

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

Docket No. 9324

PUBLIC

**NEW SEASONS MARKET, INC.'S
MOTION FOR LEAVE TO FILE
REPLY IN SUPPORT OF NEW
SEASONS MARKET'S MOTION TO
QUASH OR LIMIT SUBPOENA FROM
WHOLE FOODS MARKET, INC.**

Pursuant to 16 C.F.R. § 3.22(c), New Seasons Market, Inc. ("New Seasons") respectfully moves for an order granting New Seasons permission to file a reply in support of its Motion to Quash or Limit Subpoena from Whole Foods Market, Inc. and accepting as filed the proposed reply brief attached hereto as Exhibit 1.

ARGUMENT

New Seasons seeks permission to file the attached reply brief because Whole Foods' response to New Seasons' motion misrepresents New Seasons' efforts to resolve this

1 By /s/ Ronald G. London
2 Ronald G. London, DCB #456284
3 Davis Wright Tremaine LLP
4 1919 Pennsylvania Avenue, N.W. – Suite 200
5 Washington D.C. 20006-3402
6 Tel: (202) 973-4229
7 Fax: (202) 973-4499
8 Email: ronaldlondon@dwt.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

EXHIBIT 1

1 UNITED STATES OF AMERICA

2 BEFORE THE FEDERAL TRADE COMMISSION

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

Docket No. 9324

PUBLIC

**[PROPOSED] REPLY IN SUPPORT OF
NEW SEASONS MARKET'S MOTION
TO QUASH OR LIMIT SUBPOENA
FROM WHOLE FOODS MARKET,
INC.**

9
10 **I. INTRODUCTION**

11 Whole Foods' response misrepresents New Seasons' efforts to resolve this dispute
12 and mischaracterizes the procedural history between New Seasons and the FTC. Whole Foods
13 also attempts to put an inaccurate gloss on the burden New Seasons would suffer if required to
14 respond to Whole Foods' subpoena by offering for the first time a restriction to employees at
15 New Seasons' "headquarters." In addition, Whole Foods incorrectly argues that the protective
16 order in this matter is the most "stringent" available while failing to address whether the outside
17 counsel who will have access to New Seasons' confidential information engage in competitive
18 decision-making. Whole Foods further ignores the fact that, by its terms, the protective order
19 allows the parties to introduce New Seasons' confidential information into evidence in this
20 matter as presumptively public. Finally, Whole Foods fails to recognize that New Seasons, as a
21 private company, is not required to disclose the information Whole Foods seeks to anyone. New
22 Seasons should not now be required to produce its most sensitive competitive information to a
23 primary competitor under a protective order that is demonstrably inadequate.

24 **II. ARGUMENT**

25 **A. Whole Foods mischaracterizes the negotiations with New Seasons.**

26 Whole Foods accuses New Seasons of making "contrived" arguments while itself

1 slinging accusations about New Seasons supposedly “stringing Whole Foods along for weeks”
2 and “renegeing” on claimed promises. Resp., pp. 3, 6, 11. Those accusations are both false and
3 irrelevant. New Seasons initially sought an extension because its counsel had been out of the
4 country for several weeks and did not return to the office until October 27, 2008, leaving
5 insufficient time for him to confer with Whole Foods or otherwise respond to the subpoena. See
6 Declaration of Robert Newell (“Newell Decl.”), ¶ 2; New Seasons’ Unopposed Motion for
7 Extension (filed October 24, 2008). Whole Foods’ counsel graciously agreed. Declaration of
8 James A. Fishkin (“Fishkin Decl.”), ¶ 5. As New Seasons attempted to resolve its differences
9 with Whole Foods without a motion – as required under the Commission’s rules – it became
10 apparent that additional time would be beneficial to assess the requests further and to determine
11 whether agreement could be reached. See Newell Decl., ¶ 3; Fishkin Decl., Ex. 3. Whole Foods’
12 counsel again graciously agreed. Fishkin Decl., ¶ 6. Although the parties discussed possible
13 limitations to address the issue of burden, no promises were made and no agreement was
14 reached. Newell Decl., ¶ 4.

15 Further, Whole Foods offered no meaningful response to New Seasons’
16 arguments regarding the inadequacy of the protective order. See Fishkin Decl. ¶¶1-15; Newell
17 Decl., ¶ 5. When it became apparent that even if the issue of burden were resolved, the
18 inadequacy of the protective order would remain an insurmountable hurdle despite New Seasons’
19 good faith efforts to reach a resolution, New Seasons filed its motion. Newell Decl., ¶ 5.
20 Apparently, Whole Foods would have New Seasons either file its motion without making any
21 effort to resolve this dispute extra-judicially, or confer *ad nauseum* even when it is clear from
22 Whole Foods’ response that no resolution is possible. New Seasons’ conduct was proper and in
23 fact required. Whole Foods’ attacks are both unfounded and irrelevant.

24 **B. Whole Foods’ never-before-offered “compromise” would not reduce the**
25 **burden to New Seasons.**

26 Whole Foods’ supposedly burden-reducing “compromise” involving “high-level”

1 employees and “high-level” documents may make good sound bites but fail to withstand
2 scrutiny. First, during the conferral process, Whole Foods did not mention any limitation to
3 corporate headquarters. Newell Decl., ¶ 4. Whole Foods spoke only generally in terms of some
4 limitation to some number of “higher level” (not even “high level”) employees. Newell Decl., ¶
5 4. As explained in New Seasons’ motion, New Seasons has a flat management structure with
6 largely decentralized decision-making. Identifying a “higher level” employee is difficult. Even
7 if such identification were made, however, it would not materially reduce the burden because all
8 emails and other documents still must be searched to determine whether the sender or recipient
9 was “high level.”

10 Any proposed restriction to “high level” documents is equally meaningless. The
11 universe of emails and other documents to be searched remains unchanged. All documents still
12 would need to be searched and reviewed to determine whether they are “high level,” whatever
13 that means. The ultimate number or nature of the documents produced does not reduce the
14 burden associated with the exact same volume of documents which must be searched.

15 Finally, Whole Foods argues at length that the requested information is highly
16 relevant to its defense, but ignores that it has available to it numerous other sources of
17 information on which Whole Foods can rely to show that it competes with more than just New
18 Seasons in the Portland, Oregon market. Whole Foods can look at its own sales numbers in
19 Portland as compared to other markets, the number of competitors’ stores in the market, market
20 demographics and the like to make its case. Whole Foods nonetheless insists on compelling
21 New Seasons to engage in a burdensome search to produce its confidential information, with no
22 hint of any offer to share in the cost of responding to its subpoena.

23 ///
24 ///
25 ///
26

1 **C. The protective order is inadequate to protect New Seasons' confidential**
2 **information.**

3 **1. Whole Foods' argument that the protective order is the "most**
4 **stringent" it can be is provably incorrect and relies on a misplaced**
5 **distinction between in-house and retained counsel.**

6 Tellingly, Whole Foods never argues that the protective order adequately protects
7 New Seasons' confidential trade secret information. Instead, Whole Foods incorrectly argues
8 that the protective order is the most stringent that exists in civil litigation. Resp., p. 12. That is
9 provably false: the protective order lacks the added protection New Seasons requests in the form
10 of a penalty provision for disclosure in violation of the protective order, a provision included in
11 the District Court's protective order.

12 Moreover, the inside counsel versus outside counsel distinction on which Whole
13 Foods relies is entirely irrelevant. See Resp., p. 12. There is no greater or lesser likelihood of
14 inadvertent disclosure merely because counsel is retained as opposed to in-house.

15 Denial or grant of access ... cannot rest on a general assumption
16 that one group of lawyers are [sic] more likely or less likely
17 inadvertently to breach their duty under a protective order. Indeed,
18 it is common knowledge that some retained counsel enjoy long and
19 intimate relationships and activities with one or more clients,
20 activities on occasion including retained counsel's service on a
21 corporate board of directors. Exchange of employees between a
22 client and a retained law firm is not uncommon. Thus the factual
23 circumstances surrounding each individual counsel's activities,
24 association, and relationship with a party, whether counsel be in-
25 house or retained, must govern any concern for inadvertent or
26 accidental disclosure.

27 *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 (Fed. Cir. 1984). The individual lawyer's
28 ethical standards or record is also irrelevant. *Infosint v. H. Lundbeck A.S.*, 2007 WL 1467784, *3
29 (S.D.N.Y. May 16, 2007) ("The inquiry should not be directed at any one attorney's own ethical
30 standards or record."). "Even if the competitor's counsel acted in the best of faith and in
31 accordance with the highest ethical standards, the question remains whether access to the moving
32 party's confidential information would create an unacceptable opportunity for inadvertent
33 disclosure." *Id.* (quotation omitted). Indeed,

1 Like retained counsel ... in-house counsel are officers of the court,
2 are bound by the same Code of Professional Responsibility, and
3 are subject to the same sanctions. In-house counsel provide the
4 same services and are subject to the same types of pressures as
5 retained counsel. The problem and importance of avoiding
6 inadvertent disclosure is the same for both. Inadvertence, like the
7 thief-in-the-night, is no respecter of its victims. ... Whether an
8 unacceptable opportunity for inadvertent disclosure exists,
9 however, must be determined, as above indicated, by the facts on a
10 counsel-by-counsel basis, and cannot be determined solely by
11 giving controlling weight to the classification of counsel as in-
12 house rather than retained.

13 *U.S. Steel*, 730 F.2d at 1468. Whole Foods' attempt to label the protective order as the most
14 "stringent" available fails because it is based on an artificial distinction between in-house and
15 retained counsel.

16 New Seasons raised this very issue in its motion to quash. New Seasons noted
17 that the scope of Whole Foods' outside counsel's role is unknown and that it is unknown whether
18 Whole Foods' retained outside counsel provides ongoing counseling with respect to competitive
19 decision-making. Mot., p. 11. It is telling that Whole Foods utterly failed to offer any evidence
20 that its outside counsel's role is limited to defense of this antitrust matter or otherwise does not
21 include active participation in Whole Foods' competitive decision-making. Whole Foods cannot
22 rely on its naked proclamations that New Seasons is adequately protected when it coyly avoids
23 any representation that its outside counsel is divorced from Whole Foods' competitive decision-
24 making. See *Infosint*, 2007 WL 1467784 at *4 (protective order allowing outside counsel access
25 to highly confidential information was inappropriate where outside counsel and his firm were
26 involved in competitive decision-making). Particularly given the absence of any evidence that
Whole Foods' retained counsel does not in fact participate in competitive decision-making, the
"outside counsel only" provision is meaningless, and the protective order does not adequately
protect New Seasons against inadvertent disclosure of its confidential information, either
publicly or internally within Whole Foods.

///

1 **2. Whole Foods fails to address the impact of its experts' access to New**
2 **Seasons' confidential information.**

3 Whole Foods also fails to address in any way the fact that the protective order
4 allows the industry experts Whole Foods has retained to have unfettered access to New Seasons'
5 confidential information. Those experts will undoubtedly work for other New Seasons'
6 competitors as well. Try though they might, those experts cannot unlearn or meaningfully
7 compartmentalize and exclude from consideration New Seasons' confidential information.
8 Instead, New Seasons' information "will be added to the expert's repository of other information
9 for possible future use." *Litton Indus., Inc. v. Chesapeake & Ohio Railway Co.*, 129 F.R.D. 528,
10 531 (E.D. Wis. 1990). The protective order offers no enforceable protection against this use and
11 disclosure. Whole Foods fails to respond to this point because it is irrefutable.

12 **3. Even if the protective order is followed, it offers inadequate protection**
13 **to New Seasons' confidential information.**

14 Whole Foods also ignores the fact that even if the protective order were followed
15 in every respect, by the terms of the order New Seasons' confidential information remains
16 confidential only so long as New Seasons continues to fight to protect its confidential
17 information and the administrative law judge agrees that the information is confidential. Under
18 the protective order, if Whole Foods or the FTC plans to introduce New Seasons' confidential
19 information into evidence, it is presumptively public. The parties merely have to give New
20 Seasons some unspecified amount of "advance notice," and then the protective order places the
21 burden on New Seasons to file a motion to seek *in camera* treatment, and provides New Seasons
22 only five days to intervene to attempt to protect its confidential information. Protective Order, ¶
10.

23 Whole Foods does not respond to this argument because the inadequacy of the
24 protective order in this regard is indisputable. In short, information that New Seasons, as a
25 privately held corporation, treats as confidential, can presumptively be publicly released by the
26 terms of the very protective order that supposedly protects New Seasons' information from

1 disclosure. The protective order does not protect New Seasons' confidential information.
2 Instead, it merely provides cover to Whole Foods to obtain its competitors' confidential
3 information and then New Seasons – a non-party to this case – is left to litigate on an
4 inexplicably short timeframe the confidentiality of its trade secret information. This scheme
5 hardly squares with Whole Foods' bald declaration that the protective order is the most
6 “stringent” protective order available.

7 **4. Whole Foods misrepresents the nature and outcome of New Seasons'**
8 **motion to quash the CID the Commission served last year.**

9 Whole Foods also misrepresents New Seasons' dispute with the Commission in
10 connection with the CID the Commission issued last year. First, Whole Foods ignores that,
11 although a single Commissioner (Pamela Jones Harbour) denied New Seasons' motion to quash
12 the CID, New Seasons appealed that decision to the full Commission and the full Commission
13 never ruled. Newell Decl., ¶ 6, Ex. 1. Instead, New Seasons withdrew its request for full
14 Commission review after the Commission's counsel agreed that New Seasons did not have to
15 produce any confidential information and that the Commission would not issue any further
16 CID's or subpoenas to New Seasons in this matter. Newell Decl., ¶ 7, Exs. 2-3. Whole Foods'
17 failure to provide the entire procedural history – one which ended with an undecided appeal and
18 no production of confidential information – is decidedly misleading.

19 Whole Foods similarly mischaracterizes the argument New Seasons made to the
20 Commission regarding damages. Resp., p. 14. New Seasons did not make the “precise
21 argument” it now makes, because there was no protective order in place to provide ostensible
22 protection to New Seasons at the time it filed its Petition to Limit the CID. The Commission
23 relied solely on statutory and regulatory protections. Further, New Seasons asked for damages if
24 the Commission breached its statutory and regulatory obligations. By contrast, what New
25 Seasons now seeks – and what Judge Friedman ordered – was a penalty in the event of disclosure
26 of confidential information. The first was a measure of damages that New Seasons would suffer

1 from disclosure; the latter is a non-reimbursable penalty for violation of the protective order.
2 New Seasons presently asks for a provision like that Judge Friedman included in the prior
3 protective order in this matter, not for a damages remedy like that New Seasons requested in the
4 absence of a protective order.

5 **5. The newly remanded district court case dilutes the protective order in**
6 **this matter.**

7 Concurrent with New Seasons' filing in this matter, the District of Columbia
8 Circuit Court of Appeals remanded the case before the United States District Court for the
9 District of Columbia, *FTC v. Whole Foods Market, Inc.*, Case No. 07-01021, for further
10 proceedings.¹ The protective order in that case allows Whole Foods' general counsel access to
11 unredacted drafts of pleadings, deposition transcripts, and the like, which could include New
12 Seasons' confidential information. *See FTC v. Whole Foods Market, Inc.*, Case No. 07-01021,
13 Docket No. 100. The supposedly most "stringent" protective order in this matter effectively
14 allows Whole Foods to preview New Seasons' confidential trade secret information to determine
15 whether to seek it under a protective order that allows Whole Foods' general counsel access to
16 that information. All Whole Foods then has to do is issue its subpoena under a new caption.

17 Moreover, the protective order in the district court case was amended to provide
18 general counsel's access after an interim protective order had been put in place. *See id.* Third
19 parties who produced information under the interim protective order – which was an "outside
20 counsel" only protective order – suddenly found their confidential information available to
21 Whole Foods' inside counsel. *See FTC v. Whole Foods Market, Inc.*, Case No. 07-01021,
22 Docket No. 11. There is no guarantee that the protective order presently in place here will not
23 similarly be amended to allow broader disclosure of confidential information.

24 _____
25 ¹ The D.C. Circuit denied Whole Foods' motion for rehearing before the full panel by amended opinion
26 dated November 21, 2008, when New Seasons' motion was already in transit for filing on November 24,
2008.

1 **6. Whole Foods ignores the inappropriate disclosures which have**
2 **already taken place in this very case.**

3 Finally, in touting the effectiveness of the protective order, Whole Foods ignores
4 the fact that confidential information supposedly subject to statutory protections and a protective
5 order has already been inadvertently disclosed in this very case. Whole Foods summarizes its
6 argument by saying “If the protective order is violated – and counsel for Whole Foods intends to
7 abide by it – the matter can be taken up with the Commission.” Resp., p. 14. In essence, Whole
8 Foods argues that the destruction of New Seasons’ business as a result of disclosure of trade
9 secret information Whole Foods compelled New Seasons to disclose is not Whole Foods’
10 problem. If the protective order is violated and New Seasons’ trade secret information is made
11 public, whether intentionally or inadvertently, New Seasons cannot unring the bell by “taking it
12 up with the Commission.” Whole Foods would have a less cavalier attitude, and therefore better
13 protect New Seasons’ information, if a substantial, non-reimbursable penalty were a part of the
14 protective order.

15 **III. CONCLUSION**

16 For the foregoing reasons and all the reasons stated in New Seasons’ Motion to
17 Quash or Limit Subpoena from Whole Foods Market, Inc., New Seasons’ motion should be
18 granted and the subpoena should be quashed or limited as to requests three through nine.

19 DATED this 11th day of December, 2008.

20 Respectfully submitted,

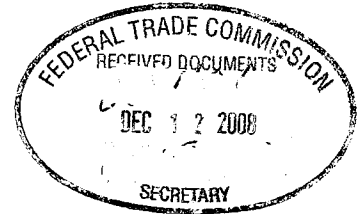
21 **DAVIS WRIGHT TREMAINE LLP**

22 By _____
23 Robert D. Newell, OSB #790917
24 Kevin H. Kono, OSB #023528
25 Tel: (503) 241-2300
26 Fax: (503) 778-5499
 Email: bobnewell@dwt.com
 Email: kevinkono@dwt.com

1 **DAVIS WRIGHT/TREMAINE LLP**

2
3 By

4 Ronald G. London, DCB #456284
5 Davis Wright Tremaine LLP
6 1919 Pennsylvania Avenue, N.W. – Suite 200
7 Washington D.C. 20006-3402
8 Tel: (202) 973-4229
9 Fax: (202) 973-4499
10 Email: ronaldlondon@dwt.com



1
2 UNITED STATES OF AMERICA
3 BEFORE THE FEDERAL TRADE COMMISSION

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

Docket No. 9324

PUBLIC

**[PROPOSED] ORDER GRANTING
NEW SEASONS MARKET, INC.'S
MOTION FOR LEAVE TO FILE
REPLY IN SUPPORT OF NEW
SEASONS MARKET'S MOTION TO
QUASH OR LIMIT SUBPOENA FROM
WHOLE FOODS MARKET, INC.**

11
12 Upon due consideration of New Seasons Market, Inc.'s Motion for Leave to File
13 Reply in Support of New Seasons Market's Motion to Quash or Limit Subpoena from Whole
14 Foods Market, Inc., it is hereby ORDERED that:

- 15 1. New Seasons Market, Inc.'s motion is GRANTED;
16
17 2. New Seasons Market, Inc.'s proposed reply attached as Exhibit 1 to New
18 Season Market Inc.'s motion is hereby deemed filed.

19 IT IS SO ORDERED.

20 Date: _____

21 _____
22 D. Michael Chappell
23 Administrative Law Judge

1 **CERTIFICATE OF SERVICE**

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

6 James A. Fishkin
7 Dechert, LLP
8 17551 I Street, N.W.
9 Washington, DC 20006-2401

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

10 Of Attorneys for Whole Foods Market, Inc.

Of Attorneys for Federal Trade Commission

11 Matthew J. Reilly
12 Catharine M. Moscatelli
13 Federal Trade Commission
14 601 New Jersey Avenue, N.W.
15 Washington, DC 20001

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

16 Of Attorneys for Federal Trade
17 Commission

18 by mailing a copy thereof in a sealed, first-class postage prepaid envelope, addressed
19 to said attorney's last-known address and deposited in the U.S. mail at Portland, Oregon on the date set
20 forth below;


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

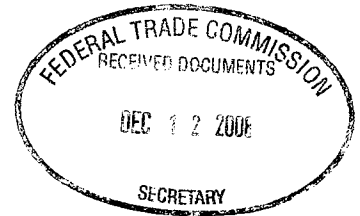
23 by faxing a copy thereof to said attorney at his/her last-known facsimile number on
24 the date set forth below; or

25 by electronically mailed notice on the date set forth below.

26 Dated this 12th day of December, 2008.

DAVIS WRIGHT TREMAINE LLP

By  _____
Ronald G. London, DCB #456284
Davis Wright Tremaine LLP
1919 Pennsylvania Avenue, N.W. – Suite 200
Washington D.C. 20006-3402
Tel: (202) 973-4229
Fax: (202) 973-4499
Email: ronaldlondon@dwt.com



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

Docket No. 9324

PUBLIC

**DECLARATION OF ROBERT D.
NEWELL**

I, Robert D. Newell, under penalty of perjury, hereby declare:

1. I am one of the attorneys representing New Seasons Market, Inc. ("New Seasons") in connection with the subpoena issued to New Seasons by Whole Foods Market, Inc. ("Whole Foods") in the above-captioned matter. I make this declaration based on personal knowledge and am competent to testify as to all matters contained herein.

2. I was on vacation from September 27, 2008 until October 27, 2008 and was out of the country nearly that entire time. I did not return to the office until October 27, 2008 and therefore did not have sufficient time to respond to Whole Foods' subpoena to New Seasons without an extension of the time to move to quash the subpoena and/or to respond to the subpoena. It was for these reasons that New Seasons requested a two-week extension of time.

1 3. Shortly after my return to the office, I began the conferral process with
2 Whole Foods' counsel James Fishkin. As stated in my previously filed Statement of Counsel, I
3 spoke with Mr. Fishkin on three separate occasions in an effort to resolve by agreement the
4 issues presented in New Seasons' Motion to Quash. At the outset of that process, it became clear
5 that additional time would be beneficial to assess the requests fully and determine whether
6 agreement could be reached. It was for these reasons that New Seasons requested a second two-
7 week extension of time.

8 4. During my conversations with Whole Foods' counsel, I raised the
9 concerns regarding burden described in New Seasons' motion to quash. In response, Whole
10 Foods' counsel offered to limit the subpoena to cover some limited number of "higher level"
11 employees. I explained New Seasons' decentralized management structure and the difficulty in
12 determining who is a "higher level" employee. I have no memory of Mr. Fishkin ever making
13 any mention of New Seasons' headquarters or offering to limit the scope of the subpoena to
14 documents at New Seasons' headquarters. Although Whole Foods' counsel and I discussed
15 possible limitations to address the issue of burden, I made no promises and we did not reach any
16 agreement.

17 5. During my conversations with Whole Foods' counsel, I also raised the
18 concerns regarding the inadequacy of the protective order which are described in New Seasons'
19 motion to quash. Whole Foods' counsel did not offer any resolution of those issues and instead
20 responded simply that it is the Commission's order and he could do nothing about it, even
21 though he admitted that the parties jointly submitted it. New Seasons proceeded with its motion
22 to quash only after it became apparent that even if Whole Foods and New Seasons were able to
23 reach agreement regarding issues of burden, the inadequacy of the protective order would remain
24 insurmountable despite New Seasons' good faith efforts to reach a resolution.

25 6. New Seasons was served with a Civil Investigative Demand ("CID") from
26

1 the Commission in or about April 2007. New Seasons petitioned to quash or limit that CID.
2 Commissioner Paula Jones Harbour denied that petition. New Seasons then appealed
3 Commissioner Harbour's decision to the full Commission. A true and correct copy of New
4 Seasons Request for Full Commission Review of Commissioner Paula Jones Harbour's
5 Disposition of New Seasons Market, Inc.'s Petition to Quash or Limit Civil Investigative
6 Demand is attached hereto as Exhibit 1. The full Commission never ruled on that request.

7 7. After filing New Seasons' request for full Commission review, I
8 negotiated on behalf of New Seasons an agreement with the Commission pursuant to which New
9 Seasons did not have to produce any confidential information, New Seasons would withdraw its
10 request for full Commission review and the Commission would not issue any further CIDs or
11 subpoenas in this matter. A true and correct copy of New Seasons' withdrawal of its request for
12 full Commission review, excluding exhibits, is attached hereto as Exhibit 2. A true and correct
13 copy of email correspondence and an attached letter from the Commission's counsel confirming
14 its agreement that it would not issue any further CIDs or subpoenas in this matter is attached
15 hereto as Exhibit 3. Pursuant to that agreement, New Seasons in fact did not produce any
16 confidential information to the Commission.

17 Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing
18 is true and correct and that this declaration was executed on the 11 day of December, 2008.

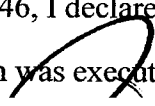
19
20 By  _____
Robert D. Newell, OSB #790917

EXHIBIT 1

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

BEFORE THE UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION

In the Matter of the Proposed Acquisition by
Whole Foods Market, Inc. of Wild Oats
Markets, Inc.,

File No. 071-0114

**NEW SEASONS MARKET, INC.'S
REQUEST FOR FULL COMMISSION
REVIEW OF COMMISSIONER
PAMELA JONES HARBOUR'S
DISPOSITION OF NEW SEASON
MARKET, INC.'S PETITION TO
QUASH OR LIMIT CIVIL
INVESTIGATIVE DEMAND**

PUBLIC

Pursuant to 16 C.F.R. § 2.7(f), New Seasons Market, Inc. ("New Seasons") hereby requests that the full Federal Trade Commission ("FTC") review the ruling made by Commissioner Pamela Jones Harbour disposing of New Season's petition to quash or limit the Civil Investigative Demand ("CID") issued to it on April 24, 2007 ("Ruling").¹ For the reasons stated below, the FTC should vacate the Ruling and grant New Seasons' petition.

I. INTRODUCTION

The FTC issued a CID to New Seasons on April 24, 2007. The CID contains two

¹ Copies of New Seasons' petition and of the Ruling are attached hereto as Exhibits A and B, respectively.

1 specifications. New Seasons promptly complied with the first specification. The second
2 specification, however, seeks New Seasons' confidential, commercially sensitive information.
3 After engaging the FTC in numerous and ongoing negotiations in a good faith effort to reach an
4 agreement regarding New Seasons' concerns – including discussions of New Seasons' intention
5 to file a petition to quash if a resolution was not reached – New Seasons filed a petition to limit
6 or quash the CID on June 15, 2007. By letter dated June 26, 2007, Commissioner Harbour
7 issued the Ruling, in which she denied the petition based on her finding that the petition was not
8 timely filed.² Because this finding is erroneous, and because New Seasons is entitled on the
9 merits of its petition to the relief it seeks, New Seasons hereby asks the full FTC review the
10 Ruling pursuant to 16 C.F.R. § 2.7(f).

11 **II. ARGUMENT**

12 **A. The petition was timely filed.**

13 The Ruling denies New Seasons' petition based on the erroneous finding that
14 New Seasons' petition was not timely filed. As the Ruling states, the time for filing a petition to
15 quash can be extended "in conformity with 16 C.F.R. § 2.7(d)(3)." Ruling, p. 2. Under
16 C.F.R. § 2.7(d)(3), certain employees of the FTC have the delegated authority to extend the time
17 within which a petition to quash must be filed. The rule contains no requirement that such
18 extensions be in writing. Here, the FTC, acting through its authorized representatives, extended
19 the time by which New Seasons could file a petition to quash until June 15, 2007, and the Ruling
20 therefore erroneously denied New Seasons' petition as untimely.

21 The CID references a return date of April 30, 2007. The Ruling notes that the
22 FTC provided written approvals extending the return date to May 29, 2007. Ruling, p. 2 n.3.
23 The Ruling then states that the "Commission has reason to believe that two additional extensions
24 of the deadline for compliance were approved by an Assistant Director." *Id.* Of course, the

25 _____
26 ² New Seasons received the original of the Ruling on July 5, 2007. Affidavit of Robert D. Newell, ¶ 5.

