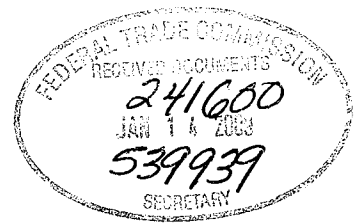


ORIGINAL



UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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

**WHOLE FOODS MARKET, INC.’S MOTION FOR ENFORCEMENT OF SUBPOENA DUCES TECUM ISSUED TO NON-PARTY EREWHON NATURAL FOODS MARKET**

Respondent Whole Foods Market, Inc. (“Whole Foods”) hereby moves to compel non-party Erewhon Natural Foods Market (“Erewhon”) to comply with the subpoena duces tecum served on it by Whole Foods, attached as Exhibit 1 hereto.

**INTRODUCTION**

Erewhon has refused to produce its weekly sales data responsive to Request 9(b) on the ground that it is “only one store and privately held. We do not give away our sales figure [sic].” Ex. 2, November 4, 2008 Letter. This is not a cognizable objection. Like non-parties New Seasons Markets, Inc. (“New Seasons”) and Gelson’s Markets (“Gelson’s”), Erewhon should be compelled to produce weekly sales data responsive to Request 9(b) of the subpoena. See In re Matter of Evanston Northwestern Healthcare Corp., Dkt. No. 9315, 2004 WL 2380499, at \*1 (F.T.C. Sept. 22, 2004) (granting motion to compel non-party to produce documents responsive to respondent’s subpoena duces tecum within ten days of Court’s order).

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 Erewhon.

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

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

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

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

## FACTUAL BACKGROUND

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

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

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

## ARGUMENT

### I. **EREWHON SHOULD BE COMPELLED TO COMPLY WITH THE SUBPOENA**

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

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

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

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

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

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

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

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<sup>2</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.

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

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

If Erewhon has concerns over the confidentiality of its sales data, those concerns have been addressed by the ALJ. The ALJ has now *twice* found that the Protective Order issued in this case is sufficient to protect the confidentiality of these documents, noting that “[t]he Protective Order prohibits any Whole Foods employees, including inside counsel, from reviewing the documents produced by non-parties. In addition, the Protective Order and the Commission’s Rules governing *in camera* treatment of confidential information prohibit disclosure of highly confidential documents.” Ex. 3, December 16, 2008 Order, at 6.<sup>3</sup> The ALJ therefore found that “New Seasons has not made an adequate showing to support its argument that the Protective Order will not protect it.” *Id.*; see also Ex. 4, December 23, 2008 Order, at 5 (“The *in camera* procedure in Part III adjudication and the Protective Order entered by the Commission in this case adequately protect Gelson’s confidential information from disclosure.”).

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<sup>3</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.

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

## **CONCLUSION**

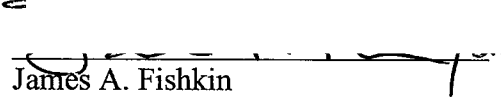
For the foregoing reasons, Whole Foods' motion should be granted.



Dated: January 14, 2009

Respectfully submitted,

By:

  
James A. Fishkin

DECHERT LLP  
1775 I Street, N.W.  
Washington, D.C. 20006  
Telephone: (202) 261-3300  
Facsimile: (202) 261-3333

Kevin T. Kerns  
Luke A.E. Pazicky  
Evan W. Davis  
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Cira Centre  
2929 Arch Street  
Philadelphia, PA 19104  
Telephone: (215) 994-4000  
Facsimile: (215) 994-2222

*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 EREWHON NATURAL FOODS MARKET**

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

1. Whole Foods' Motion is GRANTED; and
2. Erewhon shall produce all documents 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 Non-Party Erewhon Natural Foods Market was served on January 14, 2009, on the following persons by the indicated method:

**By Hand Delivery and Email:**

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

**By Hand Delivery and Email:**

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

**By First Class Mail:**

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

Vice President for Erewhon Natural Foods Market

**By E-Mail:**

J. Robert Robertson, Esq.  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Matthew J. Reilly, Esq.  
Catharine M. Moscatelli, Esq.  
Federal Trade Commission  
601 New Jersey Avenue, N.W.  
Washington, D.C. 20001

Complaint Counsel

<

By:

~~Sean P. Pugh~~ ✓

DECHERT LLP  
1775 I Street, N.W.  
Washington, D.C. 20006-2401  
Telephone: (202) 261-3300  
Facsimile: (202) 261-3333

*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)

<b>1. TO</b> Libby DeSilva Erewhon Natural Foods 7660-B Beverly Blvd. Los Angeles, CA 90036	<b>2. FROM</b>  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.

<b>3. PLACE OF PRODUCTION OR INSPECTION</b>  See Attachment A, Part II, No. 1	<b>4. MATERIAL WILL BE PRODUCED TO</b> James A. Fishkin  <b>5. DATE AND TIME OF PRODUCTION OR INSPECTION</b> November 5, 2008 at 10:00 am
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<b>6. SUBJECT OF PROCEEDING</b>  In the Matter of Whole Foods Market Inc., et al, Docket No. 9324
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<b>7. MATERIAL TO BE PRODUCED</b>  See Attachment A, Part III
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<b>8. ADMINISTRATIVE LAW JUDGE</b>  Federal Trade Commission Washington, D.C. 20580	<b>9. COUNSEL REQUESTING SUBPOENA</b>  James A. Fishkin, Esq. Dechert LLP 1775 I Street, NW Washington, DC 20006-2401
--	--

<b>DATE ISSUED</b> <i>October 3, 2008</i>	<b>SECRETARY'S SIGNATURE</b> <i>Donald S. Clark</i>
--	--

### 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:

Libby DeSilva  
Erewhon Natural Foods  
7660-B Beverly Blvd.  
Los Angeles, CA 90036

**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 14, 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.,	)	Docket No. 9324
a corporation.	)	
	)	

**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.

