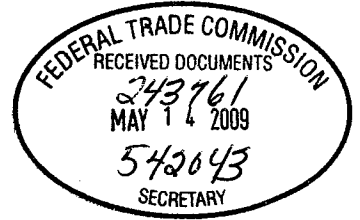


ORIGINAL



UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of )  
 )  
WHOLE FOODS MARKET, INC., )  
 a corporation. )  
 )  
 )  
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 )  
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 )

Docket No. 9324

PUBLIC

**RESPONSE OF WHOLE FOODS MARKET, INC. TO  
GELSON'S MARKETS' MOTION TO ENFORCE PROTECTIVE ORDER**

Gelson's Markets ("Gelson's") has moved for an order enforcing the provisions of the Protective Order entered by the Federal Trade Commission ("FTC") in the FTC's administrative challenge of the acquisition of Wild Oats Markets, Inc. by Whole Foods Market, Inc. ("Whole Foods"). Gelson's seeks the immediate return of the documents subpoenaed in that litigation. Whole Foods has no objection to complying with the Protective Order and returning or destroying Gelson's documents and has so advised counsel for Gelson's. Unfortunately, Whole Foods now faces separate private litigation that may create competing obligations with respect to those documents. *Kottaras v. Whole Foods Market, Inc., no. 1:08-cv-01832 (D.D.C., Paul L. Friedman, U.S.D.J.)*. Gelson's, rather than acknowledging Whole Foods' predicament, has impugned Whole Foods' motives and incorrectly claims that Whole Foods is now in violation of the Protective Order. Whole Foods submits this memorandum to set the record straight.

## BACKGROUND

The Commission is familiar with the substance of the Whole Foods acquisition of Wild Oats and the attendant court and agency proceedings. Whole Foods now faces a putative class action alleging that the acquisition by Whole Foods of Wild Oats was unlawful and that as a result, members of the putative class overpaid for purchases at Whole Foods following the acquisition.<sup>1</sup>

During the course of both the preliminary injunction proceeding in the district court and the administrative proceeding, Whole Foods subpoenaed documents from over 90 suppliers and competing grocery retailers, and received additional third party documents from complaint counsel. All documents produced to Whole Foods are subject to Protective Orders entered by the district court (*See* Exhibit A) as well as by the FTC. (*See* Exhibit B) Each Protective Order requires the return of subpoenaed documents at the conclusion of the proceedings.<sup>2</sup> Whole Foods has since settled with the FTC and anticipates that the proceedings will soon be final.

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<sup>1</sup> Whole Foods denies the allegations of the complaint.

<sup>2</sup> The district court's order provides that "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." (Exhibit A at ¶18) The FTC order provides that "at the conclusion of this proceeding, including the exhaustion of judicial review, the parties shall return documents obtained in this action to their submitters." (Exhibit B at ¶ 12)

Aware of the potential relevance of the subpoenaed documents to the class action and case law governing the preservation of documents,<sup>3</sup> and also aware of the provisions of the Protective Orders, Whole Foods advised class counsel of its obligations under paragraphs 12 and 18 of the Protective Orders. (See Exhibit C) Class counsel immediately asserted that Whole Foods had an obligation to preserve the documents. (See Exhibit D) Whole Foods then advised its competitors and suppliers of class counsel's position.<sup>4</sup> (See Exhibit E) This course of action has evoked a steady stream of correspondence -- so far, from seven competitors and one supplier -- asserting with various degrees of emphasis Whole Foods' obligation to comply with the Protective Orders and return the documents. (See Exhibit F) Gelson's has now sued for enforcement of the FTC Protective Order. Tuesday, class counsel served Whole Foods with two document requests directed at documents subpoenaed from third parties in the underlying merger litigation. Whole Foods is preparing to notify the subpoenaed parties in accordance with the relevant Protective Orders. (See Exhibit A at ¶ 12; Exhibit B at ¶ 11).

Whole Foods is between the proverbial rock and a hard place. Whole Foods cannot satisfy both class counsel and the subpoenaed parties. If it returns the documents pursuant to the Protective Orders, it risks sanctions in the pending litigation. If it retains the documents, it risks sanctions under the Protective Order. Whole Foods has sought guidance

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<sup>3</sup> See, e.g., *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003) (“Anyone who anticipates being a party or is a party to a lawsuit must not destroy unique, relevant evidence that might be useful to an adversary”); *Wagoner v. Black & Decker*, 2006 U.S. Dist. LEXIS 55314 (D. Minn. 2006) (duty to preserve evidence attaches “when a party knows or should know that the evidence is relevant to imminent litigation”).

<sup>4</sup> Whole Foods sent identical letters to each of the approximately 90 parties that had received subpoenas. For purposes of this motion, we have attached only one sample letter.

from Judge Friedman in the *Kottaras* case, but, in the interim, Gelson's filed this motion. (See Exhibit G)(attachments omitted).<sup>5</sup>

## ARGUMENT

### I. Whole Foods Faces Conflicting Obligations

Courts have given increasing attention to defining the duty to preserve documents and other evidence once litigation is reasonably anticipated. *Zubulake*, 220 F.R.D. at 217. When a party is “on notice that documents and information in its possession are relevant to litigation, or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence,” some courts have held that the party must preserve the evidence.<sup>6</sup>

Courts have varied in their formulations of the scope of the duty to preserve. Some courts have stated the duty extends to any evidence that is “material” or is even “potentially relevant” to any party’s claims or defenses or to the subject matter of the litigation.<sup>7</sup> Other courts have expressed the duty as encompassing evidence a party “knows or reasonably should know, is relevant to the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject

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<sup>5</sup> The Exhibits to this response include all the documents that were attached as exhibits to the motion filed by Whole Foods in the district court. We have therefore omitted the exhibits to the district court motion from this brief.

<sup>6</sup> *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72 (S.D.N.Y. 1991) (quoting *Wm. T. Thompson Co. v. Gen. Nutrition Corp.*, 593 F. Supp. 1443, 1455 (C.D. Cal. 1984). See also *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001) (“The obligation to preserve evidence arises when a party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.”).

<sup>7</sup> *Forest Labs., Inc. v. Caraco Pharm. Labs., Ltd.*, No. 06-CV-13143, 2009 WL 998402, at \*2 (E.D. Mich. Apr. 14, 2009) (citations omitted); *Zubulake*, 220 F.R.D. at 218.

of a pending discovery request.” *Turner*, 142 F.R.D. at 72. Myriad sanctions can be imposed for failure to comply with the duty to preserve relevant evidence.

Gelson’s correctly notes that no case explicitly states that the duty to preserve documents extends to the documents of third parties. Similarly, Gelson’s points to no case adopting its theories about “possession” or “control” of documents in this setting or providing comfort that Whole Foods would not risk sanctions by simply returning the documents to it. That is precisely Whole Foods’ dilemma: the case law does not address this issue.<sup>8</sup> It is easy for Gelson’s to be bold in opining on Whole Foods’ obligations here. It does not face potential sanctions for an incorrect prediction as to how the Court in the *Kottaras* litigation would resolve this issue.

As Gelson’s notes, the preservation duty is generally directed toward those documents within a party’s possession, custody, or control. Some case law suggests, however, that a party “controls,” and must therefore preserve documents, “if the party has the practical ability to obtain the documents from another, irrespective of his legal entitlement to the

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<sup>8</sup> Gelson’s incorrectly cites two decisions for the proposition that protective orders may trump preservation subpoenas with respect to third party documents. (Mot. at 9) *In re Lazar*, 28 Fed. R. Serv. 3d 52 (Bankr. C.D. Cal. 1993), was vacated by the district court in *In re Grand Jury Subpoenas Duces Tecum Issued July 28, 1993 by Dye Grand Jury*, Misc. No. 29699, 1993 WL 566341, (C.D. Cal. Oct. 14, 1993). In the subsequent opinion (ignored by Gelson’s) the district court instead held that the subpoenas would be enforced, and it modified the protective order to allow compliance with the grand jury’s investigation. *Id.* at \*1. *In re Baldwin United Corp.*, 46 B.R. 314 (Bankr. S.D. Ohio 1985), determined that preservation was the issue before the court, as opposed to the issue of disclosure of documents. *Id.* at 317. Because the court expected disclosure to become an issue for the district court in the future, it ordered that the bankruptcy examiner “maintain and preserve all documents and other materials received or generated by him during his investigation which are not subject to a claim of privilege.” *Id.* (emphasis added). Neither of these opinions supports Gelson’s position.

documents.” *In re NTL, Inc. Securities Litigation*, 244 F.R.D. 179, 195 (S.D.N.Y. 2007) (quoting *Golden Trade, S.r.L. v. Lee Apparel Co.*, 143 F.R.D. 514 (S.D.N.Y. 1992)). Given this broad formulation of the preservation duty, some courts’ expansive definition of what is relevant, and the potentially disastrous consequences for noncompliance with the duty, Whole Foods should not be faulted for taking a conservative approach and seeking guidance.

Whole Foods recognizes that it has an obligation to comply with the Protective Order in this case. No precedent was found to dictate the appropriate course of action when the duty to preserve evidence competes with a protective order. It is for this reason Whole Foods sought guidance from the district court with respect to documents produced by third parties.

## II. Whole Foods is in Compliance with the FTC Protective Order

First and foremost, Whole Foods has done nothing to violate the Protective Order entered by the FTC. Gelson’s suggests that Whole Foods has violated the Order by “using the documents to assess their relevance to another *unrelated* matter, without receiving a discovery request.” (Mot. at 5) Gelson’s contends that this violates the Protective Order’s provision that documents be used “only for the purposes of the preparation and hearing of this proceeding, or any appeal there from, and for no other purpose whatsoever.” (Ex. B. at ¶8)

The *Kottaras* action is not “unrelated” to the merger proceeding in any meaningful sense of the word for purposes of this motion. The documents were produced in the FTC proceeding challenging the acquisition and now plaintiffs challenge that same acquisition. The potential for relevance within the meaning of Rule 26 is obvious. Gelson’s definition of “use” appears to embrace counsel remembering that it has possession of the documents and attempting to resolve the competing interests raised. That is all Whole Foods has done. This

sort of thought process cannot constitute “use.” Otherwise, a party would violate a protective order virtually every time it thought about confidential documents after the close of a proceeding.

Gelson’s next contends that Whole Foods violates the Protective Order by retaining Gelson’s documents which, it asserts, should be returned “immediately.” (Mot. at 6) As noted above, Whole Foods has no objection to returning the documents but, as even Gelson’s concedes (Mot. at fn. 1), Whole Foods’ obligation to do so has not yet been triggered because the FTC proceeding has not yet concluded.<sup>9</sup> (See Exhibit B at ¶12) Thus, Whole Foods’ retention of the documents does not violate the Protective Order.

Indeed, Whole Foods brought this issue to a head before the Protective Order obligations are triggered, which Gelson’s dubiously characterizes as “inviting” class counsel to subpoena the documents. (Mot. at 7) To the contrary, Whole Foods has attempted to act responsibly by alerting all concerned parties to the situation and providing an opportunity for all to assert their competing claims and resolve them – hopefully in an efficient manner.

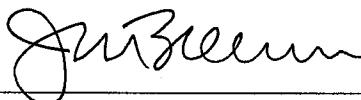
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<sup>9</sup> Gelson’s attempts to rewrite the Protective Order by requiring “immediate” return of the documents. Not only has the administrative proceeding not come to a conclusion, but the protective order does not contain this qualifier even when the duty to return the documents is triggered.

**CONCLUSION**

Whole Foods does not object to returning Gelson's documents after the close of this matter in accordance with the Protective Order entered by the administrative law judge. That day has not yet arrived and so Whole Foods' failure to return the documents thus far does not place it in violation of the Order. Instead, Whole Foods has acted responsibly in attempting to resolve the competing obligations it faces.

Respectfully submitted,



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Carolyn E. Budzinski  
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Washington, D.C. 20006-2401  
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Fax: (202) 261-3333  
jeffrey.brennan@dechert.com  
*Attorneys for Whole Foods Market, Inc.*

Dated: May 14, 2009



**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Response of Whole Foods Market, Inc. to Gelson's Markets' Motion to Enforce Protective Order was served this 14<sup>th</sup> day of May, 2009, on the following persons by the indicated method:

By Hand Delivery:

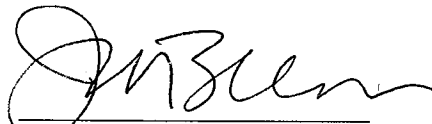
Donald S. Clark, Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

By Hand Delivery:

Alexander Y. Thomas, Esq.  
Reed Smith LLP  
1301 K Street, N.W.  
Washington, D.C. 20005

By Email:

Matthew Reilly, Esq.  
Federal Trade Commission  
601 New Jersey Ave., N.W.  
Washington, D.C., 20580  
mreilly@ftc.gov

  
\_\_\_\_\_  
Jeffrey W. Brennan

Dated: May 14, 2009

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**JEFFREY W. BRENNAN**

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+1 (202) 261-3326 Direct  
+1 (202) 261-3020 Fax

May 14, 2009

**VIA HAND DELIVERY**

Donald S. Clark, Esq.  
Secretary  
Federal Trade Commission  
6th Street and Pennsylvania Ave., NW  
Washington, D.C. 20580

Dear Secretary Clark:

Enclosed please find the Response of Whole Foods Market, Inc. to Gelson's Markets' Motion to Enforce Protective 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,



Jeffrey W. Brennan  
Counsel for Whole Foods Market, Inc.

# EXHIBIT

A

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: 7/1/07

**WE ASK FOR THIS:**

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