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FEDERAL TRADE COMMISSION
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BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of

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

Docket No. 9324

PUBLIC

WHOLE FOODS MARKET, INC.'S RESPONSE
IN OPPOSITION TO NEW SEASONS MARKET'S MOTION TO

Subpoena Duces Tecum (attached as Exhibit 1 to New Seasons Market's Motion To Quash
("New Seasons' Br.")). Whole Foods has no other effective means to obtain information from its
non-party competitors necessary for its defense. Of the 93 identical subpoenas Whole Foods has

New Seasons to identify the appropriate senior-level employees based on their area of

responsibility whose files would be searched in an effort to reduce the burden. Id. ¶ 11. To

search with the other one than New Seasons would presumably only have to search a handful of

employees' files at its headquarters. New Seasons does not even attempt to show why a search
this narrow could be unduly burdensome, but rather directs its arguments solely to the fallacy that

January 1, 2006.¹ Id. at Request 9.

Because the Commission has taken the position that, in 2007, New Seasons was one of just two competitors of Whole Foods and Wild Oats, the documents Whole Food seeks will bear heavily

of its senior management team who were likely to have such high-level documents. Id. ¶ 11.

Moreover, Whole Foods' counsel offered to limit Whole Foods' requests only to those high-level employees who work at New Seasons' Portland, Oregon *headquarters*, meaning that New Seasons would not have to search any files at its stores. Id. ¶ 12. In response to New Seasons' confidentiality concerns, counsel for Whole Foods pointed out that the protective order entered

by the Commission in this matter on October 10, 2008 would afford the highest level of

[REDACTED]

[REDACTED]

[REDACTED]

I. New Seasons Has Failed To Demonstrate, and Cannot Demonstrate, that the Subpoena Is Unduly Burdensome

As the undersigned party, New Seasons has "the burden of showing that the requested

[REDACTED] b7c b7d [REDACTED] 2008 2009 PROTECTIVE ORDER 10/21/2009

A. Whole Foods' Subpoena Seeks Highly Relevant Information

Since as far back as the 1970s, "[t]he practice of the Commission has been to uphold

Seasons' Br., at 3-4. The \$250-500,000 figure, itself entirely unsupported, is based on a premise that New Seasons would have to search 300 employee files. As discussed above, this is simply not the case. Whole Foods has agreed to limit its third, fourth, seventh, and eighth requests only

9-12.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

II. The Protective Order Addresses New Seasons' Concerns Regarding

Confidential and Commercially Sensitive Information

New Seasons also advances the curious argument that the existing protective order issued

by the Commission, which prohibits any Whole Foods employees, including individuals 1.6

confidential documents of third parties such as New Seasons through a number of safeguards. Most importantly, the protective order allows disclosing confidential documents only to an extremely restricted group, such as your Honor, the Commission, outside counsel for Whole Foods, and expert witnesses. See Oct. 10, 2008 Protective Order ¶ 7 (attached as Exhibit 1 to New Seasons' brief). Thus, New Seasons' confidential documents *cannot* be disclosed to any Whole Foods employee. Id.

The protective order also prohibits [REDACTED]

[REDACTED]

clear, — New Seasons does not trust Whole Foods to abide by the order. This line of reasoning has

been 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) (cited on page 4 of

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

III. New Seasons' Attack on Whole Foods Is a Red Herring Calculated to Divert Attention from the Absence of Facts and Authority Supporting its Position

In its brief, in an attempt to smear Whole Foods, New Seasons cites *accusations* of anticompetitive conduct against Whole Foods.

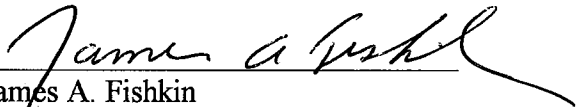
[REDACTED]

CONCLUSION

For the foregoing reasons, New Seasons' motion should be denied.

Dated: December 4, 2008

Respectfully submitted,

By: 

James A. Fishkin

Kevin T. Kerns

Luke A. E. Pazicky

DECHERT LLP

1775 I Street, N.W.

Washington, D.C. 20006

Telephone: (202) 261-3300

Facsimile: (202) 261-3333

Attorneys for Whole Foods Market, Inc.

[REDACTED]

In the Matter of

)
)

Docket No. 9324

WHOLE FOODS MARKET, INC.,
a corporation.

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)

[PROPOSED] ORDER DENYING NEW SEASONS MARKET'S MOTION TO QUASH OR LIMIT SUBPOENA FROM WHOLE FOODS MARKET, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response In Opposition to
New Seasons Market's Motion to Quash or Limit Subpoenaed to Produce Documents

this December 4, 2008, on the following persons by the undersigned:

EXHIBIT A

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

In the Matter of)

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

Docket No. 9324

PUBLIC

Declaration of James A. Fishkin

I, James A. Fishkin, under penalty of perjury, hereby declare:

1. I am one of the attorneys for Whole Foods Market, Inc. ("Whole Foods") in the above-captioned matter.

2. In October, 2008, Whole Foods served subpoenas duces tecum on 93 of its non-party competitors.

3. Of the 93 companies that were subpoenaed, over 50 have so far fully or partially complied by producing documents or stating that they possess no responsive documents.

4. On October 14, 2008, Whole Foods served a subpoena duces tecum on New Seasons Market, Inc. ("New Seasons"). That subpoena is attached as Exhibit 1 to New Seasons' Motion To Quash or Limit Subpoena from Whole Foods Market, Inc.

which I also granted.

Seasons, Robert Newell, Esq., in an effort to resolve New Seasons' concerns about the subpoena informally. In total, those three conversations lasted approximately 1.5 hours.

8. During those three conversations, Mr. Newell never contested the relevance of

protection in that no Whole Foods employee could have access to New Seasons' confidential documents.

14. After the conversation I had with Mr. Newell on November 20, 2008, my understanding was that both sides were close to resolving New Seasons' concerns. Mr. Newell

EXHIBIT 1



Office of the Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

VIA FACSIMILE AND EXPRESS MAIL

New Seasons Market
c/o Robert D. Newell, Esquire
Davis Wright Tremaine LLP
1300 S. W. Fifth Ave. – Suite 2300
Portland, OR 97201

Re: *New Seasons Markets's ("NSM") Petition to Quash or Limit Civil Investigative Demand ("NSM's Petition")*, File No. 071-0114

Dear Mr. Newell:

This letter advises you of the disposition of NSM's Petition to quash or limit

Sections of the Civil Investigative Demand ("CID") issued to it on April 24, 2007. Because

The CID at issue was signed and issued to NSM on April 24, 2007, returnable on April 30, 2007, Petition at 1, and was served on NSM on April 25, 2007. NSM states that "the FTC has granted multiple extensions, ultimately extending the time to respond to June 15, 2007." *Id.* NSM did not seek, nor was it granted, however, an extension of time within which to file a

time granted pursuant to and in conformity with 16 C.F.R. § 2.7(d)(3), is the earlier of the date for compliance with the CID or 20 days after service. In the case of this CID, a petition to quash

~~could have been filed no later than the earlier of April 20th (initial compliance date) or May 15th~~

EXHIBIT 2



LAWYERS



Davis Wright Tremaine LLP

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October 22, 2008

James A. Fishkin

1775 I Street, NW
Washington, DC 20006-2401

Re: New Seasons Markets Subpoena

SECRET

[REDACTED]

[REDACTED]

[REDACTED]

EXHIBIT 4

II. THE PARTIES AND JURISDICTION

Whole Foods Market, Inc.

1. Respondent Whole Foods is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 550 Bowie Street, Austin, Texas 78703.
2. Established in 1980, Whole Foods operates approximately 260 premium natural and organic supermarkets in more than 37 states and the District of Columbia.

3. Whole Foods is the largest operator of premium natural and organic supermarkets in the

United States.

4. According to Whole Foods' Chief Executive Officer John Mackey, Whole Foods is "a

9. In authorizing the commencement of this action, the Commission determined that a temporary restraining order and a preliminary injunction were in the public interest and that it had reason to believe that the Acquisition would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act because the Acquisition likely

11. [Redacted] competition in the relevant markets alleged in the complaint

10. On June 7, 2007, United States District Court Judge Paul L. Friedman of the United States District Court for the District of Columbia issued an Order granting the

14. Premium natural and organic supermarkets offer a distinct set of products and services to a distinct group of customers in a distinctive way, all of which significantly distinguish

retailers of food and grocery items ("Retailers").

15. Premium natural and organic supermarkets are not simply outlets for natural and organic foods. Whole Foods' Chief Executive Officer John Mackey acknowledged that "Whole Foods isn't primarily about organic foods. It never has been. Organic foods is only one part of its highly successful business model." In announcing its fourth quarter results for 2006, Whole Foods stated that "Whole Foods Market is about much more than just selling 'commodity' natural and organic products. We are a lifestyle retailer and have

created a unique shopping environment built around satisfying and delighting our

[REDACTED]

[REDACTED]

25. With respect to Tender Loaves, Mr. [redacted] stated, "This is a completely different concept

than WFMI. WFMI's business is all about perishables – fresh produce, fresh seafood,

fresh meat, in store delis, juice bars, and bakeries. WFMI has stated that more than 50% of their sales are in these categories of products – categories which TJ's doesn't even

have. TJ's is primarily a discount private label company with a large wine selection."

26. Unlike other natural and organic products, [redacted]

describes it. These markets include: Palo Alto, CA; Fairfield County, CT; Miami Beach,

33. Whole Foods' Mr. Mackey has said that "Whole Foods has taken significant market share from OATS wherever they have opened competing stores – Boulder, Santa Fe, Denver, Boca Raton, Ft. Lauderdale, and St. Louis." Each of the parties, in anticipation of entry

by the other, has engaged in aggressive price and non-price competition that conveys to shoppers benefits that go well beyond the benefits resulting from the presence or threatened entry in those geographic markets of other retailers. In addition, when Whole Foods or Wild Oats expected the other to enter one of its markets, it planned substantial improvements in quality, including renovations, expansions, and competitive pricing. As Mr. Mackey explained upon Whole Foods' entry into Nashville: "At least Wild Oats will likely improve their store there in anticipation of Whole Foods' entry."

premium natural and organic supermarkets are not likely to switch to other retailers in response to a small but significant non-transitory increase in premium natural and organic supermarket prices.

39. The Acquisition is likely to have substantially lessened competition and continues to substantially lessen competition in the following ways, among others:

a. the Acquisition has already eliminated one of only two or three premium natural and organic supermarkets and has substantially increased concentration in the operation of premium natural and organic supermarkets in the relevant geographic

markets, each of which already is highly concentrated;

b. the Acquisition has already eliminated substantial and effective price and non-

price competition between Whole Foods and Wild Oats in the operation of

premium natural and organic supermarkets in the relevant geographic markets, substantially reducing or eliminating competition in the operation of premium natural and organic supermarkets in each of those geographic areas;

c. the Acquisition has already eliminated one of only two or three premium natural and organic supermarkets in each of the relevant geographic markets, tending to create a monopoly in the operation of premium natural and organic supermarkets in each of those geographic areas;

d. the Acquisition has already eliminated the only existing company that can serve as a meaningful springboard for a conventional supermarket operator to enter the market for premium natural and organic supermarkets in each of the relevant geographic markets, tending to create a monopoly in the operation of premium natural and organic supermarkets in each of those geographic areas;

without knowledge thereof, a statement to that effect. Allegations of the Amended Complaint not thus answered shall be deemed to have been admitted.

answer shall consist of a statement that you admit all of the material facts to be true. Such an

4. Re-establishment of Wild Oats stores, with Whole Foods stores added as necessary, along with any associated or necessary assets in a manner that creates a group or system of stores that may be available for divestiture, including, but not limited to, re-opening

EXHIBIT 5

FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION

Plaintiff,

Case No. 07-01021 DFE

PUBLIC VERSION

by conventional supermarkets or other food retailers is unlikely. The Hartman Study reported that:

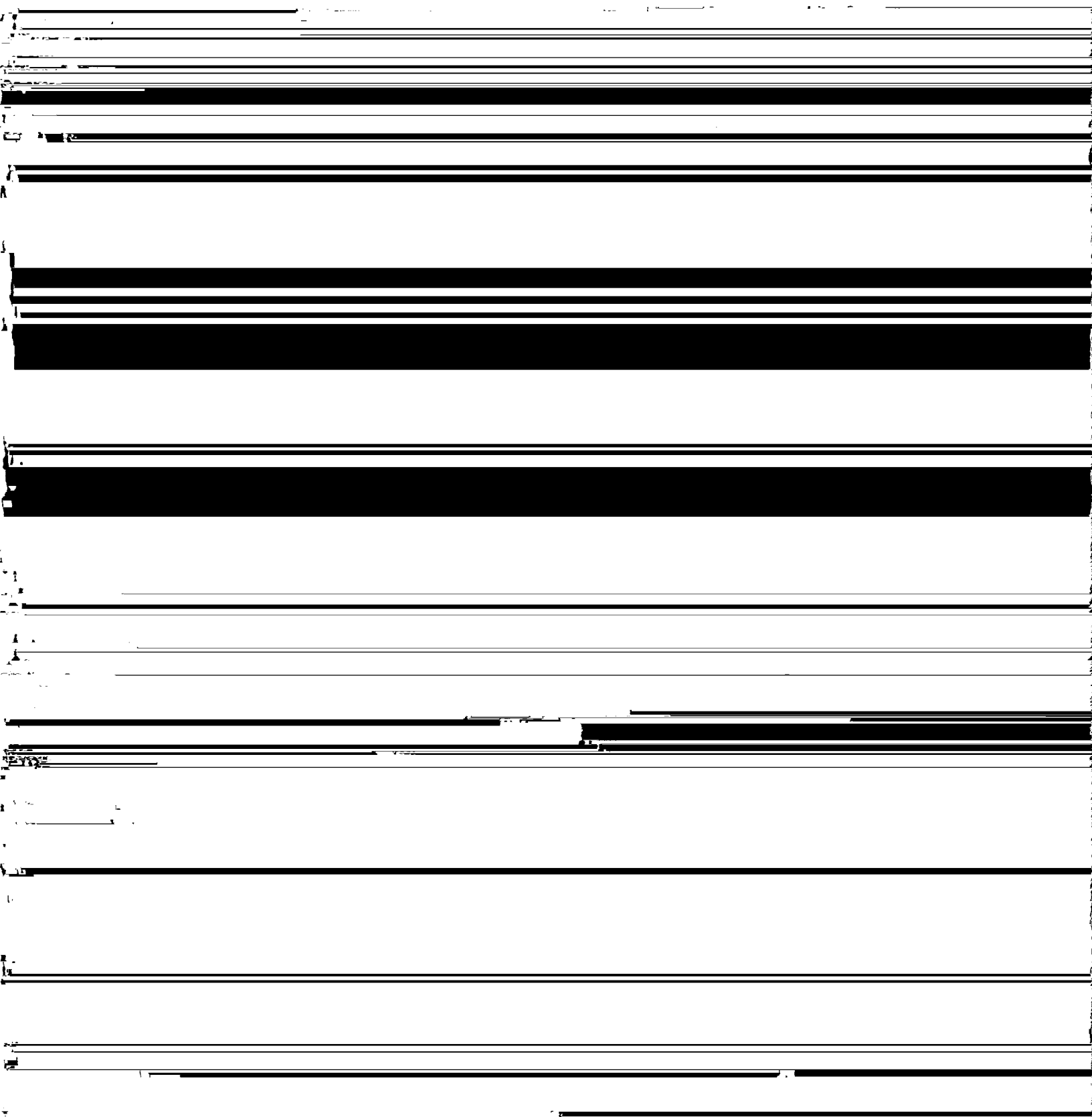
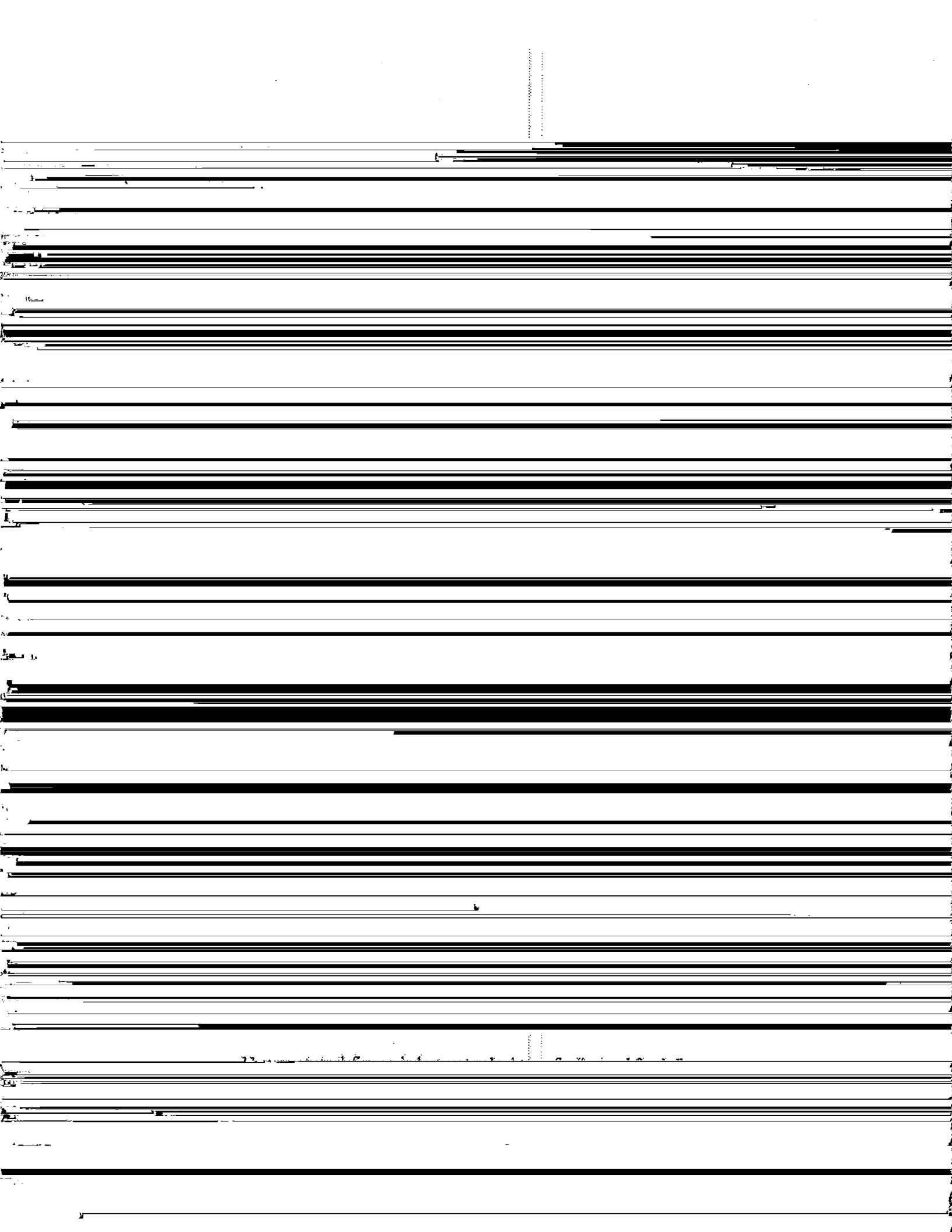


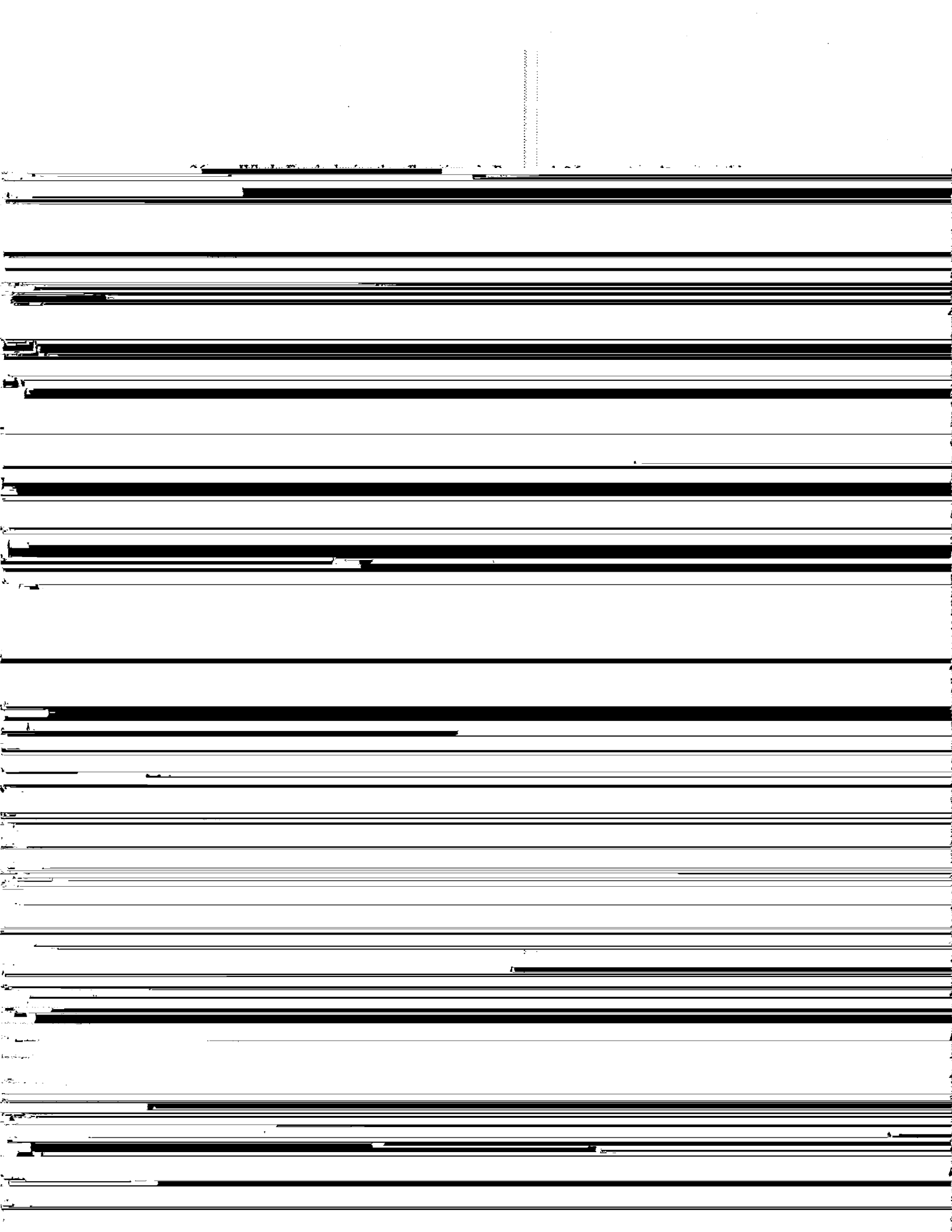
EXHIBIT 6

7. Whole Foods admits that it is in the process of operating certain former Wild Oats



23 Whole Foods admits that the statement quoted in Document 22 was made but

[REDACTED]



4. Whole Foods reserves the right to assert any other defenses as they become

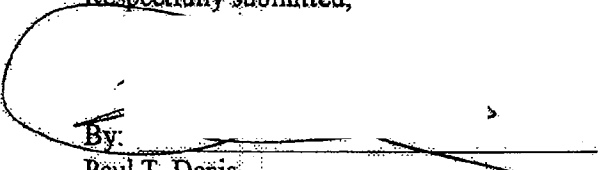
known to Whole Foods.

WHEREFORE, Respondent Whole Foods respectfully requests that the Commission (i) deny the contemplated relief, (ii) dismiss the Amended Complaint in its entirety with prejudice, (iii) award Whole Foods their costs of the suit, including attorneys' fees, and (iv) award such

Dated: September 26, 2008

Respectfully submitted,

Of Counsel:

By: 
Paul T. Denis
Paul H. Friedman

I hereby certify that a true and correct copy of the foregoing Respondent Whole Foods

EXHIBIT 7

business information, previously produced to the FTC, is at issue. Specifically, each of the following intervenors filed a brief in opposition to the joint motion: Trader Joe's Company, Wegmans Food Markets, Inc., Supervalu, Inc., Publix Super Markets, Inc., Wal-mart Stores, Inc., H.E. Butt Grocery Company, Safeway, Inc., and Kroger Co.²

In connection with Whole Foods' original motion for entry of a final protective

order, Ms. Lang submitted a sworn declaration. See Declaration of Roberta L. Lang, Ex. C to Whole Foods' Motion for Entry of a Final Protective Order ("Lang Decl."). She states:

I did not participate in competitive decision-making at Whole Foods

Id. Id.

[T]he courts have precluded access to confidential information from those who can be described as competitive decision-makers. The “leading authority” is U.S. Steel Corp. v. United States, 730 F.2d 1465 (Fed. Cir. 1984). In that case, the Federal Circuit said:

The parties have referred to involvement in “competitive decisionmaking” as a basis for denial of access. The phrase would appear serviceable as shorthand for a counsel's activities, association, and relationship with a client that are

such as to involve counsel's advice and participation in any or all of the client's decisions (pricing, product design, etc.) reads in light of similar or corresponding information about

evidence before Magistrate Judge Facciola in Intervet that the in-house counsel was a

have access to the materials in question. See id. at 58; see also United States v. Sungard Data Systems, 173 F.Supp.2d 20, 21 (D.D.C. 2001) (Facciola, J.) (allowing access by in-house counsel

