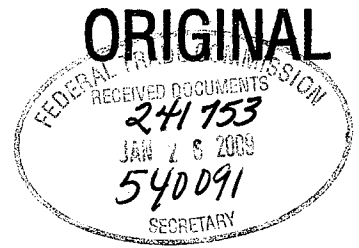


UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION



In the matter of )  
 )  
WHOLE FOODS MARKET, INC., ) Docket No. 9324  
 )  
Respondent. ) **Public**  
 )

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

In its motion, Respondent Whole Foods Market, Inc. ("Whole Foods") seeks 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 respond to a document production request that seeks irrelevant information in light of documents Trader Joe's has offered to produce. Specifically, Request 9(b) requests that Trader Joe's provide "for each store . . . the total weekly sales for each week since January 1, 2006 to the current date." Whole Foods insists that this weekly data be produced, despite Trader Joe's offer to provide such sales data compiled over multiple six-month periods. Trader Joe's respectfully requests that the Court deny Whole Foods' motion for enforcement of the subpoena duces tecum issued to Trader Joe's on or about October 14, 2008 ("the Subpoena").

**INTRODUCTION**

Since March 30, 2007, Trader Joe's has received and responded to a civil investigative demand from the Federal Trade Commission ("FTC") and two separate subpoenas from Whole

Foods in connection with this matter. In addition, Trader Joe's CEO has participated in an investigational hearing by the FTC and a deposition by both the FTC and Whole Foods. At all times, Trader Joe's has worked diligently to provide both the FTC and Whole Foods with the information that was requested.

The only documents still in dispute are the weekly sales figures requested by Whole Foods' Subpoena in its Request 9(b)<sup>1</sup> which, in that particular form, are not relevant to Whole Foods' defense of the FTC's Complaint. Trader Joe's recognizes the importance of defining relevant product market(s) in antitrust matters, and for that reason has offered to provide the confidential information compiled over six-month periods broken down by Whole Foods' defined Geographic Areas. Whole Foods' position that this offered sales information is insufficient is untenable. Such data is more relevant than the weekly sales data requested, because the weekly sales data cover intervals that are too short and subject to many discrete factors that would skew the data and any subsequent conclusions. Thus, Trader Joe's should not be compelled to provide the weekly sales data requested by Whole Foods.

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## FACTUAL BACKGROUND

On October 14, 2008, Whole Foods issued a Subpoena to Trader Joe's. Request 9(b) of the Subpoena requests that Trader Joe's provide, "for each store . . . the total weekly sales for each week since January 1, 2006 to the current date."<sup>2</sup> In its October 24, 2008 response to Whole Foods' subpoena, Trader Joe's objected to that Request, in part, because the weekly sales information requested was not reasonably calculated to lead to the discovery of admissible

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<sup>1</sup> Whole Foods' counsel concedes that Trader Joe's has complied with 8 of the 9 requests in the Subpoena as amended by negotiations between Whole Foods' counsel and Trader Joe's counsel. *See* Whole Foods Market, Inc.'s Motion for Enforcement of Subpoena Duces Tecum Issued to Non-Party T.A.C.T. Holding Company ("Whole Foods' Motion") at 3.

<sup>2</sup> Attached as Ex. 1 to Whole Foods' Motion.

evidence.<sup>3</sup> In an effort to provide Whole Foods with information that could be relevant, Trader Joe's offered to provide "the average sales for all Trader Joe's stores within each Geographic Area for the first half of 2006, 2007, and 2008."<sup>4</sup> Counsel for Trader Joe's and Whole Foods discussed this and other issues relating to the Subpoena over a period of several weeks in an effort to ensure that Whole Foods would receive the information it requested and needed to defend itself against the FTC.

On or about December 10, 2008, counsel for Whole Foods represented to counsel for Trader Joe's that New Seasons Market ("New Seasons") had filed a motion to quash an identical subpoena duces tecum issued to it by Whole Foods based on the same issues raised by Trader Joe's in its objections, and that Whole Foods anticipated a ruling on New Seasons' motion soon. Upon receiving the Court's Order denying New Seasons' motion and seeing that New Seasons did not raise the relevance objection in its motion, counsel for Trader Joe's restated its position to counsel for Whole Foods' counsel that the weekly sales information requested was irrelevant in light of the six-month sales figures offered by Trader Joe's. Whole Foods refused to accept Trader Joe's compromise proposal and filed its Motion to Compel Production of the information requested in Specification 9(b) of the Subpoena.

## ARGUMENT

### **I. THE PARTICULAR INFORMATION REQUESTED BY SPECIFICATION 9(b) IS IRRELEVANT TO WHOLE FOODS' DEFENSE**

Parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint or to the defenses thereto. 16 C.F.R. § 3.31(c)(1). The weekly sales information requested by Trader Joe's is irrelevant to any

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<sup>3</sup> Trader Joe's October 24, 2008 response, attached as Ex. 5 to Whole Foods' Motion, at 7.

defense, including relevant product market(s) definition, and the Court should not compel Trader Joe's to provide it.

Evidence demonstrating the impact of opening or closing of a Whole Foods or Wild Oats store on other stores in the area could be relevant to Whole Foods' defense to the Complaint issued by the FTC. Weekly sales information, however, will not shed light on that issue because it would fail to provide more than an initial reaction to a store opening or closing. For example, a customer may visit a new Whole Foods or Wild Oats to compare its products and prices to another store, and it is reasonable to expect that a customer would make a purchase at the new store during this initial visit. In fact, the opening of a new Whole Foods or Wild Oats store may indeed impact the sales of a closely located Trader Joe's store during that initial period while customers decide whether it is, for them, a substitute for Trader Joe's. Similarly, a customer might make a one-time trip to the closest store offering a similar desired product if it arrives at its normal destination only to discover that it has closed. For example, a customer arriving at a closed Wild Oats store could instead purchase milk at a Trader Joe's store down the road from the closed Wild Oats store. These purchases would not necessarily portend any future shopping pattern of the customers. Rather, in order to discern whether and how customers actually switched their shopping patterns in response to a store closing or opening, one would need to look at longer sales intervals.

In addition to being irrelevant due to its limited time intervals, weekly sales data is subject to being unreliable because it can be drastically skewed by factors that are wholly separate from shopping patterns and preferences. For example, customers could temporarily stay away from a store during periods of construction in its parking lot or on an adjacent road.

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<sup>4</sup> Id. In its Motion, Whole Foods incorrectly suggests that Trader Joe's would not provide this information for each Geographic Area. Whole Foods' Motion at 5.

Customers also may be less likely to shop at a store that is undergoing renovations. One would need to understand and account for all of the reasons that shopping purchases may change from week to week for the data to be meaningful. The longer the interval of sales data being considered, the less significant any short-term factor would be on the analysis of the impact of store closings or openings on shopping patterns. Accordingly, the information offered by Trader Joe's – sales figures for stores compiled for six-month periods – is both more relevant to and sufficient for Whole Foods' claimed defense needs.

## **II. THE COURT HAS NOT RULED ON THE RELEVANCE OF THE INFORMATION REQUESTED BY SPECIFICATION 9(b)**

Non-parties Gelson's Markets ("Gelson's") and New Seasons filed motions in this case requesting that the Court quash or limit subpoenas issued by Whole Foods that are identical to the Subpoena issued to Trader Joe's. In contrast to Whole Foods' representation that this Court has determined that the information requested by Request 9(b) is relevant,<sup>5</sup> that issue has never been briefed for the Court. As the Court stated in its previous Orders, neither Gelson's nor New Seasons raised a relevance objection in its Motion to Quash.<sup>6</sup> Thus, the Court should consider the relevancy argument raised by Trader Joe's in this Objection.

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<sup>5</sup> Whole Foods' Motion at 2.

<sup>6</sup> Order on Non-Party Gelson's Markets Motion for Protective Order or to Quash or Limit Subpoena from Whole Foods Market, Inc., attached as Ex. 3 to Whole Foods' Motion, at 2; Order on Non-Party New Seasons Markets' Motion to Quash or Limit Subpoena from Whole Foods Market, Inc., attached as Ex. 2 to Whole Foods' Motion, at 3.

## CONCLUSION

For the foregoing reasons, Whole Foods' Motion for Enforcement of Subpoena Duces Tecum Issued to Trader Joe's should be denied.

Dated: January 26, 2009



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*Attorneys for Non-Party T.A.C.T Holding Company*

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

_____	)	
In the matter of	)	
	)	
WHOLE FOODS MARKET, INC.,	)	Docket No. 9324
	)	
Respondent.	)	
_____	)	

**[PROPOSED] ORDER DENYING 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 Motion for Enforcement of Subpoena Duces Tecum Issued to Non-Party T.A.C.T. Holding Company, it is hereby ORDERED that Whole Food's motion is DENIED.

IT IS SO ORDERED.

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

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

**CERTIFICATE OF SERVICE**

I hereby certify that on this 26<sup>th</sup> day of January, 2009, I served the foregoing Objection to Motion for Enforcement of Subpoena Duces Tecum Issued to Third Party T.A.C.T. Holding Company on the following persons by the indicated method:

**By Hand Delivery and Electronic Mail:**

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

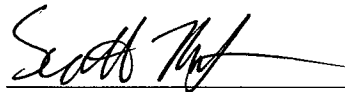
The Honorable D. Michael Chappell  
Chief Administrative Law Judge  
600 Pennsylvania Avenue, N.W.  
Washington, DC 20580

**By Electronic Mail and First Class Mail:**

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