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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.¹

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.² 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

¹ 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.

² 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.³ 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.

³Whole 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.⁴ 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

⁴ 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.

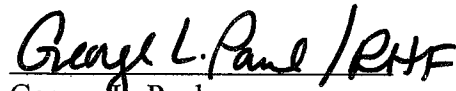
CONCLUSION

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

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

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

any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this proceeding.

2. Any document or portion thereof produced or submitted by a respondent or a third party during a Federal Trade Commission investigation or during the course of this proceeding that is entitled to confidentiality under the Federal Trade Commission Act, or any regulation, interpretation, or precedent concerning documents in the possession of the Commission, as well as any information taken from any portion of such document, shall be treated as confidential material for purposes of this Order.

3. The parties and any third parties, in complying with informal discovery requests, disclosure requirements, or discovery demands in this proceeding may designate any responsive document or portion thereof as confidential material, including documents obtained by them from third parties pursuant to discovery or as otherwise obtained.

4. The parties, in conducting discovery from third parties, shall provide to each third party a copy of this Order so as to inform each such third party of his, her, or its rights herein.

5. A designation of confidentiality shall constitute a representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain and that counsel believes the material so designated constitutes confidential material as defined in Paragraph 1 of this Order.

6. Material may be designated as confidential by placing on or affixing to the document containing such material (in such manner as will not interfere with the legibility thereof) the designation “CONFIDENTIAL–FTC Docket No. 9324” or any other appropriate notice that identifies this proceeding, together with an indication of the portion or portions of the document considered to be confidential material. Confidential information contained in electronic

documents may also be designated as confidential by placing the designation “CONFIDENTIAL–FTC Docket No. 9324” or any other appropriate notice that identifies this proceeding, on the face of the CD or DVD or other medium on which the document is produced. Masked or otherwise redacted copies of documents may be produced where the portions deleted contain privileged matter, provided that the copy produced shall indicate at the appropriate point that portions have been deleted and the reasons therefor.

7. Confidential material shall be disclosed only to: (a) the Administrative Law Judge presiding over this proceeding, personnel assisting the Administrative Law Judge, the Commission and its employees, and personnel retained by the Commission as experts or consultants for this proceeding, provided such experts or consultants are not employees of the respondent, or any entity established by the respondent, or employees of any third party which has been subpoenaed to produce documents or information in connection with this matter, and provided further that each such expert or consultant has signed an agreement to abide by the terms of this protective order; (b) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter; (c) outside counsel of record for the respondent, their associated attorneys and other employees of their law firm(s), provided such personnel are not employees of the respondent or of any entity established by the respondent; (d) anyone retained to assist outside counsel in the preparation or hearing of this proceeding including experts or consultants, provided such experts or consultants are not employees of the respondent, or any entity established by the respondent, or employees of any third party which has been subpoenaed to produce documents or information in connection with this matter, and provided further that each such expert or consultant has signed an agreement to abide by the terms of this protective order; and (e) any witness or deponent who authored or

received the information in question, or who is presently employed by the producing party.

8. Disclosure of confidential material to any person described in Paragraph 7 of this Order shall be only for the purposes of the preparation and hearing of this proceeding, or any appeal therefrom, and for no other purpose whatsoever, provided, however, that the Commission may, subject to taking appropriate steps to preserve the confidentiality of such material, 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.

9. In the event that any confidential material is contained in any pleading, motion, exhibit or other paper filed or to be filed with the Secretary of the Commission, the Secretary shall be so informed by the party filing such papers, and such papers shall be filed *in camera*. To the extent that such material was originally submitted by a third party, the party including the materials in its papers shall immediately notify the submitter of such inclusion. Confidential material contained in the papers shall continue to have *in camera* treatment until further order of the Administrative Law Judge, provided, however, that such papers may be furnished to persons or entities who may receive confidential material pursuant to Paragraphs 7 or 8. Upon or after filing any paper containing confidential material, the filing party shall file on the public record a duplicate copy of the paper that does not reveal confidential material. Further, if the protection for any such material expires, a party may file on the public record a duplicate copy which also contains the formerly protected material.

10. If counsel plans to introduce into evidence at the hearing any document or transcript containing confidential material produced by another party or by a third party, they shall

provide advance notice to the other party or third party for purposes of allowing that party to seek an order that the document or transcript be granted *in camera* treatment. If that party wishes *in camera* treatment for the document or transcript, the party shall file an appropriate motion with the Administrative Law Judge within 5 days after it receives such notice. Until such time as the Administrative Law Judge rules otherwise, the document or transcript shall be accorded *in camera* treatment. If the motion for *in camera* treatment is denied, all documents and transcripts shall be part of the public record. Where *in camera* treatment is granted, a duplicate copy of such document or transcript with the confidential material deleted therefrom may be placed on the public record.

11. If any party receives a discovery request in another proceeding that may require the disclosure of confidential material submitted by another party or third party, the recipient of the discovery request shall promptly notify the submitter of receipt of such request. Unless a shorter time is mandated by an order of a court, such notification shall be in writing and be received by the submitter at least 10 business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the submitter of its rights hereunder. Nothing herein shall be construed as requiring the recipient of the discovery request or anyone else covered by this Order to challenge or appeal any order requiring production of confidential material, to subject itself to any penalties for non-compliance with any such order, or to seek any relief from the Administrative Law Judge or the Commission. The recipient of the discovery request shall not oppose the submitter's efforts to challenge the disclosure of confidential material. In addition, nothing herein shall limit the applicability of Rule 4.11(e) of the Commission's Rules of

Practice, 16 CFR § 4.11(e), to discovery requests in another proceeding that are directed to the Commission.

12. At the time that any consultant or other person retained to assist counsel in the preparation or hearing of this action concludes participation in the action, such person shall return to counsel all copies of documents or portions thereof designated confidential that are in the possession of such person, together with all notes, memoranda or other papers containing confidential information. At the conclusion of this proceeding, including the exhaustion of judicial review, the parties shall return documents obtained in this action to their submitters, provided, however, that the Commission's obligation to return documents shall be governed by the provisions of Rule 4.12 of the Rules of Practice, 16 CFR § 4.12.

13. The inadvertent production or disclosure of information or documents produced by a party or third party in discovery that is subject to a claim of privilege will not be deemed to be a waiver of any privilege to which the producing party would have been entitled had the inadvertent production or disclosure not occurred, provided the producing party exercised reasonable care to preserve its privilege. In the event of such inadvertent production or disclosure, the party claiming inadvertence shall promptly notify any party that received the information of the claim and the basis for it. After being so notified, the receiving party must promptly return the specified information, and all copies of it, and may not use or disclose the information unless the claim is resolved such that no privilege applies to the information. Nothing in this Order presupposes a determination on the claim of privilege or of reasonable care in preserving privilege if challenged.

14. The provisions of this Protective Order, insofar as they restrict the communication and use of confidential discovery material, shall, without written permission of the submitter or further order of the Commission, continue to be binding after the conclusion of this proceeding.

By the Commission.

Donald S. Clark
Secretary

ISSUED: October 10, 2008

Exhibit 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

JUL 10 2007

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

FEDERAL TRADE COMMISSION)

Plaintiff,)

v.)

Civil Action No. 1:07-CV-01021-PLF

WHOLE FOODS MARKET, INC.)

and)

WILD OATS MARKETS, INC.)

Defendants.)

PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL

For the purpose of protecting the interests of the Parties and Third Parties against the improper use and disclosure of confidential information submitted or produced in connection with this Matter:

IT IS HEREBY ORDERED THAT this Protective Order Governing Discovery Material (the "Protective Order") shall govern the handling of all Discovery Material in the above captioned Matter.

DEFINITIONS

For purposes of this Protective Order, the following definitions shall apply:

1. "Whole Foods" means defendant Whole Foods Market, Inc., 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 at 550 Bowie Street, Austin, Texas 78703, and its predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures.

2. "Wild Oats" means defendant Wild Oats Markets, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 3375 Mitchell Lane, Boulder, Colorado 80301, and its predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures.

3. "Commission" or "FTC" means the Federal Trade Commission, or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for the purposes of this Matter.

4. "Confidential Discovery Material" means all Discovery Material that is confidential or proprietary information produced in discovery. Such material is referred to in, and protected by, Rule 26(c)(7) of the Federal Rules of Civil Procedure. Confidential Discovery Material shall include non-public trade secret or other research, development, or commercial information, the disclosure of which would likely cause commercial harm to the Producing Party or to Defendants, in instances where the Producing Party produces information generated by the Defendants. The following is a non-exhaustive list of examples of information that likely will qualify for treatment as Confidential Discovery Material: strategic plans (involving pricing, marketing, research and development, product road maps, corporate alliances, or mergers and acquisitions) that have not been fully implemented or revealed to the public; trade secrets; customer-specific evaluations or data (e.g., prices, volumes, or revenues); sales contracts; system maps; personnel files and evaluations; information subject to confidentiality or non-disclosure agreements; proprietary technical or engineering information; proprietary financial data or projections; and proprietary consumer, customer, or market research or analyses applicable to current or future market conditions, the disclosure of which could reveal Confidential Discovery Material. Discovery Material will not be considered confidential if it is in the public domain.

5. "Counsel of Record" means counsel who file a notice of appearance in this Matter.

6. "Disclosing Party" means a party that is disclosing or contemplating disclosing Discovery Material pursuant to this Protective Order.

7. "Discovery Material" includes without limitation deposition testimony, deposition exhibits, interrogatory responses, admissions, affidavits, declarations, Documents produced pursuant to compulsory process or voluntarily in lieu thereof, and any other Documents or information produced or given to one Party by another Party or by a Third Party in connection with discovery in this Matter. Information taken from Discovery Material that reveals its substance shall also be considered Discovery Material.

8. "Document" means the complete original or a true, correct, and complete copy and any non-identical copies of any written or graphic matter, no matter how produced, recorded, stored, or reproduced. "Document" includes, but is not limited to, any writing, letter, envelope, telegraph, e-mail, meeting minute, memorandum, statement, affidavit, declaration, book, record, survey, map, study, handwritten note, working paper, chart, index, tabulation, graph, drawing, chart, photograph, tape, phono record, compact disc, video tape, data sheet, data processing card, printout, microfilm, index, computer readable media or other electronically stored data, appointment book, diary, diary entry, calendar, organizer, desk pad, telephone message slip, note of interview or communication, and any other data compilation from which information can be obtained, and includes all drafts and all copies of such Documents and every writing or record that contains any commentary, notes, or marking whatsoever not appearing on the original.

9. "Expert/Consultant" means testifying or consulting experts or other persons who are retained to assist Plaintiff's Counsel or Defendants' Counsel in preparation for the hearing or to give testimony at the hearing.

10. "Matter" means the above captioned matter pending in the United States District Court for the District of Columbia, and all subsequent administrative, appellate or other review proceedings related thereto.

11. "Outside Counsel" means the law firms that are Counsel of Record for Defendants in this Matter, their partners and associated attorneys, or other persons regularly employed by such law firm(s) including legal assistants, clerical staff, vendors assisting with electronic discovery and information management personnel and temporary personnel retained by such law firm(s) to perform legal or clerical duties, or to provide logistical litigation support with regard to this Matter; provided that any attorney associated with Outside Counsel shall not be a director, officer, or employee of Defendants. The term Outside Counsel does not include persons retained as consultants or experts for the purposes of this Matter.

12. "Party" means either the FTC, Whole Foods, or Wild Oats.

13. "Person" means any natural person, business entity, corporate entity, sole proprietorship, partnership, association, governmental entity, or trust.

14. "Producing Party" means a Party or Third Party that produced or intends to produce Confidential Discovery Material to any of the Parties. With respect to Confidential Discovery Material of a Third Party that is in the possession, custody, or control of the FTC, or has been produced by the FTC in this Matter, the Producing Party shall mean the Third Party that originally provided such material to the FTC. The Producing Party shall mean the FTC for purposes of any Document or Discovery Materials prepared by, or on behalf of, the FTC.

15. "Defendants" means Whole Foods and Wild Oats.

16. "Third Party" means any natural person, partnership, corporation, association, or other legal entity not named as a Party to this Matter and its employees, directors, officers, attorneys, and agents.

TERMS AND CONDITIONS OF PROTECTIVE ORDER

1. Discovery Material, or information derived therefrom, shall be used solely by the Parties for purposes of this Matter, and shall not be used for any other purpose, including without limitation any business or commercial purpose. Notwithstanding the foregoing, nothing contained in this Protective Order shall prevent the Commission from using any material produced as part of the investigation in this Matter, including any Discovery Material, for any authorized law enforcement purpose, provided that the Commission may only use or disclose Discovery Material as provided by (a) its Rules of Practice, and any cases so construing them, (b) Sections 6(f) and 21 of the Federal Trade Commission Act, and any cases so construing them, and (c) any other legal obligation imposed upon the Commission. The Parties, in conducting discovery from Third Parties, shall attach to all discovery requests a copy of this Protective Order and a cover letter that will apprise such Third Parties of their rights hereunder.

2. Confidential Discovery Material may be designated as such by (a) placing or affixing on each page of a Document containing such material, in a manner that will not interfere with its legibility, the notation "CONFIDENTIAL - FTC v. Whole Foods," or (b) any Party or Third Party instructing the court reporter, with notice to all Parties, within five (5) business days of the receipt of the transcript, to designate as "Confidential" each page of the deposition transcript containing the Confidential Discovery Material. Such designations constitute a good-faith representation by counsel for the Party or Third Party making the designation that the

Document or transcript constitutes or contains Confidential Discovery Material. All deposition transcripts shall be treated as Confidential Discovery Material until the expiration of five (5) business days after the receipt of the transcript. A Producing Party will use reasonable care to avoid designating any Discovery Material as Confidential Discovery Material that is not entitled to such designation.

3. Confidential Discovery Material shall not be copied or reproduced for use in this Matter except to the extent such copying or reproduction is reasonably necessary to the conduct of this Matter. All such copies or reproductions of the Discovery Material and any documents generated by the Parties containing information drawn from such Discovery Material shall be subject to the terms of this Protective Order. If the duplication process by which copies or reproductions of Confidential Discovery Material are made does not preserve the confidentiality designations that appear on the original Documents, all such copies or reproductions shall be stamped with the same confidentiality designation as the original.

4. All Documents obtained by compulsory process or voluntarily in lieu of process from any Party or Third Party, regardless of whether designated or marked confidential by the Party or Third Party, and transcripts of any investigational hearings, interviews, or depositions that were obtained before this Protective Order was adopted, shall be treated as Confidential Discovery Material for a period of ten (10) days from the time notice of the intent to produce is given to the Producing Party. At the expiration of that time, this material shall be treated as non-confidential unless documents or transcripts pages are otherwise designated with specificity by the Producing Party as Confidential Discovery Material.

5. If any Party seeks to challenge a Producing Party's designation of material as Confidential Discovery Material, the challenging Party shall notify the Producing Party and all

other Parties of the challenge. Such notice shall identify with specificity (*i.e.*, by document control numbers, deposition transcript page and line reference, or other means sufficient to locate easily such materials) the designation being challenged. The Producing Party may preserve its designation by providing the challenging Party and all other Parties a written statement of the reasons for the designation within three (3) business days of receiving notice of the confidentiality challenge. If the Producing Party timely preserves its rights, the Parties shall continue to treat the challenged material as Confidential Discovery Material, absent a written agreement with the Producing Party or order of the Court providing otherwise.

6. If any conflict regarding a confidentiality designation arises and the Parties involved have failed to resolve the conflict via good-faith negotiations, a Party seeking to disclose Confidential Discovery Material or challenging a confidentiality designation may make written application to the Court for relief. The application shall be served on the Producing Party and the other Parties to this Matter, and shall be accompanied by a certification that good-faith negotiations have failed to resolve the outstanding issues. The Producing Party and any other Party shall have three (3) business days after receiving a copy of the motion to respond to the application. While an application is pending, the Parties shall maintain the pre-application status of the Confidential Discovery Material. Nothing in this Protective Order shall create a presumption or alter the burden of persuading the Court of the propriety of a requested disclosure or change in designation.

7. The Parties shall not be obligated to challenge the propriety of any designation or treatment of information as Confidential Discovery Material and the failure to do so promptly shall not preclude any subsequent objection to such designation or treatment, or any motion seeking permission to disclose such material to Persons not otherwise entitled to access under the

terms of this Protective Order. If Confidential Discovery Material is produced without the designation attached, the material shall be treated as Confidential from the time the Producing Party advises Plaintiff's Counsel and Defendants' Counsel in writing that such material should be so designated and provides all the Parties with an appropriately labeled replacement. The Parties shall return promptly or destroy the unmarked materials.

8. Confidential Discovery Material shall not, directly or indirectly, be disclosed or otherwise provided to anyone except:

- (a) Plaintiff's counsel and the Commission, as permitted by the Commission's Rules of Practice;
- (b) Outside Counsel;
- (c) Roberta L. Lang, General Counsel of Whole Foods Market, Inc., on condition that Ms. Lang shall have access only to unredacted draft and final versions of pleadings, deposition and hearing transcripts, and expert reports, but shall not have access to any accompanying exhibits or underlying discovery materials to the extent those exhibits or discovery materials have been designated "Confidential";
- (d) Experts/Consultants;
- (e) court reporters and deposition transcript reporters;
- (f) judges and other court personnel of any court having jurisdiction over any proceedings involving this Matter;
- (g) any author or recipient of the Discovery Material; any individual who was in the direct chain of supervision of the author at the time the Discovery Material was created or received; any employee or agent of the entity that created or received the Discovery Material; or anyone representing the author or recipient of the Discovery Material in this Matter; and
- (h) any other Person(s) authorized in writing by the Producing Party.

9. Confidential Discovery Material shall not, directly or indirectly, be disclosed or otherwise provided to an Expert/Consultant until such person has executed and transmitted to counsel for the party retaining such person a declaration in the form attached as Exhibit "A."

Each Party's counsel shall maintain a file of all such declarations for the duration of the litigation.

10. If any Party desires to disclose Confidential Discovery Material to (a) either any Expert/Consultant, any deponent, or any witness that is or was an officer, director or employee of Whole Foods or Wild Oats, or (b) any Person other than those referred to in paragraph 8 of this Protective Order, the Disclosing Party shall notify the Producing Party any other Party of its desire to disclose such material. The notice shall identify those materials sought to be disclosed with specificity (*i.e.*, by document control numbers, deposition transcript page and line reference, or other means sufficient to locate easily such materials) and the specific Person to whom the Confidential Discovery Material is to be disclosed. For disclosure to any Expert/Consultant, deponent, or witness that is or was an officer, director, or employee of Whole Foods or Wild Oats, the identification of the Person shall include, but not be limited to, the full name, professional address and/or affiliation, and current curriculum vitae of the identified Person. The Producing Party may object to the disclosure of the Confidential Discovery Material within five (5) business days of receiving notice of an intent to disclose such material to the Person by providing the Disclosing Party with a written statement of the reasons for objection. If the Producing Party timely objects, the Disclosing Party shall not disclose the Confidential Discovery Material to the identified Person, absent a written agreement with the Producing Party or order of the Court permitting the disclosure. If the Producing Party does not object to the disclosure of Confidential Discovery Material to the identified Person within five (5) business days, the Disclosing Party may disclose the Confidential Discovery Material to the identified Person.

11. If the FTC (a) receives a discovery request that may require the disclosure by it of a Third Party's Confidential Discovery Material, or (b) intends to or is required to disclose, voluntarily or involuntarily, a Third Party's Confidential Discovery Material (whether or not such disclosure is in response to a discovery request), the FTC promptly shall notify the Third Party of the receipt of such request or its intention to disclose such material. Such notification shall be in writing and, if not otherwise done, sent for receipt by the Third Party at least five (5) business days before disclosure, and shall include a copy of this Protective Order and a cover letter that will apprise the Third Party of its rights hereunder.

12. If any Person receives a discovery request in another proceeding that may require the disclosure of a Producing Party's Confidential Discovery Material, the recipient of the discovery request shall promptly notify the Producing Party of receipt of the request. The notification shall be in writing and be received by the Producing Party at least five (5) business days before production in the other proceeding, and shall include a copy of this Protective Order and a cover letter apprising the Producing Party of its rights. Nothing herein shall be construed as requiring the recipient of the discovery request or anyone else covered by this Protective Order to challenge or appeal an order requiring production of Confidential Discovery Material, to subject itself to any penalties for noncompliance with such an order, or to seek any relief from the Court. The recipient shall not oppose the Producing Party's efforts to challenge the discovery request calling for the production by the recipient of the Producing Party's Confidential Discovery Material. In addition, nothing herein shall limit the applicability of Section 4.11(e) of the FTC Rules of Practice, 16 C.F.R. § 4.11(e), to discovery requests in another proceeding that are directed to the Commission.

13. Counsel for the Parties or any Producing Party shall have the right to exclude from oral depositions any person not authorized to receive Confidential Discovery Material, during periods of examination or testimony relating to such material.

14. In the event that any Confidential Discovery Material is contained in any pleading, motion, exhibit, brief, or other paper filed or to be filed with the Court, the Party filing the papers shall inform the Clerk of Court, and the papers shall be filed under seal pursuant to the Federal Rules of Civil Procedure and the Local Rules of the United States District Court for the District of Columbia. Confidential Discovery Material contained in papers (including Confidential Discovery Material from the Parties and Third Parties) shall remain under seal until further order of the Court; provided, however, that the papers may be furnished to persons or entities who may receive Confidential Discovery Material pursuant to this Protective Order. After filing any paper containing Confidential Discovery Material, the filing Party must file on the public record a duplicate copy of the paper with the Confidential Discovery Material deleted, within five (5) business days of the original filing. Further, if the protection for any such material ceases, any Party may file on the public record a copy that also contains the formerly protected material.

15. If counsel for a Party plans to introduce into evidence at trial any Document or transcript containing Confidential Discovery Material produced by a Third Party or any other Party, the counsel shall provide forty-eight (48) hours advance notice before such introduction to the Producing Party and any other Party, or as much notice before the introduction as practicable under the circumstances, for purposes of allowing that Party to seek an order that the Document or transcript be granted *in camera* treatment. Except where an order seeking *in camera* treatment is granted, all Documents and transcripts shall be part of the public record. If *in camera*

treatment is granted, a copy of the Document or transcript with the Confidential Discovery Material deleted must be placed on the public record.

16. The inadvertent production or disclosure of (i) material provided to the FTC during its investigation under the Hart-Scott-Rodino Antitrust Improvement Act, 15 U.S.C. § 18a, or (ii) any Discovery Material, which a Producing Party claims should not have been produced or disclosed because of a privilege, will not be deemed to be a waiver of any privilege to which the Producing Party would have been entitled had the privileged Discovery Material not inadvertently been produced or disclosed. In the event of such claimed inadvertent production or disclosure, the procedures of Federal Rules of Civil Procedure 26(b)(5)(B) shall apply. The inadvertent production of a privileged document shall not be deemed a waiver of any privilege applicable to any other documents relating to that subject matter.

17. Nothing in this Protective Order shall be construed to conflict with the provisions of Sections 6, 10, and 21 of the Federal Trade Commission Act, 15 U.S.C. §§ 46, 50, 57b-2, or with Rules 3.22, 3.45, or 4.11 (b)-(e), 16 C.F.R. §§ 3.22, 3.45, and 4.11 (b)-(e). Any Party or Producing Party may move at any time for *in camera* treatment of any Confidential Discovery Material or any portion of the proceedings in this Matter to the extent necessary for proper disposition of this Matter.

18. At the conclusion of this Matter, the Defendants shall (a) return or destroy all Documents obtained in this Matter that contain or refer to Confidential Discovery Material, other than materials that have been made part of the public record in this Matter, and (b) provide the Producing Party with an affidavit of destruction, provided that the provisions of 15 U.S.C. § 18a and § 4.12 of the FTC Rules of Practice, 16 C.F.R. § 4.12, shall govern the retention, return, or destruction of any documents obtained by the FTC prior to the filing of the Complaint to the

extent the provisions of that statute or regulation is inconsistent with the provisions of this Protective Order. At the time that any Expert/Consultant or other person retained to assist counsel in the preparation of this Matter concludes participation in this Matter, that person shall return to counsel all copies of Documents or portions thereof designated Confidential Discovery Material that are in the possession of that person, together with all notes, memoranda, or other papers containing Confidential Discovery Material.


19. The provisions of this Protective Order, insofar as they restrict the communication and use of Confidential Discovery Material shall, without written permission of the Producing Party or further order of the Court, continue to be binding after the conclusion of this Matter.

20. This Protective Order shall not apply to the disclosure by a Producing Party or its Counsel of the Producing Party's Confidential Discovery Material to the Producing Party's current or former employees, agents, board members, directors, and officers.

21. 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. This Paragraph 21 shall only apply to the person(s) identified in Paragraph 8(c) above.

22. Entry of the foregoing Protective Order is without prejudice to the right of the Parties or Third Parties to apply for further protective orders or for modification of any provision of this Protective Order by application to the Court for good cause shown,

ORDERED:


Paul L. Friedman
United States District Judge

Dated: 7/4/07

WE ASK FOR THIS:

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Counsel for Whole Foods Market, Inc.

WITH ADDITIONAL COPIES TO:

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Counsel for Wild Oats Markets, Inc.

EXHIBIT A
TO THE PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL

**UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA**

FEDERAL TRADE COMMISSION,)
)
 Plaintiff,)
)
 v.)
)
 WHOLE FOODS MARKET, INC.,)
)
 - and -)
)
 WILD OATS MARKETS, INC.,)
)
 Defendants.)

Civil Action No. 1:07-CV-01021-PLF

**DECLARATION CONCERNING PROTECTIVE
ORDER GOVERNING DISCOVERY MATERIAL**

I, [NAME], hereby declare and certify the following to be true:

1. [Statement of employment]
2. I have read the "Protective Order Governing Discovery Material" ("Protective Order") issued by the Court on [Date], in connection with the above captioned Matter. I understand the restrictions on my access to and use of any Confidential Discovery Material (as that term is used in the Protective Order) in this Matter, and I agree to abide by the Protective Order.
3. I understand that the restrictions on my use of such Confidential Discovery Material include:
 - a. that I will use such Confidential Discovery Material only for the purpose of preparing for this proceeding, and hearing(s) and any appeal of this proceeding and for no other purpose;
 - b. that I will not disclose such Confidential Discovery Material to anyone, except as permitted by the Protective Order;
 - c. that I will use, store and maintain the Confidential Discovery Material in such a way as to ensure its continued protected status; and

- d. that, upon the termination of my participation in this proceeding, I will promptly return all Confidential Discovery Material and all notes, memoranda, or other papers containing Confidential Discovery Material, to Plaintiff's Counsel or Defendants' Outside Counsel, as appropriate.

4. I understand that if I am receiving Confidential Discovery Material as an Expert/Consultant, as that term is defined in this Protective Order, the restrictions on my use of Confidential Discovery Material also include the duty and obligation to:

- a. maintain such Confidential Discovery Material in separate locked room(s) or locked cabinet(s) when such Confidential Discovery Material is not being reviewed;
- b. return such Confidential Discovery Material to Plaintiff's Counsel or Defendants' Outside Counsel, as appropriate, upon the conclusion of my assignment or retention, or upon conclusion of this Matter; and
- c. use such Confidential Discovery Material and the information contained therein solely for the purpose of rendering consulting services to a Party to this Matter, including providing testimony in judicial or administrative proceedings arising out of this Matter.

5. I am fully aware that, pursuant to Rule 26, Federal Rules of Civil Procedure, Rule 37, Federal Rules of Civil Procedure, and Section 3.42(h) of the FTC Rules of Practice, 16 C.F.R. § 3.42(h), my failure to comply with the terms of the Protective Order may constitute contempt of the Commission and may subject me to sanctions imposed by the Court or the Commission.

Full Name [Typed or Printed]

Date: _____

Exhibit 3

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

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

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

**DECISION AND ORDER
[Public Record Version]**

The Federal Trade Commission (“Commission”) having heretofore issued its complaint charging Whole Foods Market, Inc. (“Whole Foods” or “Respondent”) with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Respondent having been served with a copy of that complaint, together with a notice of contemplated relief, and Respondent having answered the complaint denying said charges but admitting the jurisdictional allegations set forth therein; and

The Respondent, its attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Secretary of the Commission having thereafter withdrawn the matter from adjudication in accordance with § 3.25(c) of its Rules; and

The Commission having thereafter considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, and having duly considered the comments filed by interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in conformity with the procedure prescribed in § 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following Order:

1. Whole Foods is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its offices and principal place of business located at 550 Bowie Street, Austin, Texas 78703.

2. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. "Whole Foods" or "Respondent" means Whole Foods Market, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Whole Foods Market, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. "Wild Oats" means the former corporation Wild Oats Markets, Inc., which was organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1821 30th Street, Boulder, Colorado 80301, and which was acquired by Respondent Whole Foods.
- C. "Commission" means the Federal Trade Commission.
- D. "Closing Date" means the date on which Respondent (or the Divestiture Trustee) and a Commission-approved Acquirer consummate a transaction to divest any Asset To Be Divested pursuant to this Order.
- E. "Commission-approved Acquirer" means an entity that receives the prior approval of the Commission to acquire particular assets that the Respondent is required to divest pursuant to this Order.
- F. "Divestiture Trustee" means a trustee appointed by the Commission pursuant to the relevant provisions of this Order to effectuate the divestitures required by this Order [as distinguished from interim monitor].
- G. "Assets To Be Divested" means:
 - 1. The name "WILD OATS," all trademarks, trade dress, service marks, trade names, and other Wild Oats intellectual property associated with the Wild Oats stores (all hereinafter collectively "Wild Oats Associated Intellectual Property");
 - 2. The store locations listed on Appendix A of this Order;

3. The store locations listed on Appendix B of this Order; and
 4. All assets, leases, fixtures, properties, government permits (to the extent transferable), tangible and intangible, related to or used in the stores operated at these locations at the Closing Date, but shall not include those assets consisting of or pertaining to any of Respondent's other (non "WILD OATS") trademarks, trade dress, service marks, or trade names, or any inventory, books and records, financial information, supplies or packaging related to or used in the stores operated at these locations.
- H. "Divestiture Agreement" means any agreement between the Divestiture Trustee and a Commission-approved Acquirer and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Assets To Be Divested that have been approved by the Commission to accomplish the requirements of this Order.
- I. "Interim Monitor" means a monitor appointed by the Commission pursuant to the Order to Maintain Assets in this matter.
- J. "Store Employees" means all employees of Whole Foods currently working at the store locations listed on Appendix A of this Order, or who have, within the past six (6) months, worked at any store location listed on Appendix A or Appendix B of this Order.
- K. "Third Party Consents" means all consents and waivers from any person other than the Respondent, including all landlords, that are necessary to effect the complete divestiture of the Assets To Be Divested to the Commission-approved Acquirer(s) and that are necessary for the continued operation of the stores by the Commission-approved Acquirer(s).

II.

IT IS FURTHER ORDERED that:

- A. Respondent shall divest the Assets To Be Divested, at a price from each Commission-approved Acquirer not less than zero dollars, absolutely and in good faith, in a manner that receives the prior approval of the Commission and solely to an acquirer (or acquirers) that receives the prior approval of the Commission. Such divestiture (or divestitures) shall be accomplished exclusively by the Divestiture Trustee pursuant to Paragraph II of this Order.
- B. The Commission hereby appoints The Food Partners LLC as Divestiture Trustee to divest the Assets To Be Divested. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondent shall execute a trustee agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order.
- C. Respondent shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest the Assets To Be Divested and to assure that Respondent has completed all of its obligations under Paragraph II.H. of this Order for any Asset To Be Divested.
2. The Divestiture Trustee shall have six (6) months from the date the Commission approves the trustee agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the six (6) month period, the Divestiture Trustee has received a good faith offer or offers for a particular store or stores, the divestiture period may be extended by the Commission as to such store(s) to allow the Divestiture Trustee to continue negotiations with such potential acquirer(s); *provided however*, the Commission may extend the divestiture period for any such store(s) only for a maximum of six (6) months; *provided further, however*, that if the Divestiture Trustee submits any proposed Divestiture Agreement(s) and proposed acquirer(s) to the Commission for approval before the end of the divestiture period for the particular store(s), as may be extended by the Commission, and if the Commission has not acted on such Divestiture Agreement(s), or the Closing Date has not occurred, by the end of the divestiture period, then the divestiture period for the store(s) covered by such Divestiture Agreement(s) shall automatically extend until the day after the Commission rejects such Divestiture Agreement(s) or the Closing Date(s) has occurred, whichever is the case; *provided further, however*, that the Divestiture Trustee's authority shall extend for such time until Respondent has completed all of its obligations under Paragraph II.H. of this Order for any particular Asset To Be Divested.
3. The divestiture of the Assets To Be Divested may be made to one or more Commission-approved Acquirers, *provided, however*, that the Wild Oats Associated Intellectual Property shall be divested to only a single Commission-approved Acquirer; *provided further, however*, that any Commission-approved Acquirer of the Wild Oats Associated Intellectual Property may license, at its sole option, any other person(s) to use the Wild Oats Associated Intellectual Property at any location in any place in the United States.
4. Respondent shall provide to the Divestiture Trustee the information listed in Appendix C within ten (10) days of the date the Commission approves the trustee agreement. The Divestiture Trustee shall have reasonable access to the facilities listed in Appendix A and Appendix B. Subject to any demonstrated legally recognized privilege, Respondent shall provide any additional information requested by the Divestiture Trustee that is directly related to the Assets To Be Divested and shall cooperate with the Divestiture Trustee, *provided however*, that Respondent shall not be required to provide income statement and balance sheet financial information (other than as listed in Appendix C and updated quarterly gross sales data by store); other information related to Whole Foods' operation of the store(s); vendor information; any sku-level data; and team member (employee) information and files related to human resources, payroll or benefits. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by

Respondent shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission.

5. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest expeditiously and at a price from each Commission-approved Acquirer not less than zero dollars. Each divestiture shall be made in the manner and to a Commission-approved Acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity for a particular location listed on Appendix A or Appendix B of this Order, and if the Commission determines to approve more than one such acquiring entity for such location, the Divestiture Trustee shall divest to the acquiring entity selected by Respondent from among those approved by the Commission; *provided further, however*, that Respondent shall select such entity within five (5) days after receiving notification of the Commission's approval.
6. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent, on such reasonable and customary terms and conditions as the Commission may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondent, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of the relevant assets that are required to be divested by this Order.
7. Respondent shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.
8. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested.

9. The Divestiture Trustee shall report in writing to Respondent and to the Commission every thirty (30) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
 10. The Divestiture Trustee shall notify Respondent immediately upon signing any letter of intent or other significant event relating to the sale of the Assets To Be Divested that is required to be revealed by Respondent to accurately reflect its financial statements.
 11. Respondent may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- D. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of a proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Divestiture Trustee, Respondent shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- E. Any Divestiture Agreement that has been approved by the Commission between the Divestiture Trustee and a Commission-approved Acquirer shall be deemed incorporated into this Order, and any failure by Respondent to comply with any term of such Divestiture Agreement shall constitute a failure to comply with this Order.
- F. Respondent shall:
1. from the date any Divestiture Agreement is signed, not interfere with the hiring or employing by each Commission-approved Acquirer of Store Employees, and shall remove any impediments or incentives within the control of Respondent that may deter these employees from accepting employment with the Commission-approved Acquirer, including, but not limited to, any non-compete provisions of employment or other contracts with Respondent that would affect the ability or incentive of those individuals to be employed by the Commission-approved Acquirer; *provided, however*, that nothing in this Order shall be construed to require Respondent to terminate the employment of any employee or prevent Respondent from continuing the employment of any employee; *provided further, however*, that nothing in this Order shall be construed to prohibit Respondent from providing any notice required by law or contract to any Store Employee who Respondent may transfer to another of Respondent's stores; and
 2. provide all Store Employees with reasonable financial incentives to continue in their positions until the Closing Date. Such incentives shall include, but are not limited to, a continuation, until the Closing Date, of all employee benefits, including regularly

scheduled raises, bonuses and vesting of pension benefits (as permitted by law and for those Store Employees covered by a pension plan), offered by Respondent.

G. Prior to the each Closing Date, Respondent shall secure all Third Party Consents.

Provided however, that, if within twelve (12) months of the date the Commission approves the trustee agreement described herein, Respondent certifies to the Commission that a landlord is unreasonably withholding its consent to a transfer or assignment of the lease of a particular store location, then the divestiture period is tolled while the Commission reviews the matter. If Respondent demonstrates to the Commission's satisfaction that a landlord is unreasonably withholding its consent to a transfer or assignment of the lease of a particular store location, then, and only then, Respondent may remove that location from the definition of Assets To Be Divested and may substitute a store location to the definition of Assets To Be Divested from the list contained on Confidential Appendix D. Any substitutions of locations shall be made in the order in which the stores appear in Confidential Appendix D. If a substitution is made pursuant to this Paragraph, then the Divestiture Trustee shall have six (6) months from the date Respondent notifies the Divestiture Trustee of the substitution to accomplish the divestiture of the substituted store location, which shall be subject to the prior approval of the Commission. The Divestiture Trustee's period may be extended in the same manner as provided in Paragraph II.C.2.

Provided further, however, that Respondent may seek substitution for store locations only up to the number of stores contained in Confidential Appendix D;

Provided further, however, that Respondent may not seek further substitution for any store that has been added to the Assets To Be Divested from Confidential Appendix D;

Provided further, however, that Respondent shall notify the Divestiture Trustee of any substitution within three (3) days of Respondent's receipt from the Commission of the Commission's acceptance of such substitution;

Provided further, however, that all of Respondent's obligations as to the Assets To Be Divested, including its obligations under Paragraph II.C.4., shall apply to the substitute store as of the date Respondent notifies the Divestiture Trustee of the substitution.

H. Respondent shall make all commercially reasonable efforts to remove as soon as practicable any of Respondent's trademarks, trade dress, service marks, trade names, inventory, and all other proprietary information from the store locations listed in Appendix A of this Order after the Closing Date for each such location, during which time the location will not be open for business, pursuant to the following terms:

1. For a period of not more than ten (10) days after the Closing Date, Respondent shall have exclusive access to the store, during which period Respondent shall use all commercially reasonable efforts to remove as soon as practicable all confidential

business information, including all information technology and operating systems, all human resources, payroll and benefits records, all accounting and financial records, all company policies and directives, and all purchasing information. This exclusive access period shall end when Respondent has removed all confidential business information from the store. *Provided, however,* that Respondent shall also use commercially reasonable efforts to remove as soon as practicable any of Respondent's trademarks, trade dress, service marks, trade names, inventory, and all other proprietary information from the store during such exclusive access period.

2. For a period of not more than twenty (20) days after Respondent has removed the confidential business information from the store, Respondent shall have non-exclusive access to the store, during which period Respondent shall use all commercially reasonable efforts to remove as soon as practicable any remaining trademarks, trade dress, service marks, trade names, inventory, and all other proprietary information from the store. Respondent shall cooperate fully with the Commission-approved Acquirer to coordinate its removal efforts with the Commission-approved Acquirer's efforts to prepare the location for reopening.

Provided, however, that Respondent shall be responsible for all lease and utility costs associated with such store until it has completely removed its assets from such store.

Provided further, however, that Respondent shall not remove any of the Wild Oats Associated Intellectual Property identified in Paragraph I.G.1. of this order.

- I. The purpose of the divestiture of the Assets To Be Divested is to ensure the viable and competitive operation of the Assets To Be Divested in the same business and in the same manner in which the Assets To Be Divested were engaged at the time of the announcement of the proposed acquisition of Wild Oats by Whole Foods and to remedy the lessening of competition alleged in the Commission's complaint.

III.

IT IS FURTHER ORDERED that:

- A. Within thirty (30) days after the date this Order becomes final, and every thirty (30) Days thereafter until Respondent has fully complied with Paragraphs II.A., through II.H, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondent shall submit at the same time a copy of its report concerning compliance with this Order to the Interim Monitor, if any Interim Monitor has been appointed and to the Divestiture Trustee. Respondent shall include in its reports, among other things that are required from time to time, a full description of the efforts being made to comply with the relevant Paragraphs of this Order.

IV.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed (1) dissolution of the Respondent, (2) acquisition, merger or consolidation of Respondent, or (3) any other change in the Respondent that may affect compliance obligations arising out of this Order, including, but not limited to, assignment, the creation or dissolution of subsidiaries, or any other change in Respondent.

V.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondent, Respondent shall, without restraint or interference, permit any duly authorized representative(s) of the Commission:

- A. access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of the Respondent related to compliance with this Order, which copying services shall be provided by the Respondent at its expense; and
- B. to interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.

VI.

IT IS FURTHER ORDERED that this Order shall terminate on May 28, 2019.

By the Commission.

Donald S. Clark
Secretary

SEAL
ISSUED: May 28, 2009

**APPENDIX A
OPERATING LOCATIONS**

Wild Oats Market
2584 Baseline Rd.
Boulder, CO 80305

Alfalpa's
1651 Broadway St.
Boulder, CO 80302

Whole Foods Market
3180 New Center Point
Colorado Springs, CO 80922

Wild Oats Market
4301 Main St.
Kansas City, MO 64111

Whole Foods Market
7250 W. Lake Mead Blvd.
Las Vegas, NV 89128

Wild Oats Market
5910 S. University Blvd.
Littleton, CO 80121

Whole Foods Market
6930 S. Highland Dr.
Cotton Wood Heights, UT 84121

Wild Oats Market
1090 St. Francis Dr.
Santa Fe, NM 87505

Whole Foods Market
8688 East Raintree Drive
Scottsdale, AZ 85260

Whole Foods Market
19440 NW Cornell Rd.
Hillsboro, OR 97124

Whole Foods Market
7133 N. Oracle Rd.
Tucson, AZ 85704

Whole Foods Market
340 N. Main St.
West Hartford, CT 06117

Whole Foods Market
9229 N. Sheridan Blvd.
Westminster, CO 80031

