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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.

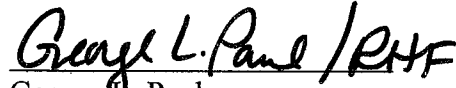
CONCLUSION

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