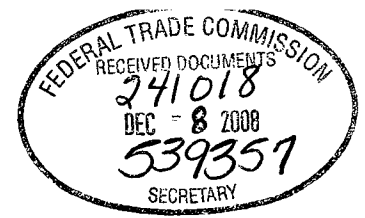


ORIGINAL



UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

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

PUBLIC

Oral Argument Requested

GELSON'S MARKETS' MOTION FOR PROTECTIVE ORDER OR IN THE  
ALTERNATIVE TO QUASH OR LIMIT THE SUBPOENA

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*Counsel for Gelson's Markets*

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

In the Matter of	)	
WHOLE FOODS MARKET, INC.,	)	<b>Docket No. 9324</b>
a corporation.	)	<b>Public</b>
	)	
	)	<b>Oral Argument Requested</b>
	)	

**GELSON’S MARKETS’ MOTION FOR PROTECTIVE ORDER OR IN THE  
ALTERNATIVE TO QUASH OR LIMIT THE SUBPOENA**

Pursuant to 16 C.F.R. §§ 3.31(d) and 3.34(c), Gelson’s Markets (“Gelson’s”) respectfully requests that a protective order issue to protect materials listed and withheld by Gelson’s in its response and objections to the subpoena issued by Whole Foods Markets, Inc. (“Whole Foods”) or in the alternative that the subpoena be quashed in part.<sup>1</sup>

**I. BACKGROUND**

Gelson’s operates eighteen premium grocery markets, all of which are located in Southern California. Declaration of Bernard Briskin, ¶ 2 (Briskin Declaration).<sup>2</sup> Gelson’s is a subsidiary of the Arden Group, Inc. (Arden Group), a publicly held holding company. *Id.* ¶ 3. The Arden Group releases Gelson’s quarterly and annual sales information in the aggregate, as to all of its stores, as part of its regular public filings. *Id.* Those filings are not required to provide store-by-store weekly sales information, and Gelson’s diligently protects its weekly, location-specific sales information, and does not disclose this information to anyone outside of the company. *Id.* ¶ 4-5. We are not aware of any publicly held markets which disclose store-by-

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<sup>1</sup> The Whole Foods subpoena *duces tecum* and attachments are attached as Exhibit 1

<sup>2</sup> The Declaration of Bernard Briskin is attached as Exhibit 2.

store sales information—weekly, monthly or otherwise – because of its use to competitors.

Indeed, Gelson’s has not even provided this information to its outside counsel. *Id.* ¶ 4.

Gelson’s has first hand knowledge of Whole Foods anti-competitive activities in Southern California. Whole Foods repeatedly has either opened, or sought to open, stores in the same immediate areas as Gelson’s, often within a few blocks. As just two examples of Whole Foods’ predatory activity, Whole Foods is currently planning to open stores within a few blocks of the Gelson’s stores in both Santa Barbara and Tarzana, California. *Id.* ¶ 6. Gelson’s understands that Whole Foods actually entered into a letter of intent seeking to acquire the leasehold rights to one of Gelson’s premier locations (Encino, California) several years prior to the expiration of Gelson’s lease on the property. *Id.* ¶ 7. Gelson’s takes very seriously the competitive threat posed by Whole Foods’ unchecked expansion in Southern California, including the acquisition of competitive grocery stores.

On June 28, 2007, the Federal Trade Commission (“FTC”) instituted this administrative action against Whole Foods, challenging the legality of its acquisition of Wild Oats Markets, Inc. (“Wild Oats”). In connection with this proceeding, Whole Foods issued a third party subpoena to Gelson’s on or about October 15, 2008.

Gelson’s obtained an extension to respond and responded on November 19, 2008 by (1) producing certain responsive documents under the subpoena, (2) stating that it did not possess responsive documents to other requests, and (3) withholding other documents, listing such withheld documents, and stating its objections, pursuant to 16 C.F.R. § 3.38A.<sup>3</sup>

Specifically, Gelson’s withheld (1) documents evidencing weekly sales for each Gelson’s store, responsive to request no. 9(b); and (2) a responsive site study, containing sales projections,

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<sup>3</sup> The November 19, 2008 letter is attached as Exhibit 3.

responsive to request No. 5. Gelson's response raised several legal objections to the production of these items.<sup>4</sup> Most critically, Gelson's objected and withheld these documents because they contain Gelson's most highly confidential and sensitive commercial information. The dissemination of this information in any way, especially to Whole Foods, in light of Whole Foods' ongoing activities in Southern California, would cause irreparable harm to Gelson's business. Briskin Declaration ¶ 5. Disclosure of this information to Whole Foods – or to other competitors or to the public – would provide a blueprint for Whole Foods to continue its anti-competitive activities in Southern California and drive Gelson's out of business – as Whole Foods' ongoing activities demonstrate are its clear intention. *Id.* ¶ 5.

After receiving Gelson's letter and production, on November 20, Whole Foods, through counsel, communicated telephonically with counsel for Gelson's and requested that Gelson's fully comply with the subpoena or risk Whole Foods' seeking to compel production. Gelson's offered to provide Whole Foods with gross quarterly and annual sales in lieu of the more highly proprietary commercial data requested in the subpoena. Counsel for Whole Foods rejected Gelson's offer.

Seeking to avoid adjudicative involvement, Gelson's followed up by letter to Whole Foods on December 2, 2008.<sup>5</sup> The December 2, 2008 letter offered another compromise with

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<sup>4</sup> Gelson's objected to production these items because they contain Gelson's most confidential and proprietary information, the dissemination of which would cause irreparable harm and oppression to Gelson's business. Gelson's further objected on the grounds that the Protective Order was insufficient to protect this critical proprietary information. In addition, Gelson's objected on the grounds that the risks of disclosure outweigh the potential benefits of the information pursuant to 16 C.F.R. § 3.31(c)(1)(iii). Finally, Gelson's also raised objections on the grounds that these requests impose an undue burden and are overly broad and not reasonably calculated to elicit relevant information.

<sup>5</sup> The December 2, 2008 letter is attached as Exhibit 4.

regard to the requested highly confidential store-specific sales information. Gelson's offered to provide "the percentage of increase or decrease in the sales by Gelson's of organic products for the 3 month period(s) after the opening of a Whole Foods store for each Gelson's store in the same trade area, after January 1, 2006 and within the geographic markets outlined in the subpoena." Gelson's requested that such information be provided to the Administrative Law Judge *in camera* "for his/her determination as to whether it is relevant to a decision on pending issues; and, if deemed relevant (after briefing and argument by Whole Foods and Gelson's), how to protect the information from being made public and how to keep this highly sensitive and proprietary information away from the eyes and knowledge of Whole Foods and other competitors in Southern California."

On December 5, 2008, Whole Foods counsel rejected Gelson's compromise, explaining that it will accept nothing less than location-specific sales data.

Gelson's now seeks an order protecting from disclosure the commercially sensitive documents withheld and described in its response to Whole Foods' subpoena or alternatively, to quash the subpoena with regards to these requests.

## II. ARGUMENT

An Administrative Law Judge ("ALJ") has broad discretion to enter a protective order limiting access to information to preserve any privilege "as governed by the Constitution, any applicable act of Congress, or the principles of the common law." 16 C.F.R. § 3.31I(2). An ALJ may limit discovery in FTC adjudicative proceedings "as justice requires" to protect a "party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to protect undue delay in the proceeding." 16 C.F.R. § 3.31(d). Like federal courts, the FTC rules

may limit third party disclosure where the risk of disclosure and the resultant damage to the nonparty outweigh any benefits from enforcing these subpoenas. *See* 16 C.F.R. § 3.311(1)(iii).

Additionally, the Federal Rules inform that subpoenaed information may be protected from disclosure if it is a “trade secret or other confidential research, development, or commercial information.” Fed. R. Civ. P. 45I(3)(B)(1). Further, the FTC’s enabling act mandates that trade secrets and confidential commercial information receive special care. *E.g.*, 15 U.S.C. § 46(f). The FTC Act prohibits the FTC from disclosing of trade secrets as well as commercial or financial information that is privileged or confidential. *Id.* The FTC has interpreted and defined trade secrets and commercial or financial information as “competitively sensitive information, such as costs or various types of sales statistics and inventories. It includes trade secrets in the nature of formulas, patterns, devices, and processes of manufacture, as well as names of customers in which there is a proprietary or highly competitive interest.” 16 C.F.R. § 4.10(a)(2).

**A. A Protective Order Should Issue to Protect Gelson’s Most Confidential, Commercially Sensitive Information Because Disclosure Would Be Anti-Competitive**

A protective order should issue to protect Gelson’s confidential and commercially sensitive information because disclosure of such information is inherently anti-competitive. Whole Foods’ subpoena would require Gelson’s to provide detailed information regarding the lifeblood of Gelson’s business, including three years’ worth of weekly sales information for each of its locations and a Site Study detailing strategic plans and sales projections in one critical location. In essence, Whole Foods would obtain the blueprint to Gelson’s success in the Southern California market.

The information sought to be protected is detailed, weekly, and location specific commercial information. The location-specific information lies at the very core of Gelson’s business and drives its competitive decision-making. This information – and its secrecy – is

critical to Gelson's existence and continued success in the micro-market in which each of Gelson's store exists. The competitive harm from disclosure of this information to Whole Foods or the public is obvious, especially in light of Whole Foods pattern of anti-competitive activity.

Whole Foods has refused to accept any compromise and seeks only to require Gelson's to turn over this most sensitive, location-specific, weekly sales information to one of its primary competitors – a competitor accused of anti-competitive conduct and which has a history of taking a predatory approach toward its competition.<sup>6</sup> Whole Foods has an admitted history of “systematically and relentlessly taking [a competitor's] business away from them one market after another,” *See FTC v. Whole Foods Market, Inc.*, Case No. 07-cv-01021 PLF (D.D.C. Aug. 23, 2007) (“*Whole Foods Case*”), Public Version of the Expert Report of Kevin M. Murphy, Ph.D, ¶ 36 (quoting Whole Food's CEO John Mackey summarizing the Whole Foods strategy in February 2005). Whole Foods does not simply want to compete with other supermarkets – its model has long been premised on the elimination of its competitors. In 1998, “Jim Sud [an officer] of Whole Foods noted the importance of the ‘elimination of a competitor in the marketplace, competition for sites, competition for acquisitions, and operational economies of scale. We become the Microsoft of the natural foods industry.’” Plaintiff Federal Trade Commission's Proposed Findings of Fact (Public Version), ¶ 582. With the trade secret information Whole Foods seeks from Gelson's, Whole Foods effectively could eliminate Gelson's as a competitor.

Indeed, Mr. Mackey declared that “Wild Oats needs to be removed from the playing field[.]” Plaintiff Federal Trade Commission's Proposed Findings of Fact (Public Version), ¶ 38.

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<sup>6</sup> Gelson's recognizes that the protective order in this case limits disclosure of confidential information to Whole Foods' outside counsel, experts, consultants, and the like. The shortcomings of the protective order are discussed below.

According to Mr. Mackey, Whole Foods went about “systematically destroying [Wild Oats] viability as a business – market by market, city by city.” *Whole Foods Case*, Part I of Plaintiff’s Public Version of Its Corrected Brief on Its Motion for Preliminary Injunction, p. 6. As Whole Foods’ Regional President Will Paradise succinctly stated: “[m]y goal is simply – I want to crush [Wild Oats] and am willing to spend a lot of money in the process.” *Id* at 25 (alteration in original). To that end, Mr. Mackey said: “I believe that Whole Foods will continue to aggressively enter their markets and will pressure and harass them at every opportunity.” Plaintiff Federal Trade Commission’s Proposed Findings of Fact (Public Version), 1 585. Whole Foods’ approach is to “really punish” their competitors “and make a statement about any competition that thinks about competing with” Whole Foods. *Whole Foods Case*, Public Version of the Supplemental Rebuttal Expert Report of Kevin M. Murphy, Ph.D, ¶ 2.

Whole Foods’ approach of “pressuring,” “harassing;” and “punishing” competitors is not limited to Wild Oats. Whole Foods approach is reflected in its statements regarding Earth Fare, a regional, thirteen-store natural and organic food chain in the Southeast. As Whole Foods’ chief operating officer A.C. Gallo reported to the Whole Foods Board of Directors:

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

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

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

We are crushing [Earth Fare].... Our opening in [redacted in original] dropped their store from about [redacted in original].



We cannot see how this company is viable going forward, and I expect the investors are going to take some drastic action soon.

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

Gelson's has first hand knowledge of Whole Foods' anti-competitive activities in Southern California. Whole Foods repeatedly has opened stores in the same immediate areas as Gelson's locations, sometimes across the street or within the few blocks. Briskin Declaration ¶ 6. As just two examples of Whole Foods' predatory activity, Whole Foods is currently planning to open stores within a few blocks of the Gelson's stores in both Santa Barbara and Tarzana, California. *Id.* Further, Gelson's understands that Whole Foods actually entered into a letter of intent seeking to acquire the leasehold rights to one of Gelson's premier locations (Encino, California) while a Gelson's Market still occupied the property and had more than several years remaining on its lease. *Id.* ¶ 7. Gelson's takes very seriously the competitive threat posed by Whole Foods unchecked expansion in Southern California.

Whole Foods has approximately 270 stores while Gelson's has just 18. Gelson's has no reason to believe that Whole Foods would not relish the opportunity to do to Gelson's what it did to Wild Oats and what it does to its other competitors such as Earth Fare, and Whole Foods has the size and resources to do it with the assistance of Gelson's trade secrets and other commercially sensitive information.

Further, as a non-party to the dispute between Whole Foods and the FTC, Gelson's is "particularly vulnerable." *Mycogen Plant Science, Inc. v. Monsanto Co.*, 164 F.R.D. 623, 628 (RD. Pa. 1996). "The 'fact of non-party status' is a 'significant factor' in the decision to require disclosure of trade secrets." *Id.* (quoting *Katz, supra*, 984 F.2d at 424). Courts therefore have "a special responsibility to alleviate the risk that the subpoenas present" because "courts should be

concerned that litigation tactics not be adopted with a view to improve a client's competitive position." *Id.* That is particularly true where the requesting party, as here, openly engages in what is admittedly aggressive, punitive competitive tactics which, depending on the outcome of this proceeding, may in fact be unlawful.

Gelson's, in good faith, has offered two compromises to limit production of the most critical and harmful commercial information withheld and the potential anti-competitive effects of disclosure. Gelson's offered to provide public, quarterly and/or annual sales data to Whole Foods. This compromise was rejected by Whole Foods. Gelson's also offered to provide "the percentage of increase or decrease in the sales by Gelson's of organic products for the 3 month period(s) after the opening of a Whole Foods store for each Gelson's store in the same trade area, after January 1, 2006 and within the geographic markets outlined in the subpoena." *See* Letter to Counsel 12/2/08, at Ex. 4. Gelson's offered this information on the condition that such information be provided to the Administrative Law Judge *in camera* "for his/her determination as to whether it is relevant to a decision on pending issues; and, if deemed relevant (after briefing and argument by Whole Foods and Gelson's), how to protect the information from being made public and how to keep this highly sensitive and proprietary information away from the eyes and knowledge of Whole Foods and other competitors in Southern California." *See* Letter to Counsel 12/2/08, at Ex. 3. Again this compromise was rejected by Whole Foods.

It is clear from Whole Foods' repeated denials of Gelson's attempts to cooperate that Whole Foods will stop at nothing less than obtaining Gelson's most critical information – location-specific sales. Disclosure of the information withheld by Gelson's, even if arguably relevant to the FTC proceedings, is itself anti-competitive. Whole Foods should not be allowed to obtain Gelson's private, confidential, highly sensitive information for any purpose.

**B. A Protective Order Should Issue to Protect Gelson's Most Confidential, Commercially Sensitive Information Because Disclosure, Even Under The Existing Protective Order, Would Cause Gelson's Irreparable Harm**

A protective order should issue to protect the information and documents withheld by Gelson's because Gelson's cannot be compelled to produce its confidential and commercially sensitive information without adequate protection against disclosure or adequate remedies if the information is disclosed. As noted above, although Gelson's is a non-party to this matter, the subpoena nonetheless seeks some of Gelson's most proprietary and commercially sensitive information. If the information became public, or if it were disclosed to Whole Foods' competitive decision-makers, Gelson's would be irreparably damaged. The protective order presently in place in this case does not adequately protect Gelson's confidential information, and certainly fails to provide any remedy to Gelson's if the protective order is violated.

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

As the court in *Litton* warned:

Finally, this court is not sanguine that a protective order could be constructed to sufficiently maintain the confidential nature of this information. The information would, of course, have to be disclosed to Litton's experts. Like all experts, these individuals, often professors, are regularly called upon for assistance. This is one of the things that makes them "experts." But once an expert has digested this confidential information, it is unlikely that the expert will forget. The expert's *raison d'être* is to assimilate information in his or her chosen field and

formulate that material into various theories. The information obtained from Bay [the non-party] will be added to the expert's repository of other information for possible future use. Even with stem sanctions for unauthorized disclosure, how does one practically police a protective order? If the expert is called upon two years after this litigation to assist a potential competitor in structuring its business, will he really be able to compartmentalize all he or she has learned and not use any of the information obtained from Bay?

*Id.* If Gelson's is compelled to disclose its trade secrets, notwithstanding any protective order and the good faith efforts of the recipients, those trade secrets, as a practical matter, are no longer under Gelson's control and become available, whether specifically or in general terms, to its competitors.. The experts in this case will have Gelson's' confidential information. They cannot unlearn it. Other competitors may hire those experts. Whole Foods has not demonstrated and cannot demonstrate any need for Gelson's' confidential information sufficient to overcome Gelson's right to maintain the privacy of its trade secrets and other confidential information. *See id* at 530 ("It is incumbent upon [the requesting party] to show that its needs outweigh the burden and invasion of corporate privacy that would result to ... a non-party to this action.") (internal quotation omitted).

Second, the protective order does not adequately protect Gelson's information. If either Whole Foods or the FTC chooses to introduce Gelson's confidential information into evidence at the hearing in this matter, the protective order improperly places the burden on Gelson's to protect its confidential information. The protective order requires only that Whole Foods or the FTC provide notice to Gelson's of their intent to introduce Gelson's' confidential information into evidence. Protective Order, ¶ 10. The protective order then places the burden on Gelson's to file a motion with the Administrative Law Judge to show why the confidential information it was compelled to produce should not be made public, and provides Gelson's only five days to do so. *Id.* If the Administrative Law Judge denies that motion, Gelson's' confidential information

will be made public, even though Gelson's considers it to be confidential and even though Gelson's has no obligation to report its store-by-store weekly sales, market share, or other confidential information to anyone. There should be an absolute requirement that Gelson's confidential information be kept confidential. Further, the five-day time period is insufficient to provide Gelson's with a fair opportunity to protect its confidential information. The protective order should provide a period substantially longer than five days for Gelson's to intervene to protect its confidential information from public disclosure, and Whole Foods, as the party seeking Gelson's information, should be required to pay Gelson's costs, including attorney fees, associated with any instance in which Gelson's is required to intervene under the protective order.

Third, and most fundamentally, the protective order fails to provide an adequate disincentive against or remedy for disclosure of Gelson's confidential information. Gelson's recognizes that, by its terms, the protective order does not permit the disclosure of confidential information to anyone within Whole Foods (i.e. only to outside counsel and hired experts). Protective Order, ¶ 7. Gelson's does not impute to Whole Foods' counsel any intent to violate the protective order. Nonetheless, providing Gelson's most sensitive information to Whole Foods' outside counsel is not materially different from providing that information to Whole Foods itself. In any event, any disclosure of Gelson's information, whether directly to Whole Foods or indirectly through public disclosure, would cause Gelson's irreparable competitive harm. Yet the protective order relies meagerly on the bare prohibition against disclosure. That is not enough.

The United States District Court for the District of Columbia agrees. In the injunction proceeding in this matter, the District Court recognized the importance of a significant hammer

hanging over the heads of the parties and their lawyers “as an added incentive against inadvertent misuse of any confidential information[.]” *Whole Foods Case*, July 6, 2007 Memorandum Opinion and Order, p. 5. Accordingly, “[i]n an abundance of caution,” the court required the following penalty provision:

Any violation of this Order will be deemed a contempt and punished by a fine of \$250,000. This fine will be paid individually by the person who violates this Order. Any violator may not seek to be reimbursed or indemnified for the payment the violator has made. If the violator is an attorney, the Court will deem the violation of this Order to warrant the violator being sanctioned by the appropriate professional disciplinary authority and Judge Friedman will urge that authority to suspend or disbar the violator.

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

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

Further, the FTC will also receive all materials produced in response to Whole Foods’ subpoena. Notwithstanding the limitations imposed on Whole Foods, the protective order has a gaping hole with respect to the FTC. The protective order provides that the FTC is to use the

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<sup>7</sup> Gelson’s would request the additional modification that any such fine be payable to Gelson’s if its information were disclosed.

information only for purposes of the present proceeding, except that the FTC “may 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.” Protective Order, In other words, the protective order provides Gelson’s with no protection whatsoever with respect to what the FTC does with Gelson’s’ confidential information outside the confines of this proceeding.

For that, Gelson’s apparently must rely on statutory and regulatory prohibitions against the release of its confidential information. There is no question that the FTC has a statutory and regulatory obligation to maintain the confidentiality of Gelson’s financial information. The problem is that, notwithstanding the prohibitions against disclosure, Gelson’s has no remedy if the FTC destroys Gelson’s’ business by disclosing its confidential information. Without a penalty provision of the nature described above, or the FTC’s agreement to make Gelson’s whole in the event of disclosure, Gelson’s has absolutely no protection against the FTC’s inadvertent disclosure.<sup>8</sup>

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

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<sup>8</sup> Gelson’s has no reason to believe that the FTC will intentionally disclose Gelson’s confidential information in violation of statutory prohibitions or the protective order, and makes no such assertion here.

*Wearly v. F.T.C.*, 616 F.2d 662, 664 (3<sup>rd</sup> Or. 1980) (internal quotations and citations omitted). In a recent case in which there was both a protective order and the statutory protections in place, the FTC posted on its website exhibits to a filing that it did not intend to make public. *See In the Matter of Basic Research, L. L. C. et al.*, Fed. Trade Comm'n Docket No. 9318. Although the FTC disputed, after the disclosure, whether the designation of the documents at issue as “confidential” and “restricted confidential, attorney eyes only” was proper, there is no question that the FTC negligently made those confidential materials available to the public via its website. There is also no question that, despite its error, which the respondents asserted resulted in the public disclosure of its trade secret and confidential financial information, the FTC offered no remedy other than its “deep regret.”

Indeed, the FTC has already publicly disclosed confidential information in this very matter. The FTC publicly filed a document that it had “redacted” through by blackening out text electronically. However, that text – which contained trade secret information – remained in the document, and could be easily copied, pasted, viewed, and published, which the Associated Press did. The information then was widely disseminated, as a direct result of the FTC’s carelessness and apparent failure to take seriously the protection of the confidential information. Gelson’s concern about inadvertent disclosure is not exaggerated or unfounded. The likelihood of disclosure is real. Gelson’s detailed, confidential information and trade secrets should be protected absent a protective order that prohibits the FTC from disclosing information Gelson’s appropriately withheld from production and requires the disclosing party to make Gelson’s financially whole if there is a breach of the protective order. But it is obvious that any fine will not make Gelson’s whole as to the irreparable harm it will surely sustain by disclosure.

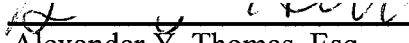


### III. CONCLUSION

For the forgoing reasons, Gelson's Motion for Protective Order or in the alternative to Quash or Limit the Subpoena concerning all documents listed and withheld in its response to the Whole Foods' subpoena.

DATED this 8<sup>th</sup> day of December, 2008

Respectfully submitted,

  
\_\_\_\_\_  
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Daniel Z. Herbst, Esq.

Reed Smith, LLP

1301 K. Street, N.W.

Washington, D.C. 20005


(202) 414-9200

(202) 414-9299 (fax)

*Counsel for Gelson's Markets*

**CERTIFICATION PURSUANT TO 16 C.F.R. § 3.22(f)**

Pursuant to 16 C.F.R. § 3.22(f), the undersigned counsel for Gelson's states that he conferred telephonically with James Fishkin, counsel for Whole Foods, on October 24, 2008 at 10:30 a.m., November 20, 2008 at 1:00 p.m., and December 5, 2008 at 10:40 a.m. and exchanged written correspondence with Mr. Fishkin on November 19, 2008 and December 2, 2008, attached as exhibits to this motion, all in good faith attempts to resolve the dispute. However, the parties were unsuccessful in reaching an agreement.

  
\_\_\_\_\_  
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JAMES A. FISHKIN

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October 14, 2008

**VIA FEDERAL EXPRESS**

Robert E. Stiles  
President  
Gelson's  
16400 Ventura Blvd., Suite 240  
Encino, CA 91436

Re: In the Matter of Whole Foods Market, Inc., FTC Docket No. 9324

Dear Mr. Stiles:

I am an attorney representing Whole Foods Market, Inc. in the above captioned matter, which is the Federal Trade Commission's administrative litigation against Whole Foods Market, Inc. for its acquisition of Wild Oats Markets, Inc. Enclosed is a subpoena requesting documents related to this matter.

I have also included a copy of the Protective Order in this matter which provides instructions regarding the designation of confidential material and limits who may see material designated as confidential.

Please call me at 202-261-3421 or Gorav Jindal at 202-261-3435 if you have any questions. Thank you for your time and attention to this matter.

Sincerely,

  
James A. Fishkin

Enclosures



# SUBPOENA DUCES TECUM

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

1. TO

Robert E. Stiles  
President  
Gelson's  
16400 Ventura Blvd., Suite 240  
Encino, CA 91436

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)

