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July 2, 2009

VIA HAND DELIVERY

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

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



Dear Mr. Clark:

Enclosed please find Third Parties' Motion to Enforce Protective Order and Proposed Order. This package contains the original plus twelve copies, plus an electronic copy.

I certify that the electronic copy is a true and correct copy of the paper original.

Sincerely,

Rebecca H. Farrington

Enclosures



proceeding...the parties shall return documents obtained in this action to their submitters....” Protective Order, ¶ 12, Exhibit 1. Therefore, the FTC should now direct Whole Foods Markets, Inc. (“Whole Foods”) to return the Moving Third Parties’ documents.

As the Commission is aware, counsel for Whole Foods recently provided notice that plaintiffs in *Kottaras*, a separate action, have propounded discovery requests on Whole Foods. Those document requests include wholesale requests for production of the highly confidential documents and materials produced by third parties, including the Moving Third Parties, in the FTC administrative matter. Instead of serving a Rule 45 subpoena on any of the third parties, the *Kottaras* Plaintiffs are seeking access to the third parties’ highly confidential materials in a manner that intentionally circumvents the terms of the Protective Order and the Federal Rules of Civil Procedure.

Pursuant to the governing Protective Order, Whole Foods must immediately return the confidential documents to the third parties. However, without conceding the right to immediate return or waiving any objections, the Moving Third Parties recognize that given the pending document requests that have been served by the *Kottaras* Plaintiff on Whole Foods, as a practical matter, Whole Foods would be hard-pressed to return the confidential documents to the third parties without guidance from Judge Friedman, who is the presiding district court judge in both the *Kottaras* case and *FTC v. Whole Foods Market Inc.*, CA No. 1:07-CV-01021-PLF (D.D.C.). Therefore, the Moving Third Parties request very limited relief here: merely an order instructing Whole Foods to return immediately to the Moving Third Parties all documents upon entry of an order permitting as much by Judge Friedman.

### **BACKGROUND**

On June 28, 2007, the FTC instituted an administrative action against Whole Foods, *In re Whole Foods Markets, Inc.*, Docket No. 9324, challenging the legality of Whole Foods’

acquisition of Wild Oats Markets, Inc. (“Wild Oats”). The Moving Third Parties, competitors to Whole Foods, operate grocery stores throughout the United States. The Moving Third Parties did not have any involvement in Whole Foods’ acquisition of Wild Oats, or the related administrative action, beyond production of the documents at issue here.

On October 10, 2008, the Commission entered the Protective Order currently in force in this matter to protect the competitively sensitive information being provided by the submitting parties. Exhibit 1. When the FTC started its administrative proceeding into the proposed acquisition by Whole Foods of Wild Oats Markets, Inc., numerous third parties cooperated with this effort by providing highly sensitive trade secret information to the FTC, consistent with the FTC’s confidentiality obligations under the law and regulations, including the Hart-Scott-Rodino Acts, and subject to the Protective Order.<sup>1</sup>

Each of the Moving Third Parties received a subpoena from Whole Foods in the FTC administrative action. Included in the various productions by third parties are highly confidential trade secret materials.<sup>2</sup> These materials are some of the most sensitive to each company. The materials include highly confidential strategic planning documents that provide information regarding store expansions, new store openings, as well as operating objectives and competitive reports. Additionally, third parties provided operating statements, including sales and gross profit by store and department, as well as other detailed data by store and department. This information is not technical. In other words, it can easily be understood by outside parties

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<sup>1</sup> Numerous third parties also produced highly sensitive trade secret materials in *FTC v. Whole Foods Market, Inc.*, CA No. 1:07-CV-01021-PLF (D.D.C.), subject to a protective order that is similar to the Protective Order in this action. Exhibit 2.

<sup>2</sup> The Protective Order governing this matter explicitly states that confidential materials may only be disclosed to certain enumerated individuals, including outside counsel for Whole Foods, experts, judges and court reporters. Protective Order ¶ 7, Exhibit 1. In addition, at the conclusion of the matter the Protective Order directs Whole Foods to “return documents obtained in this action to their submitters . . . .” Protective Order ¶ 12, Exhibit 1.

without the aid of consultants or experts in the field, and can be used to the competitive detriment of those third parties.

The purpose of the Moving Third Parties' productions in the FTC action was very limited – the documents and materials were to be used only in preparation for and during the administrative trial. Protective Order, ¶ 8, Exhibit 1. As clearly described in the Protective Order, once the matter concluded, and the stated use of the documents ceased to exist, the documents had to be returned to the Moving Third Parties. Protective Order, ¶ 12, Exhibit 1. On May 28, 2009, the FTC approved a final consent order in the administrative hearing, concluding this matter. Exhibit 3. Given this development, the parties respectfully request that the FTC direct Whole Foods to return the Moving Third Parties' highly confidential documents, upon entry of an order permitting as much by Judge Friedman.

Recently, counsel for Whole Foods provided notice that *Kottaras* plaintiffs seek, through document requests pursuant to Federal Rules of Civil Procedure 34, wholesale production of the highly confidential trade secret materials produced by third parties in this action and governed by the Protective Order.<sup>3</sup> The Plaintiffs in *Kottaras* have not (1) served Rule 45 requests on any of the Third Parties; (2) demonstrated any need for this highly sensitive trade secret information or shown why this information is even discoverable in the *Kottaras* case; or (3) agreed to be bound by the provision of the Protective Order.

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<sup>3</sup>Whole Foods filed A Motion For Direction With Respect To Third Party Documents in the *Kottaras* matter. On June 16, 2009, after a hearing on this motion before Magistrate Judge Robinson, the *Kottaras* parties were instructed to meet-and-confer with third parties regarding the third party documents. The meet-and-confer did not resolve the third party document issues with *Kottaras* Plaintiffs for many of the third parties. Third parties were given the option of filing a motion to intervene in the *Kottaras* court by Magistrate Judge Robinson. A number of third parties are seeking relief in *Kottaras* through an amicus brief, requesting the Court enter a protective order that limits the Plaintiffs' requests for production to the extent Plaintiffs request that Whole Foods produce confidential third party documents produced in separate actions.

## ARGUMENT

### **I. THE COMMISSION SHOULD ENFORCE THE PROTECTIVE ORDER.**

#### **A. Documents Should Not Be Produced to *Kottaras* Plaintiffs in Violation of the Protective Order**

Here, the Commission entered a crystal-clear protective order that, among other things, states that produced materials “shall be used only for the purposes of the preparation and hearing of this proceeding, or any appeal therefrom, and for no other purpose whatsoever...” Protective Order ¶ 8, Exhibit 1. These types of provisions are common in legal proceedings and are routinely enforced. *See Culinary Foods, Inc. v. Raychem Corp.*, 151 F.R.D. 297, 307 (N.D. Ill. 1993) (“We hold that confidential information obtained by Culinary in this litigation may not be disseminated to litigants in other cases against Raychem.”); *cf. Smithkline Beecham Corp. v. Synthon Pharmaceuticals Ltd.*, 210 F.R.D. 163, 169 (M.D.N.C. 2002) (refusing to modify protective order to allow plaintiffs to use confidential documents in other litigation); *Avery v. Sabbia*, 301 Ill. App. 3d at 839, 845, 704 N.E.2d 750, 756 (1st Dist. 1998) (affirming trial court’s protective order that prevented providing deposition transcripts to non-party for use in other actions).

This is particularly true in situations where, as here, a party seeks to obtain from a responding party information received by the responding party in an unrelated litigation. *See Smithkline Beecham Corp.* 210 F.R.D. at 169 (refusing to allow use of confidential information beyond present case when parties in other litigation had alternative means to obtain discovery). *See also Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 535 (1st Cir. 1993) (holding that disclosure of confidential discovery information could not be justified by need “to avoid wasteful duplication of discovery in other cases”).

Because of the highly sensitive material at issue in this case, the Protective Order contained specific provisions to safeguard these materials. Not only are there strict limitations on the use of the materials – clearly providing that the information could be used only in connection with the above-captioned case – but there are tight restrictions on access to the information.<sup>4</sup> Everything about this Protective Order makes clear that the produced information could go no further than to those specifically identified in the Protective Order.

Under these circumstances, the Commission should enforce the Protective Order. Among other things, enforcement of these kinds of protective orders encourages third parties to cooperate fully with the Commission in time-sensitive merger cases without unduly delaying discovery by extensively litigating or appealing discovery requests. If, on the other hand, Protective Orders could be ignored in the fashion suggested by the Plaintiffs in the *Kottaras* case, third parties will be forced to fully litigate and appeal all decisions relating to third-party subpoenas out of fear that confidential information provided in Commission proceedings will later be produced by a party in a manner inconsistent with the governing protective order and the Federal Rules. This is particularly alarming where the party holding the confidential material is a competitor of the submitting parties.

**B. *Kottaras* Plaintiffs Should Not be Allowed Use the FTC’s Administrative Process to Circumvent Rule 45.**

Plaintiffs in *Kottaras* fundamentally seek to obtain discovery from entities that are not a party to the *Kottaras* case; there is thus no question that the proper process for Plaintiffs to follow would be to serve a Rule 45 subpoena on the appropriate third parties. *Jones v. National American Univ.*, 2008 WL 4616684 (D. S.D. Oct. 16, 2008) (“Because Rule 34 specifically

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<sup>4</sup> The Protective Order strictly limits access to certain enumerated individuals. Protective Order, ¶ 7, Exhibit 1.

references a procedure for obtaining documents from a party and specifically states that documents can be obtained from non-parties pursuant to Rule 45, the court finds that the language of Rule 34 indicates that it applies to documents requested from parties and Rule 45 applies to documents requested from non-parties.”); *Municipal Revenue Services, Inc. v. Xspand, Inc.*, 2007 WL 1074140 (M.D. Pa. April 4, 2007) (“In federal practice, a Rule 45 subpoena command to a nonparty to produce books and records for inspection and copying is the *only* method by which document inspection may be obtained from non-parties.”); *Enwere v. Terman Associates, L.P.*, 2008 WL 2951795 (N.D. Cal 2008) (“The proper mechanism for obtaining documents from a non-party to use in a lawsuit is a Rule 45 subpoena.”)

Rather than attempting to comply with the straightforward requirements associated with Rule 45, Plaintiffs in *Kottaras* instead seek access to third parties’ highly confidential materials through the “back door” of this FTC administrative matter and *FTC v. Whole Foods Market, Inc.*, CA No. 1:07-CV-01021-PLF (D.D.C.) in the district court. This exposes the third parties to potential litigation outside their relevant jurisdictions and allows the *Kottaras* Plaintiffs access to materials without the proper showing of discoverability, relevance or need. Under the *Kottaras* Plaintiffs’ theory, there is no need for Rule 45 in myriad cases; rather, plaintiffs can just serve a document request under Rule 34 on an opposing party and obtain all documents produced by any third party in any case involving the opposing party. The *Kottaras* Plaintiffs’ theory is clearly incorrect under the Federal Rules.

Moreover, “when confidential information is being sought, the burden is on the party seeking discovery to establish that the information is sufficiently relevant and necessary to his case to outweigh the harm disclosure would cause to the person from whom he is seeking the information.” *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 306 n.4 (1991) (citing *Litton*

*Industries, Inc. v. Chesapeake & Ohio R. Co.*, 129 F.R.D. 528, 530 (E.D. Wis. 1990)); *Standard Process, Inc. v. Total Health Discount, Inc.*, 559 F. Supp. 2d 932, 944 (E.D. Wis. 2008). In addition, even in instances where confidentiality is not a primary factor, plaintiffs are required to show specific need and relevance for certain discovery information. *R. Enterprises, Inc.*, 498 U.S. at 306 n.4 (citing *Marshall v. Westinghouse Electric Corp.* 576 F.2d 588, 592 (5th Cir. 1978)). There have been no such demonstrations in the *Kottaras* case.

To summarize, this administrative matter concluded on May 28, 2009. The third parties provided confidential materials with the understanding and expectation that they would be governed by the Protective Order, which directs return of the documents at the conclusion of the administrative matter. If the Commission were to allow confidential materials to be shared and distributed to non-parties in unrelated, private actions, that would effectively negate the Protective Order. In this context, Moving Third Parties now ask the Commission to enforce the Protective Order to protect their highly confidential trade secret information. This result does not prejudice any party.

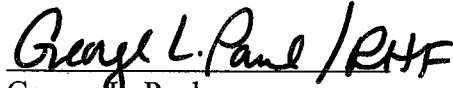
### CONCLUSION

Because this administrative matter has concluded, under the terms of the Protective Order, Whole Foods must immediately return the confidential documents to the third parties. Without conceding the right to immediate return or waiving any objections, the Moving Third Parties recognize that given the pending document requests that have been served by the *Kottaras* Plaintiff on Whole Foods, as a practical matter, Whole Foods would be hard-pressed to return the confidential documents to the third parties without guidance from Judge Friedman, who is the presiding district court judge in both the *Kottaras* case and *FTC v. Whole Foods Market Inc.*, CA No. 1:07-CV-01021-PLF (D.D.C.). Moving Third Parties therefore respectfully request that the Commission grant the Motion to Enforce the Protective Order and order Whole

Foods to return immediately to the Moving Third Parties all documents upon entry of an order permitting as much by Judge Friedman. Whole Foods does not intend to file an opposition to this motion.

Dated: July 2, 2009

Respectfully submitted,



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# **Exhibit 1**

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

**COMMISSIONERS:**        **William E. Kovacic, Chairman**  
                                  **Pamela Jones Harbour**  
                                  **Jon Leibowitz**  
                                  **J. Thomas Rosch**

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

**PROTECTIVE ORDER GOVERNING CONFIDENTIAL MATERIAL**

For the purpose of protecting the interests of the parties and third parties in the above-captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this matter:

**IT IS HEREBY ORDERED THAT** this Protective Order Governing Confidential Material (“Protective Order”) shall govern the handling of all Discovery Material, as hereafter defined.

1. As used in this Order, “confidential material” shall refer to any document or portion thereof that contains non-public competitively sensitive information, including trade secrets or other research, development or commercial information, the disclosure of which would likely cause commercial harm to the producing party, or sensitive personal information. “Discovery Material” shall refer to documents and information produced by a party or third party in connection with this matter. “Document” shall refer to any discoverable writing, recording, transcript of oral testimony, or electronically stored information in the possession of a party or a third party. “Commission” shall refer to the Federal Trade Commission (“FTC”), or