renovate or improve your stores to sell additional natural and organic products or to open stores emphasizing natural and organic products.
9. Provide documents sufficient to show, or in the alternative submit a spread sheet showing: (a) the store name and address of each of your stores separately in each Geographic Area; and (b) for each store provide the total weekly sales for each week since January 1, 2006 to the current date.

CERTIFICATE OF SERVICE

I certify that I served the foregoing Subpoena Duces Tecum and all Attachments via overnight mail delivery to:

Brian Rohter
Chief Executive Officer
New Seasons Market
2004 North Vancouver Street
Portland, OR 92227

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

Dated: October 13, 2008

/s/ James A. Fishkin
James A. Fishkin, Esq.

**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)
)

WHOLE FOODS MARKET, INC.,)
a corporation.)
_____)

Docket No. 9324

PROTECTIVE ORDER GOVERNING CONFIDENTIAL MATERIAL

For the purpose of protecting the interests of the parties and third parties in the above-captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this matter:

IT IS HEREBY ORDERED THAT this Protective Order Governing Confidential Material ("Protective Order") shall govern the handling of all Discovery Material, as hereafter defined.

1. As used in this Order, "confidential material" shall refer to any document or portion thereof that contains non-public competitively sensitive information, including trade secrets or other research, development or commercial information, the disclosure of which would likely cause commercial harm to the producing party, or sensitive personal information. "Discovery Material" shall refer to documents and information produced by a party or third party in connection with this matter. "Document" shall refer to any discoverable writing, recording, transcript of oral testimony, or electronically stored information in the possession of a party or a third party. "Commission" shall refer to the Federal Trade Commission ("FTC"), or

any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this proceeding.

2. Any document or portion thereof produced or submitted by a respondent or a third party during a Federal Trade Commission investigation or during the course of this proceeding that is entitled to confidentiality under the Federal Trade Commission Act, or any regulation, interpretation, or precedent concerning documents in the possession of the Commission, as well as any information taken from any portion of such document, shall be treated as confidential material for purposes of this Order.

3. The parties and any third parties, in complying with informal discovery requests, disclosure requirements, or discovery demands in this proceeding may designate any responsive document or portion thereof as confidential material, including documents obtained by them from third parties pursuant to discovery or as otherwise obtained.

4. The parties, in conducting discovery from third parties, shall provide to each third party a copy of this Order so as to inform each such third party of his, her, or its rights herein.

5. A designation of confidentiality shall constitute a representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain and that counsel believes the material so designated constitutes confidential material as defined in Paragraph 1 of this Order.

6. Material may be designated as confidential by placing on or affixing to the document containing such material (in such manner as will not interfere with the legibility thereof) the designation "CONFIDENTIAL-FTC Docket No. 9324" or any other appropriate notice that identifies this proceeding, together with an indication of the portion or portions of the document considered to be confidential material. Confidential information contained in electronic

documents may also be designated as confidential by placing the designation "CONFIDENTIAL--FTC Docket No. 9324" or any other appropriate notice that identifies this proceeding, on the face of the CD or DVD or other medium on which the document is produced. Masked or otherwise redacted copies of documents may be produced where the portions deleted contain privileged matter, provided that the copy produced shall indicate at the appropriate point that portions have been deleted and the reasons therefor.

7. Confidential material shall be disclosed only to: (a) the Administrative Law Judge presiding over this proceeding, personnel assisting the Administrative Law Judge, the Commission and its employees, and personnel retained by the Commission as experts or consultants for this proceeding, provided such experts or consultants are not employees of the respondent, or any entity established by the respondent, or employees of any third party which has been subpoenaed to produce documents or information in connection with this matter, and provided further that each such expert or consultant has signed an agreement to abide by the terms of this protective order; (b) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter; (c) outside counsel of record for the respondent, their associated attorneys and other employees of their law firm(s), provided such personnel are not employees of the respondent or of any entity established by the respondent; (d) anyone retained to assist outside counsel in the preparation or hearing of this proceeding including experts or consultants, provided such experts or consultants are not employees of the respondent, or any entity established by the respondent, or employees of any third party which has been subpoenaed to produce documents or information in connection with this matter, and provided further that each such expert or consultant has signed an agreement to abide by the terms of this protective order; and (e) any witness or deponent who authored or

received the information in question, or who is presently employed by the producing party.

8. Disclosure of confidential material to any person described in Paragraph 7 of this Order shall be only for the purposes of the preparation and hearing of this proceeding, or any appeal therefrom, and for no other purpose whatsoever, provided, however, that the Commission may, subject to taking appropriate steps to preserve the confidentiality of such material, use or disclose confidential material as provided by its Rules of Practice; Sections 6(f) and 21 of the Federal Trade Commission Act; or any other legal obligation imposed upon the Commission.

9. In the event that any confidential material is contained in any pleading, motion, exhibit or other paper filed or to be filed with the Secretary of the Commission, the Secretary shall be so informed by the party filing such papers, and such papers shall be filed *in camera*. To the extent that such material was originally submitted by a third party, the party including the materials in its papers shall immediately notify the submitter of such inclusion. Confidential material contained in the papers shall continue to have *in camera* treatment until further order of the Administrative Law Judge, provided, however, that such papers may be furnished to persons or entities who may receive confidential material pursuant to Paragraphs 7 or 8. Upon or after filing any paper containing confidential material, the filing party shall file on the public record a duplicate copy of the paper that does not reveal confidential material. Further, if the protection for any such material expires, a party may file on the public record a duplicate copy which also contains the formerly protected material.

10. If counsel plans to introduce into evidence at the hearing any document or transcript containing confidential material produced by another party or by a third party, they shall

provide advance notice to the other party or third party for purposes of allowing that party to seek an order that the document or transcript be granted *in camera* treatment. If that party wishes *in camera* treatment for the document or transcript, the party shall file an appropriate motion with the Administrative Law Judge within 5 days after it receives such notice. Until such time as the Administrative Law Judge rules otherwise, the document or transcript shall be accorded *in camera* treatment. If the motion for *in camera* treatment is denied, all documents and transcripts shall be part of the public record. Where *in camera* treatment is granted, a duplicate copy of such document or transcript with the confidential material deleted therefrom may be placed on the public record.

11. If any party receives a discovery request in another proceeding that may require the disclosure of confidential material submitted by another party or third party, the recipient of the discovery request shall promptly notify the submitter of receipt of such request. Unless a shorter time is mandated by an order of a court, such notification shall be in writing and be received by the submitter at least 10 business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the submitter of its rights hereunder. Nothing herein shall be construed as requiring the recipient of the discovery request or anyone else covered by this Order to challenge or appeal any order requiring production of confidential material, to subject itself to any penalties for non-compliance with any such order, or to seek any relief from the Administrative Law Judge or the Commission. The recipient of the discovery request shall not oppose the submitter's efforts to challenge the disclosure of confidential material. In addition, nothing herein shall limit the applicability of Rule 4.11(e) of the Commission's Rules of

Practice, 16 CFR § 4.11(e), to discovery requests in another proceeding that are directed to the Commission.

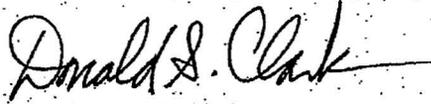
12. At the time that any consultant or other person retained to assist counsel in the preparation or hearing of this action concludes participation in the action, such person shall return to counsel all copies of documents or portions thereof designated confidential that are in the possession of such person, together with all notes, memoranda or other papers containing confidential information. At the conclusion of this proceeding, including the exhaustion of judicial review, the parties shall return documents obtained in this action to their submitters, provided, however, that the Commission's obligation to return documents shall be governed by the provisions of Rule 4.12 of the Rules of Practice, 16 CFR § 4.12.

13. The inadvertent production or disclosure of information or documents produced by a party or third party in discovery that is subject to a claim of privilege will not be deemed to be a waiver of any privilege to which the producing party would have been entitled had the inadvertent production or disclosure not occurred, provided the producing party exercised reasonable care to preserve its privilege. In the event of such inadvertent production or disclosure, the party claiming inadvertence shall promptly notify any party that received the information of the claim and the basis for it. After being so notified, the receiving party must promptly return the specified information, and all copies of it, and may not use or disclose the information unless the claim is resolved such that no privilege applies to the information.

Nothing in this Order presupposes a determination on the claim of privilege or of reasonable care in preserving privilege if challenged.

14. The provisions of this Protective Order, insofar as they restrict the communication and use of confidential discovery material, shall, without written permission of the submitter or further order of the Commission, continue to be binding after the conclusion of this proceeding.

By the Commission.



Donald S. Clark
Secretary

ISSUED: October 10, 2008

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I served a copy of the foregoing **NEW SEASONS**
3 **MARKET'S MOTION TO QUASH OR LIMIT SUBPOENA FROM WHOLE FOODS**
4 **MARKET, INC.** on:

5 James A. Fishkin
6 Dechert, LLP
7 1775 I Street, N.W.
8 Washington, DC 20006-2401

9 J. Robert Robertson
10 Federal Trade Commission
11 600 Pennsylvania Avenue, N.W.
12 Washington, DC 20580

13 Attorneys for Whole Foods Market,
14 Inc.

15 Attorneys for Federal Trade Commission

16 Matthew J. Reilly
17 Catharine M. Moscatelli
18 Federal Trade Commission
19 601 New Jersey Avenue, N.W.
20 Washington, DC 20001

21 Attorneys for Federal Trade Commission

22 by mailing a copy thereof in a sealed, first-class postage prepaid envelope,
23 addressed to said attorney's last-known address and deposited in the U.S. mail at Washington,
24 DC on the date set forth below;

25 by sending a copy thereof via courier in a sealed, prepaid envelope, addressed
26 to said attorney's last-known address on the date set forth below;

by faxing a copy thereof to said attorney at his/her last-known facsimile
number on the date set forth below; or

by electronically mailed notice on the date set forth below.

Dated this 24 day of November, 2008.

DAVIS WRIGHT TREMAINE LLP

By Ronni London IER
Ronald G. London, DCB #456284
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