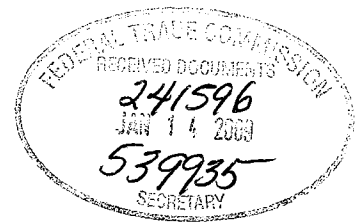


ORIGINAL



**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of

**WHOLE FOODS MARKET, INC.,
a corporation.**

Docket No. 9324

Public

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

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

INTRODUCTION

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

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

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

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

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

Ex. 2, December 16, 2008 Order Denying New Seasons Market's Motion to Quash or Limit Subpoena Duces Tecum ("December 16, 2008 Order"), at 7 (emphases added). Similar to Trader Joe's here, New Seasons objected to producing weekly sales data responsive to Request 9(b) of Whole Foods' subpoena. *Id.* at 4. The ALJ specifically overruled New Seasons' undue burden and confidentiality objections and ordered New Seasons to produce these documents as well as documents responsive to all other requests. *Id.* at 7. The ALJ similarly rejected confidentiality objections made by Gelson's and ordered it to produce data responsive to Request 9(b). *See* Ex. 3, Dec. 23, 2008 Order Denying Gelson's Markets' Motion for a Protective Order or in the Alternative To Quash or Limit the Subpoena ("December 23, 2008 Order").

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

¹ Trader Joe's has informally advised Whole Foods that it does not possess any documents responsive to the other requests in the subpoena. *See* Ex. 4, Whole Foods Market, Inc.'s Rule 3.22(f) Statement of James A. Fishkin in Support of Motion for Enforcement of Subpoena Duces Tecum Issued to Non-Party T.A.C.T. Holding Company ("Fishkin

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

FACTUAL BACKGROUND

Trader Joe's operates over 300 specialty retail grocery stores across the United States. On October 15, 2008, Whole Foods served a document subpoena on Trader Joe's, containing nine requests for documents that are identical to the requests in the other 92 subpoenas Whole Foods served on other food retailers (both large and small) it competes against throughout most of the geographic areas alleged in the Amended Complaint. See Ex. 1, Oct. 14, 2008 Subpoena Duces Tecum. The return date on the subpoena was November 5, 2008. Id. Only one of the nine requests in the subpoena is at issue here, as Trader Joe's maintains that it possesses documents responsive only to Request 9(b) (seeking the identification of total weekly store sales since January 1, 2006).²

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

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

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

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

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

ARGUMENT

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

A. The Documents That Trader Joe's Refuses to Produce Are Critical to Whole Foods' Defense.

Request 9(b) seeks information that is not only relevant, but pivotal to Whole Foods' defense. As the ALJ observed in the December 16 Order denying New Seasons' motion, "[t]he documents sought by Whole Foods are relevant to one of the central antitrust issues in this

proceeding – the appropriate definition of the relevant market.” Ex. 2, December 16, 2008 Order, at 7. Judge Friedman took a similar view last year when considering whether to preliminarily enjoin the acquisition. See FTC v. Whole Foods Market, Inc., 502 F. Supp. 2d 1, 34 (D.D.C. 2007) (“[T]he relevant product market in this case is not premium natural and organic supermarkets . . . as argued by the FTC but . . . at least all supermarkets.”); Ex. 7, Respondent Whole Foods Market, Inc.’s Answer To Am. Compl. ¶ 35.

Whole Foods’ position in this litigation is that Judge Friedman rightfully rejected the Commission’s proposed definition last year as artificially narrow. To support its position, Whole Foods intends to demonstrate that it competes with many other food retailers, including Trader Joe’s. The weekly sales data that Trader Joe’s is currently refusing to produce is critical to Whole Foods’ case, because it can be used to show how competitive interactions among Trader Joe’s, Whole Foods, Wild Oats and other supermarkets affect the sales of the others. For example, these data can be used to show that the opening of a new Whole Foods store took business away from a nearby Trader Joe’s store, and not just a Wild Oats store. Whole Foods can also use such data to show that the closing of a Wild Oats store caused an uptick in sales at a nearby Trader Joe’s store, rather than exclusively benefiting Whole Foods.³

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

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

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

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

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

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

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

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

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

Trader Joe's appears to object to producing its weekly sales data due to confidentiality concerns that have been rejected by the ALJ. See Ex. 5, TACT's Responses and Objections, at 3, 7. The ALJ has now *twice* found that the Protective Order issued in this case is sufficient to protect the confidentiality of these documents, noting that "[t]he Protective Order prohibits any Whole Foods employees, including inside counsel, from reviewing the documents produced by non-parties. In addition, the Protective Order and the Commission's Rules governing *in camera* treatment of confidential information prohibit disclosure of highly confidential documents." Ex. 2, December 16, 2008 Order, at 6.⁴ The ALJ echoed this sentiment in denying Gelson's motion to quash an identical subpoena, finding that the document requests were not anticompetitive and that the Protective Order sufficiently protected Gelson's confidential documents. See Ex. 3, December 23, 2008 Order. Any concerns that Trader Joe's has regarding production of its confidential documents have already been twice addressed – and rejected – by the ALJ.

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

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

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

of filing a timely motion. Trader Joe's did not file the required motion, however, and instead is forcing Whole Foods to incur the expense associated with seeking court enforcement of the subpoena. See 16 C.F.R. § 3.34(c) ("Any motion by the subject of a subpoena to limit or quash the subpoena shall be filed within the earlier of ten (10) days after service thereof or the time for compliance therewith."); 16 C.F.R. § 3.37 (permitting objections to be filed only in response to document requests served by "any *party* . . . on *another party*) (emphasis added); 16 C.F.R. § 3.38A (obviating the need for the recipient of a subpoena to file a timely motion to quash only when it withholds responsive material due to an evidentiary privilege). Because Trader Joe's is not a party to this action and did not purport to withhold documents on the basis of an evidentiary privilege, its failure to timely move to quash the subpoena results in a waiver of its objections.

CONCLUSION

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

Dated: January 14, 2009

Respectfully submitted,

By:


James A. Fishkin

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Attorneys for Whole Foods Market, Inc.

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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

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

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

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

IT IS SO ORDERED.

Date: _____

D. Michael Chappell
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Enforcement of Subpoena Duces Tecum Issued to Third Party T.A.C.T. Holding Company was served on January 14, 2009, on the following persons by the indicated method:

By Hand Delivery and Email:

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

By Hand Delivery and Email:

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

By E-Mail and First Class Mail:

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

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

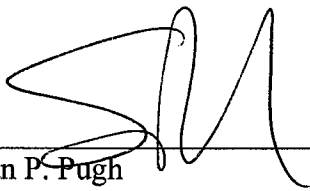
By E-Mail:

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)

1. TO

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

2. FROM

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

3. PLACE OF PRODUCTION OR INSPECTION

See Attachment A, Part II, No. 1

4. MATERIAL WILL BE PRODUCED TO

James A. Fishkin

5. DATE AND TIME OF PRODUCTION OR INSPECTION

November 5, 2008 at 10:00 am

6. SUBJECT OF PROCEEDING

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

7. MATERIAL TO BE PRODUCED

See Attachment A, Part III

8. ADMINISTRATIVE LAW JUDGE

Federal Trade Commission
Washington, D.C. 20580

9. COUNSEL REQUESTING SUBPOENA

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

DATE ISSUED

October 3, 2008

SECRETARY'S SIGNATURE

Donald S. Clark

GENERAL INSTRUCTIONS

APPEARANCE

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

MOTION TO LIMIT OR QUASH

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

TRAVEL EXPENSES

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

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

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:

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

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.,
 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

