UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

WHOLE FOODS MARKET, INC.'S RESPONSE IN OPPOSITION TO GELSON'S MARKETS' MOTION FOR PROTECTIVE ORDER OR IN THE ALTERNATIVE TO QUASH OR LIMIT SUBPOENA FROM WHOLE FOODS MARKET, INC.

PRELIMINARY STATEMENT

The motion filed by Gelson's Markets ("Gelson's") is based on identical reasoning to that contained in a motion to quash an identical subpoena filed several weeks ago by third party New Seasons Markets, Inc. ("New Seasons"). On December 16, 2008, the Administrative Law Judge ("ALJ") issued an Order overruling New Seasons' objections and denying its motion to quash. See Ex. 1, December 16, 2008 Order on New Seasons' Motion. Specifically, the ALJ found 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.

Id. at 7. This Order specifically rejected the argument that Gelson's now makes that the Protective Order in this matter is insufficient to protect its confidential documents. Accordingly, counsel for Whole Foods Market, Inc. ("Whole Foods") contacted counsel for Gelson's on December 16, 2008 and forwarded him a copy of the ALJ's Order. See Ex. 2, Fishkin Decl. ¶ 10.

Counsel for Whole Foods asked counsel for Gelson's, in light of the ALJ's ruling, to withdraw Gelson's current motion. Id. at ¶ 11. Regrettably, counsel for Gelson's refused to do so. Id. Whole Foods therefore files this memorandum to once again address the already discredited arguments raised by Gelson's.

INTRODUCTION

The motion by Gelson's rests mainly upon the unsupported and dubious premise that neither the Federal Trade Commission ("FTC" or "Commission") nor litigation counsel for Whole Foods can be ***trusted*** to abide by the Commission's protective order. Certainly, if Gelson's argument is deemed sufficient, ***any*** other subpoenaed non-party in this or ***any*** Commission action seeking to resist a subpoena would need only to assert that they "fear" that counsel for the party issuing the subpoena will not abide by the protective order.[1] The outside counsel's eyes only protective order issued by the Commission is sufficient to protect all party and non-party confidential documents, including Gelson's, and the motion to quash should be denied.

The dispute on this motion involves only two Gelson's documents, both responsive to the document subpoena served by Whole Foods. The documents -- a 2007 real estate site study that reflects Gelson's consideration of Whole Foods (responsive to Request no. 5), and a document reflecting Gelson's weekly sales since 2006 (responsive to Request no. 9(b)) -- are highly relevant to the critical issue of relevant antitrust market in this proceeding. Gelson's, which in its motion describes itself a "competitor" of Whole Foods, does not claim that there would be an undue (or any) burden to produce them. Rather, it claims that it should be permitted to withhold the documents because the protective order issued by the Commission is not strong enough.

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[1] Whole Foods has served 92 identical subpoenas on other non-party grocery

Under that order, in addition to the ALJ and the Commission itself, only outside counsel for Whole Foods and its experts may have access to documents designated as confidential under the order. Ex. 3, October 10, 2008 Protective Order. ***No*** Whole Foods employee, even its in-house counsel, can have ***any*** access to Gelson's confidential information under the existing protective order.[2] Like New Seasons, Gelson's calls into question both counsel for Whole Foods and the Commission's ability to keep confidential information entrusted to it by third parties. Like New Seasons, Gelson's "support" for this argument consists of irrelevant and discredited smears against Whole Foods, and pointing to an instance where an FTC lawyer ***accidentally*** failed to properly redact material in a Whole Foods document submitted in an August 2007 filing. If accepted, Gelson's argument could undermine the Commission's ability to obtain third party information in future investigations and litigations, and prevent respondents like Whole Foods from defending themselves.

Indeed, the documents sought by Whole Foods from Gelson's are critical to its defense against the complaint brought by the FTC. In order to properly defend itself, Whole Foods needs to be able to show that it competes with a variety of other non parties such as Gelson's (which concedes that Whole Foods is its competition). See Oct. 14, 2008 Subpoena Duces Tecum (Ex. 1 to Gelson's Market's Motion To Quash ("Gelson's Br.")). The documents that Gelson's refuses to produce go directly to this question. For example, the weekly sales data would reflect how the opening or closing of a Whole Foods or Wild Oats store impacted Gelson's sales.

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establishments. Of these, approximately 60 recipients have thus far fully or partially complied.

[2] See, e.g., Westbrook v. Charlie Sciara & Son Produce, Co., Civ. A. No. 07-2657, 2008 U.S. Dist. LEXIS 24649, at *11 (W.D. Tenn. Mar. 27, 2008) ("In general, courts utilize 'attorneys eyes only' protective orders when especially sensitive information is at issue or the information is to be provided to a competitor.").

Gelson's unsupported attacks on Whole Foods' alleged "anticompetitive conduct" have no bearing on this discovery motion. Whole Foods has no other effective means than the subpoena process to obtain from its non-party competitors necessary information to its defense. As discussed more fully below, Gelson's has failed to carry its substantial burden on this motion, and the motion should be denied.

FACTUAL BACKGROUND

Gelson's operates eighteen grocery markets in the Southern California area and describes Whole Foods as "one of its primary competitors." Gelson's Br. at 6. Whole Foods served a document subpoena on Gelson's, containing nine requests for documents that are identical to the requests served on the other 92 non-party competitor recipients. See Oct. 14, 2008 Subpoena Duces Tecum (Ex. 1 to Gelson's Br.).[3] Only two of those requests are at issue here. Gelson's maintains that it possesses documents responsive only to request 5 (seeking documents discussing Gelson's competition with other companies besides Whole Foods and Wild Oats) and 9(b) (seeking the identification of Gelson's total weekly store sales since January 1, 2006).[4] Id.

The return date on the subpoena was November 5, 2008, but Whole Foods granted Gelson's an extension to November 19, 2008. Id. at 2. Gelson's did not move to quash by November 19, 2008, but rather responded by letter that it was withholding documents responsive to Requests 5 and 9(b), and had no other responsive documents. See Nov. 19, 2008 letter (Ex. 3 to Gelson's Br.). Specifically, Gelson's stated that it was refusing to produce a "November 2007

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[3] Whole Foods' December 4, 2008 response to a similar motion to quash filed by New Seasons Markets, Inc. sets forth the nine document requests contained in the subpoena. See Whole Foods' Response at 4-5.

[4] Instead of producing documents, this ninth request alternatively allowed Gelson's to produce a spreadsheet. Id. at Request 9.

Site Study Wilshire Boulevard near Berkley Street, Santa Monica, CA, Performed by Pitney Bowes" which references Whole Foods, as well as weekly sales data for each of its stores in the relevant areas from January 1, 2006 to the present. Id. at 3. Gelson's claimed, without explanation, that "[d]isclosure of this information to a competitor, to the public, or to the Commission in any form oppresses Gelson's and risks significant harm to its commercial interests" and further stated its position that the protective order in place "does not go far enough to protect potential public disclosure given the sensitivity of the information." Id. at 3-4.

Over the past several weeks, counsel for Whole Foods conferred with counsel for Gelson's in an attempt to compromise, offering to reduce the number of stores for which weekly sales data was requested. See Ex. 2, Fishkin Decl. ¶ 8. Gelson's instead said that it would provide only ***summary*** sales data and only to the Administrative Law Judge ("ALJ") for *in camera* review, rather than to counsel for Whole Foods. See November 19, 2008 letter (Ex. 3 to Gelson's Br.); December 2, 2008 letter (Ex. 4 to Gelson's Br.). Gelson's filed the present motion on December 8, 2008.

ARGUMENT

I. GELSON'S BEARS A HEAVY BURDEN OF PERSUASION ON THIS MOTION

As the subpoenaed party resisting discovery pursuant to 16 C.F.R. § 3.31(d), Gelson's bears "[t]he burden of showing that the request[s] [are] unreasonable." In re Rambus, Inc., No. 9302, 2002 FTC LEXIS 90, at *9 (Nov. 18. 2002) (denying third party's motion to quash subpoena in FTC adjudicative proceeding). That burden is "heavy." In re Flowers Industries, Inc., No. 9148, 1982 FTC LEXIS 96, at *15 (Mar. 19, 1982) (denying motions to quash third-party subpoenas in FTC anti-merger action); accord FTC v. Texaco, Inc., 555 F.2d 862, 882

(D.C. Cir. 1977) (stating that "that burden is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose" and ordering compliance with subpoenas issued in FTC proceeding and reversing district court for modifying the requests to make them narrower).[5] Gelson's is unable to satisfy this heavy burden.

As far as counsel for Whole Foods is able to discern,[6] Gelson's claims in its motion that it should be allowed to withhold certain documents from discovery by counsel for Whole Foods due solely to the confidential nature of these documents. Essentially, Gelson's speculates that the protective order in this case would be insufficient to protect its confidential information, principally because neither counsel for Whole Foods and the Commission can be trusted to abide by the terms of the protective order issued by the Commission in this action. This argument is entirely without support, and should be rejected. The documents requested are central to the litigation, and the protective order in place here provides a high degree of protection.

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[5] It is further well-settled that "[t]hat burden is no less because the subpoena is directed at a non-party." Flowers Industries, 1982 FTC LEXIS 96, at *15; accord Rambus, 2002 FTC LEXIS 90, at *9 ("The burden is no less for a non-party."). Gelson's cites federal district court cases for the idea that courts sometimes consider "the fact of nonparty status" when ruling on a motion to quash a subpoena. See Gelson's Br. at 8 (citing Mycogen Plant Science, Inc. v. Monsanto Co., 164 F.R.D. 623, 628 (E.D. Pa. 1996) (quoting Katz v. Batavia Marine & Sporting Supplies, Inc., 984 F.2d 422, 424 (Fed. Cir. 1993))). Gelson's reliance on those cases is misplaced as those courts were interpreting the Federal Rules of Civil Procedure, while this FTC adjudicative proceeding is governed by the Commission's Rules of Practice. In any event, considering "the fact of nonparty status" is far from a settled practice in the federal courts, and many courts ignore one's non-party status when ruling on motions to quash. See, e.g., Castle v. Jallah, 142 F.R.D. 618 (E.D. Va. 1992); Composition Roofers Un. Local 30 Welfare Trust Fund v. Graveley Roofing Enters., Inc., 160 F.R.D. 70 (E.D. Pa. 1995). Indeed, the leading treatise on federal procedure "finds no basis for [a] distinction [between party and non-party status] in the [relevant] rule's language." Charles Alan Wright and Arthur R. Miller, 9A Federal Practice & Procedure § 2459 (2d ed. 2008).

[6] Counsel for Whole Foods is unable to discern the exact relief requested by Gelson's in its motion, as it failed to provide a proposed order as required by the Commission's Rules of Practice. See 16 C.F.R. § 3.22(b) (stating that all written motions must "attach a draft order

II. THE DOCUMENTS THAT GELSON'S REFUSES TO PRODUCE ARE CRITICAL TO WHOLE FOODS' DEFENSE

Gelson's seeks to deprive Whole Foods' counsel of documents that are central to Whole Foods' position on the appropriate definition of the relevant antitrust market. As Judge Friedman explained last year when considering whether to preliminarily enjoin the acquisition, the central issue in this case is the definition of the relevant product market: Whole Foods' position here is that Judge Friedman rightfully rejected the Commission's proposed definition last year as artificially narrow. 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. 4, Respondent Whole Foods Market, Inc.'s Answer To Am. Compl. ¶ 35.

To support its position, Whole Foods intends to demonstrate that it competes with many other food retailers, including Gelson's. The weekly sales data that Gelson's is currently refusing to produce is critical to Whole Foods' case, because it can be used to show how the opening or closing of a Whole Foods or Wild Oats store impacted Gelson's sales. For example, this data can be used to show that the opening of a new Whole Foods store took business away from a nearby Gelson'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 Gelson's store, rather than exclusively benefiting Whole Foods. The November 2007 site study currently withheld by Gelson's would similarly corroborate Whole Foods' position that Gelson's competes with Whole Foods, as it would evidence Gelson's considerations of Whole Foods as a competitor when

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containing the proposed relief").

determining the value of a potential Gelson's store.[7] The summaries that Gelson's offered to provide (only on an *in camera* basis) would not serve a similar purpose, since they would not allow Whole Foods to correlate sales figures with the specific time periods that Whole Foods stores were opened or that Wild Oats stores were closed.

Thus, the documents Whole Foods seeks go to the very heart of the Commission's case. It is against this backdrop that Gelson's motion must be evaluated.

III. GELSON'S COMPLAINTS ABOUT THE PROTECTIVE ORDER SHOULD BE REJECTED

A. The Outside Counsel Eyes' Only Order Would Provide Strong Protection to Gelson's Confidential Information.

Gelson's argues that the existing protective order issued by the Commission – which prohibits ***any*** Whole Foods employees, including inside counsel, from reviewing its documents – somehow cannot protect its confidential documents. This argument falls flat in the face of the "outside counsel eyes only" order that governs this action. "[P]rotective orders are routinely issued" to safeguard confidential information in Commission proceedings. See Coca-Cola Bottling, 1976 FTC LEXIS 33, at *3-5 (denying third party's motion to quash subpoena in FTC proceeding when the third party argued that the subpoena sought commercially sensitive documents). Thus, "'[t]he fact that information sought by a subpoena may be confidential does not excuse compliance.'" Rambus, 2002 FTC LEXIS 90, at *11 (denying third party's motion to quash subpoena on ground that the subpoena called for commercially sensitive documents); accord Flowers Industries, 1982 FTC LEXIS 96, at *6-12.

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[7] The FTC has raised the issue of the affect 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.

Under the protective order, Gelson's confidential documents ***cannot*** be disclosed to any Whole Foods employee, including in-house counsel. Ex. 3, October 10, 2008 Protective Order ¶ 7. The protective order also alleviates any concerns of Gelson's about its confidential documents being disclosed to the public at trial by allowing it a chance to object.[8] Should Whole Foods or the Commission intend to introduce a confidential Gelson's document at trial, counsel must "provide advance notice to [Gelson's] for purposes of allowing [it] to seek an order that the document . . . be granted *in camera* treatment." Id. at ¶ 10. The confidential document shall then receive that treatment "[u]ntil such time as the Administrative Law Judge rules otherwise." Id. See In re Basic Research, LLC, No. 9318, 2004 FTC LEXIS 272, at *6 (Aug. 18, 2004) (denying motion to quash narrowed subpoena in which subpoenaed party cited confidentiality concerns in part because "Respondents may file a motion for in camera treatment to prevent disclosure to the public of its [sic] confidential materials at the trial in this matter."); accord Kaiser Alum., 1976 FTC LEXIS 68, at *14. This advance notice provides protection to Gelson's, as well as any other non-party.

B. Gelson's Unsupported Speculation that Counsel Will Not Abide by the Order is Not a Legitimate Reason to Resist Discovery.

The thrust of Gelson's claim that the protective order is not strong enough is clear – Gelson's does not ***trust*** Whole Foods or the Commission to abide by the order. Gelson's first states that it "does not impute to Whole Foods' counsel any intent to violate the protective order." Gelson's Br. at 12; see also id. at 14 n.8 ("Gelson's has no reason to believe that the FTC

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[8] See also Rambus, 2002 FTC LEXIS 90, at *11 ("The protective order entered in this case ameliorates Mitsubishi's concerns [about producing confidential documents]."); accord Flowers Industries, 1982 FTC LEXIS 96, at *9; Dresser Industries, 1977 U.S. Dist. LEXIS 16178, at *15; Kaiser Alum.,1976 FTC LEXIS 68, at *13.

will intentionally disclose Gelson's confidential information in violation of statutory prohibitions or the protective order, and makes no such assertions here."). In the very next sentence, however, Gelson's makes that precise accusation, claiming that "[p]roviding Gelson's' most sensitive information to Whole Foods' outside counsel is not materially different from providing that information to Whole Foods itself." Id. at 12. Gelson's can only be saying that if it provides its confidential information to outside counsel for Whole Foods, counsel will turn around and share it with the client in direct violation of the protective order. Gelson's provides nothing more than speculation to support such an attack on counsel for Whole Foods (and the Commission).

Gelson's line of reasoning has been consistently rejected. See Coca-Cola Bottling, 1976 FTC LEXIS 33, at *5 ("[A]bsent a showing to the contrary, one has to assume that the protective order will work, especially in light of the extensive use of the device in Commission litigation (in cases frequently involving experts)."); see also FTC v. Invention Submission Corp., 965 F.2d 1086, 1091 & n.3 (D.C. Cir. 1992) ("[T]he harm ISC alleges will only occur if we presume that the Commission will not abide by its representations – which, as we said, we are unprepared to do;" affirming district court's enforcement of subpoenas issued in Commission investigation). As these cases recognize, presuming noncompliance would undermine Commission proceedings, in that subpoena recipients could refuse to cooperate by simply citing fears that the parties would violate the protective order. In fact, New Seasons has already made a similar and equally unsupported argument in moving to quash an identical subpoena served on it by Whole Foods.[9]

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[9] Portions of Gelson's brief are lifted verbatim from that filed several weeks ago by New Seasons. See, e.g., New Seasons Market's Motion to Quash or Limit at 8 ("As noted above, although New Seasons is a non-party to this matter, the subpoena nonetheless seeks some of New Seasons' most proprietary and commercially sensitive information. If the information became public, or if it were disclosed to Whole Foods' competitive decision-makers, New Seasons would

C. The Protective Order Binds the Parties' Experts to Treat Documents as Confidential.

Gelson's related argument regarding experts also misses the mark. Gelson's posits that the parties' experts here should not be permitted to have access to its documents, as other industry players may at some later date hire these same experts who will somehow use this information against Gelson's. Gelson's Br. at 11. As an initial matter, Gelson's does not even attempt to explain how a 2007 site study or historical sales information would allow an expert to harm it in the future, even if one presumes the expert would violate the protective order. Moreover, Gelson's ignores that the protective order requires experts to return all confidential documents and "notes, memoranda, or other papers containing confidential information" at the end of their participation in the case. Ex. 3, October 10, 2008 Protective Order ¶ 12. Experts can access confidential information only if they are not an employee of Whole Foods or any subpoenaed third party and sign an agreement that they are bound by the protective order. Id. at ¶ 7.

This exact argument has been rejected by the courts, as if accepted, it would allow a party to effectively exercise veto power over its adversary's experts. In Advanced Semiconductor Materials Am. v. Applied Materials, Inc., No. 95-20169, 1996 U.S. Dist. LEXIS 21459, at *8 (N.D. Cal. Oct. 26, 1996), the Court observed:

> Applied's objection to Dr. Sherman is that, if Dr. Sherman is given access to Applied's confidential information, he will inevitably misuse that information if he consults for Applied's competitors in the future because the information will be in his head. However, this cannot be the standard to be applied. If it was, then a

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be irreparably damaged."); Gelson's Br. at 10 ("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.").

> litigant could successfully object to any active industry consultant in any high technology litigation, thereby giving it the power of veto over its adversary's choice of experts.

Id. at *8.[10] These cases recognize that because FTC cases are inherently expert- and trade-secret intensive, the precedent that Gelson's seeks would impede discovery in Commission proceedings. All recipients of subpoenas could attack the protective order (even if it is outside counsel eyes only) and refuse to comply with the subpoena by citing the same hypothetical, unsupported concerns as Gelson's.

Indeed, Gelson's makes no mention of any specific reason why any one expert in this particular action should be barred from seeing Gelson's information. See U.S. Gypsum Co. v. Lafarge North Am., Inc., No. 03-6027, 2004 U.S. Dist. LEXIS 3239, at *3 (N.D. Ill. Mar. 2, 2004) (stating that the party seeking to prevent an expert from viewing documents bears the burden of showing that the "expert is in a position that could allow the information to be used by competitors."). Simply hypothesizing that ***any*** expert may at some future point be in a position to share this information with competitors – as Gelson's does here – should not suffice for it to withhold the requested documents from Whole Foods' counsel.

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[10] The lone case cited by Gelson's in support of this argument does not even support it. There, the court ultimately found that the subpoenaed material was not essential to the requesting party's case. See Litton Indus., Inc. v. Chesapeake & Ohio Railway Co., 129 F.R.D. 528, 531 (E.D. Wis. 1990) ("This court is not persuaded that the records of Bay Shipbuilding in the areas other than ship construction are as essential to proof of damages as claimed by Litton."). This stands in stark contrast to the instant matter, where Gelson's documents are critical to determining the central issue of the relevant market. Moreover, the party requesting documents in Litton did so ***without*** a protective order yet being in place, forcing the Court to speculate as to the protections that the requested documents would receive. In this matter, Gelson's documents would be protected by an already established, attorneys' eyes only protective order.

D. Gelson's Provides No Legitimate Basis for its Request for a Modification of the Protective Order to Include a Fine.

Gelson's, parroting New Seasons, finally claims that the protective order is inadequate because it does not provide for a fixed monetary penalty to be paid by counsel for an inadvertent disclosure and to be paid directly to it. Gelson's Br. at 13 n.7. Gelson's similarly provides no authority to support its request, other than to note that in 2007 an FTC lawyer accidentally filed redacted Whole Foods documents that could, unbeknownst to that lawyer, be unredacted by the public using a computer program. Human beings make mistakes. If the possibility of a mistake were sufficient to resist civil discovery, there would be no civil discovery. If the protective order is violated – and counsel for Whole Foods intends to abide by it – the matter can be taken up with the Commission.[11] The Commission rightfully rejected the idea that a party that inadvertently discloses confidential information be forced to pay monetary compensation when this remedy was requested by New Seasons last year. See Ex. 6, June 26, 2007 Commission Order, at 1 n.1 ("Finally, [New Seasons] offers no authority to support its request that the Commission agree to pay 'damages' in the event of an inadvertent public disclosure of confidential business information, and the mere possibility of such disclosure provides no ground for quashing the CID.")

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[11] Gelson's mischaracterizes the order entered on July 6, 2007 by Judge Friedman. There, Judge Friedman was confronted with the issue of whether Whole Foods' outside counsel could share confidential business information of Whole Foods' competitors with Whole Foods' General Counsel, Roberta L. Lang. Judge Friedman ultimately granted access to Ms. Lang, but ordered the parties to amend the protective order to contain the language about a monetary fine should a party use confidential information for a competitive advantage. See Ex. 5, Docket No. 07-1021, Docket Entry 95, July 6, 2007 Opinion and Order (D.D.C. 2007), at 5. That order has no application here, where ***no*** Whole Foods employees (even in-house counsel) would be permitted to see Gelson's confidential documents. In fact, no case cited by Gelson's in support of its motion involves a court denying access to confidential documents to outside counsel responsible

The bottom line is that the protective order in this case contains a number of adequate safeguards to protect Gelson's confidential documents.

III. Gelson's Attacks on Whole Foods Are a Red Herring Calculated to Divert Attention from the Absence of Facts and Authority Supporting its Position

Like New Seasons, in an attempt to smear Whole Foods, Gelson's cites ***accusations*** of anticompetitive conduct against Whole Foods as a reason to quash the subpoena. See Gelson's Br. at 6-8. While Judge Friedman exhaustively reviewed the very evidence Gelson's cites last year and ruled ***in favor of*** Whole Foods, a discovery motion is not the context to litigate that evidence. Gelson's references to it constitute a bald attempt to divert attention from the absence of facts and authority supporting its position. Put simply, Gelson's cannot carry its heavy burden in this motion by offering nothing more than inappropriate, petty name-calling accusations against Whole Foods.

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for litigating the case at hand.

CONCLUSION

For the foregoing reasons, Gelson's motion should be denied.

Dated: December 19, 2008

Respectfully submitted,

By: _____

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

[PROPOSED] ORDER DENYING GELSON'S MARKETS' MOTION FOR PROTECTIVE ORDER OR IN THE ALTERNATIVE TO TO QUASH OR LIMIT SUBPOENA FROM WHOLE FOODS MARKET, INC.

Upon due consideration of Gelson's Markets' Motion for Protective Order or in the Alternative to Quash or Limit Subpoena from Whole Foods Market, Inc., it is hereby ORDERED that:

1. Gelson's Markets' motion is DENIED; and

2. Within ten days of the entry of this order, Gelson's Markets shall COMPLY with the subpoena.

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 Response In Opposition to Gelson's Markets Motion for Protective Order or in the Alternative to Quash or Limit Subpoena and the Proposed Order was served on December 19, 2008, on the following persons by the indicated method:

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EXHIBIT 1

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

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

ORDER ON NON-PARTY NEW SEASONS MARKET'S MOTION TO QUASH OR LIMIT SUBPOENA FROM WHOLE FOODS MARKET, INC.

I.

On November 24, 2008, non-party New Seasons Market, Inc. ("New Seasons") filed a motion to quash or limit the subpoena issued to it by Respondent Whole Foods Market, Inc. ("Respondent" or "Whole Foods"). Respondent filed its Response in Opposition on December 4, 2008.

On December 12, 2008, New Seasons filed a motion for leave to file a reply and its reply. New Seasons' motion for leave to file a reply is GRANTED.

On December 16, 2008, Complaint Counsel filed a memorandum regarding New Seasons' motion. In it, Complaint Counsel states that it does not take a position on New Seasons' motion to quash, but concluded that the motion should be denied.

For the reasons set forth below, New Seasons' motion to quash or limit the subpoena is DENIED.

II.

New Seasons asserts that it is Whole Foods' top competitor in Portland, Oregon. New Seasons further asserts that the documents which Whole Foods seeks contain New Seasons' trade secrets and other highly confidential information. New Seasons argues that if it were required to produce the information Whole Foods seeks, this would provide Whole Foods with a blueprint to New Seasons' success and the means for Whole Foods to engage in anticompetitive conduct against one of its primary competitors in the Portland, Oregon market. New Seasons seeks an order quashing the subpoena with respect to requests three through nine on grounds that

those requests are: (1) unduly burdensome; (2) are themselves anticompetitive; and (3) seek trade secret and other confidential, commercially sensitive information without an adequate protective order.

Respondent asserts that the documents it seeks are directly relevant to the issues raised by the Complaint and that Respondent has no other effective means to obtain information from its non-party competitors necessary for its defense. Respondent further asserts that the requests are not unduly burdensome and that the Protective Order entered by the Commission in this case on October 10, 2008, ("Protective Order") adequately protects New Seasons' confidential information.

III.

Parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint. 16 C.F.R. § 3.31(c)(1). An Administrative Law Judge may limit discovery if the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or if the burden and expense of the proposed discovery outweigh its likely benefit. 16 C.F.R. § 3.31(c). In addition, an Administrative Law Judge may enter a protective order to protect a party from undue burden or expense. 16 C.F.R. § 3.31(d). Parties resisting discovery of relevant information carry a heavy burden of showing why discovery should be denied. *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975).

The subpoena served on New Seasons consists of nine requests for documents. The first two requests seek documents relating to communications with the Federal Trade Commission ("FTC") and documents previously produced to the FTC. New Seasons' motion addresses only the third through ninth requests. These requests, which seek all documents from January 1, 2006 to present, are:

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.

New Seasons does not make the objection that the documents requested are not relevant to the issues raised in the Complaint or the defenses asserted thereto. Instead, New Seasons argues the subpoena should be quashed or limited because the requests: (a) are unduly burdensome; and (b) are themselves anticompetitive; and (c) seek trade secrets and other confidential, commercially sensitive information without an adequate protective order.

A. The requests are not unduly burdensome

New Seasons argues that requests three, four, seven, and eight should be quashed or limited because they are unduly burdensome. New Seasons asserts that although Respondent has offered to limit these requests for "all documents" to "all documents generated by high level New Seasons' employees," this restriction does not materially alter the burden associated with producing the documents. New Seasons argues that to search through all of its emails to determine whether the sender or recipient was "high level" and whether the email is responsive could cost New Seasons between $250,000 and $500,000. New Seasons states that it does not wish to divert the resources necessary to accomplish the search and review called for by the requests. New Seasons further argues that because it is owned and operated locally in Portland, Oregon, and has no stores outside of that local market, any information New Seasons would provide would have no impact on the multitude of other geographic areas involved in this proceeding.

Respondent states that it has met and conferred with New Seasons in an attempt to reduce New Seasons' burden of compliance with the subpoena. Respondent also states that Respondent represented to New Seasons that New Seasons did not need to search for documents at any of its stores, but rather need only produce "high-level" documents from its "high-level" management employees at its Portland, Oregon headquarters. According to Respondent, the Commission has taken the position that, in 2007, New Seasons was one of just two competitors of Whole Foods and Wild Oats. Thus, Respondent argues, the documents Respondent seeks from New Seasons will bear heavily on the definition of the relevant market in this case.

New Seasons responds that identifying which employees are "high level" employees is difficult and would require a search through documents to determine whether the sender or recipient was "high level." New Seasons also responds that even if the request is limited to "high level" documents, it must still search the same volume of documents to determine which documents are responsive and "high level." Accordingly, argues New Seasons, the burden on New Seasons is not ameliorated by these restrictions.

"Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest." *Federal Trade Commission v. Dresser Indus., Inc.*, 1977 U.S. Dist. LEXIS 16178, *13 (D.D.C. 1977). "Inconvenience to third parties may be outweighed by the public interest in seeking the truth in every litigated case." *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993, 999 (10th Cir. 1965) (denying motion to quash subpoenas served on competitors). The requests seek relevant information. In light of the limitations to which Respondent has agreed and as are set forth below, the burden on New Seasons is not an undue burden.

B. The requests are not anticompetitive

New Seasons argues that requests three through nine should be quashed because they ask New Seasons to provide its most confidential and commercially sensitive information to one of its primary competitors, Whole Foods. New Seasons argues that Whole Foods has a history of taking competitors' business away from them and of harassing and punishing competitors. New Seasons suggests that Whole Foods may be using litigation tactics to improve its competitive position. Respondent responds that New Seasons' accusations of anticompetitive conduct are a bald attempt to divert attention from the issues raised by the discovery dispute.

The implied allegations that Whole Foods may be using the document requests to gain a competitive advantage over New Seasons are without support. Accordingly, they do not provide a reasonable basis to quash the subpoena. The fact that these documents may contain confidential and commercially sensitive information does not provide a basis to quash or limit the subpoena. The Commission's Rules of Practice do not specifically protect trade secrets or confidential information from discovery. Section 6(f) of the Federal Trade Commission Act and Section 21(d)(2) of the Improvements Act (codified at 15 U.S.C. § 46(f) and 15 U.S.C. § 57b-2(b), respectively) limit the Commission's ability to disclose confidential information to the public. The Commission's Rules of Practice also do not limit a litigant's ability to obtain confidential information through discovery. *In re E.I. DuPont de Nemours & Co.*, 97 F.T.C. 116, 116 (Jan. 21, 1981) (These provisions do "not absolutely bar disclosure of business data as evidence in [FTC] adjudicatory proceedings.").

Courts interpreting discovery sought under the Federal Rules of Civil Procedure have held that there is no immunity protecting the disclosure of trade secrets. *Federal Trade Commission v. J.E. Lonning*, 539 F.2d 202, 209-210 (D.C. Cir. 1976); *LeBaron v. Rohm and Hass Co.*, 441 F.2d 575, 577 (9th Cir. 1971) ("The fact that discovery might result in the disclosure of sensitive competitive information is not a basis for denying such discovery."). *See also Federal Trade Commission v. Rockefeller, et al.*, 441 F. Supp. 234, 242 (S.D.N.Y.