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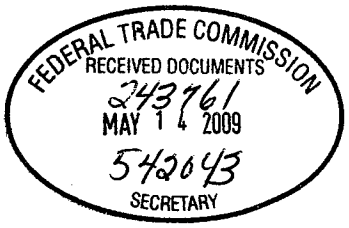

UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of WHOLE FOODS MARKET, INC., a corporation.	)	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.[1]

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.[2] Whole Foods has since settled with the FTC and anticipates that the proceedings will soon be final.

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1 Whole Foods denies the allegations of the complaint.

2 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,[3] 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.[4] (*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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3 *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").

4 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).[5]

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.[6]

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.[7] 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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5 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.

6 *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.").

7 *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.[8] 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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[8] 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.[9] (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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[9] 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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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 14th day of May, 2009, on the following persons by the indicated method:

By Hand Delivery:

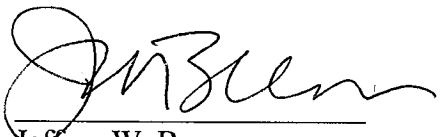
Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

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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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

FEDERAL TRADE COMMISSION

Plaintiff,

v.

WHOLE FOODS MARKET, INC.

and

WILD OATS MARKETS, INC.

Defendants.

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

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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Vinson & Elkins L.L.P.
1455 Pennsylvania Ave., N.W., Suite 600
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aatkins@velaw.com

Counsel for Whole Foods Market, Inc.

WITH ADDITIONAL COPIES TO:

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Bureau of Competition
Federal Trade Commission
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(202) 326-2813
TBrock@FTC.gov

Counsel for the Federal Trade Commission

Clifford H. Aronson
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New York, New York 10036
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caronson@skadden.com

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.	)	Civil Action No. 1:07-CV-01021-PLF
	)	
WHOLE FOODS MARKET, INC.,	)	
	)	
- and -	)	
	)	
WILD OATS MARKETS, INC.,	)	
	)	
Defendants.	)	

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.

_____ Date: _____

Full Name [Typed or Printed]

_____

EXHIBIT
B

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., a corporation.	)	Docket No. 9324

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
C

Dechert LLP

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JEFFREY W. BRENNAN

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April 1, 2009

VIA E-MAIL AND U.S. MAIL

Roy A. Katriel, Esq.
The Katriel Law Firm
1101 30th Street, N.W. Suite 500
Washington, D.C. 20007

Re: Kottaras v. Whole Foods Market, Inc.

Dear Roy:

This is to apprise you of the status of third-party documents produced to Whole Foods Market, Inc. during the course of its two proceedings involving the Federal Trade Commission: *Federal Trade Commission v. Whole Foods Market, Inc.*, CA No. 1:07-CV-01021-PLF (D.D.C.) ("PI case"), and *In the Matter of Whole Foods Market, Inc.*, Docket No. 9324 (Federal Trade Commission) ("Administrative case").

Judge Friedman, in the PI case, and the FTC, in the Administrative case, each entered a protective order governing confidential discovery material obtained during that respective case. A copy of each protective order is attached. Both orders require Whole Foods to return (or, in the PI case, to destroy) third-party documents to their submitters at the conclusion of the case. See PI case order para. 18; Administrative case order para. 12.

On March 6, 2009, Whole Foods entered into a settlement with the FTC, pursuant to which the FTC agreed to a proposed consent order, subject to public comment for 30 days. As part of the settlement, the FTC agreed to file, once the consent order becomes final, a stipulated motion to withdraw with prejudice its

complaint in the PI case. Accordingly, Whole Foods anticipates that the PI case and the Administrative case will each conclude shortly after expiration of the 30-day public comment period that began March 6, 2009.

The conclusion of each case will trigger Whole Foods' protective order obligations regarding third-party documents. Indeed, we have already received requests from certain third parties for return of their documents, even though neither case has yet concluded. Whole Foods is evaluating how to respond to these requests in light of the pending litigation and the potentially competing obligations that it may create. If you intend to assert a preservation obligation as to these documents please give Chris Levin or me a call.

Sincerely,

Jeffrey W. Brennan

cc: Christine C. Levin, Esq.

EXHIBIT
D

THE KATRIEL LAW FIRM, P.L.L.C.
1101 30TH STREET, N.W. SUITE 500
WASHINGTON, D.C. 20007
TELEPHONE: (202) 625-4342
FACSIMILE: (202) 330-5593

April 2, 2009

Dechert LLP
Christine C. Levin, Esq.
Cira Centre
2929 Arch Street
Philadelphia, PA 19104-2808

Re: *Kottaras v. Whole Foods Market, Inc.*

Dear Christine:

I write in response to your colleague Jeffrey Brennan's letter dated yesterday, in which he provides a status update on certain issues pertaining to third-party documents that were produced in the *Whole Foods* Preliminary Injunction and FTC Administrative cases. The letter indicates that as those cases are nearing an end as a result of Whole Foods' settlement with the FTC, Whole Foods is facing obligations pertaining to those documents as a result of protective orders entered in those cases. Specifically, the letter suggests that Whole Foods believes that, under those protective orders, at the upcoming conclusion of those cases, Whole Foods may be required to either destroy or return the third-party documents to their producing parties.

The letter also appears to acknowledge that these documents may be pertinent, discoverable, and relevant in our ongoing litigation in the related case of *Kottaras v. Whole Foods Market, Inc.* You have asked that we clarify whether we intend to seek a preservation obligation of these documents. We do. I left a voicemail message for you to that effect this afternoon, and this letter should also serve as a written confirmation to Whole Foods and its counsel that we are placing Whole Foods on notice of plaintiff Kottaras' intent to have these documents preserved for this litigation. Now that Kottaras' related action is pending against Whole Foods, and that Whole Foods is on notice as to our assessment that these third-party documents are pertinent to her case, we would view any destruction or disposition of these documents by Whole Foods or its counsel as a violation of, *inter alia*, Federal Rule of Civil Procedure 26, as well as ethical obligations under the applicable Rules of Professional Responsibility.

On behalf of our client, we intend to seek appropriate relief from the Court to ensure that these third-party documents are preserved for our client's ongoing litigation. In this regard, we intend to file a motion in this case seeking a Court Order that would direct Whole Foods and its counsel to preserve and maintain the status quo with respect to these documents. Also, we intend to file a motion to intervene in the *Whole Foods* Preliminary Injunction case for the limited

purpose of ensuring that the documents produced by or to parties in that case are preserved for possible production in our related case. Because the third-parties that presumably produced the documents at issue and the FTC, who was a recipient of some of these documents, are not parties in *Kottaras*, but are parties (or intervenors) to the *Whole Foods* Preliminary Injunction case, we believe that this is an appropriate course of action so that any preservation or other Order issued by the Court may apply to and bind all these interested parties. At the same time, I note that Final Judgment has not been entered in the *Whole Foods* Preliminary Injunction case. With the filing of our motion to intervene (which we anticipate filing early next week), no judgment in the *Whole Foods* Preliminary Injunction case will become Final until that intervention motion is adjudicated with finality, including all appeals that may be taken from any Order issued on that motion. My reading of Mr. Brennan's letter and of the Protective Orders referenced in his letter indicates that, in any event, Whole Foods' obligation under the Protective Orders with respect to the disposition of the third-party documents does not begin to run until the *Whole Foods* Preliminary Injunction case is at an end. Because that necessarily cannot occur until our anticipated intervention motion is resolved with finality, it is our position that Whole Foods does not have any authority or duty to dispose of these third-party documents at this time.

I trust that, in light of this letter and our stated intention to seek immediate judicial relief, Whole Foods will not do anything in the interim to affect the status of these documents. We certainly reserve the right to seek appropriate relief, including appropriate sanctions, if the documents were to be destroyed or disposed of while these motions remained pending. As an aside, I note that the Court has scheduled a Status Conference on April 8, 2009 to discuss our dispute with regard to certain terms of the proposed protective order that is to govern this case. I intend to raise the issue referenced in Mr. Brennan's letter with the Court at that time.

I understand from Mr. Brennan's letter that Whole Foods believes it faces "competing obligations" with respect to these third-party documents. I appreciate you calling this circumstance to our attention so that we may seek a resolution that is agreeable to all involved. At the same time, I trust that you understand that we take seriously our right to safeguard the integrity of and our access to these relevant third-party documents.

I invite you to call me if you would like to discuss this matter further.

Sincerely,

Roy A. Katriel, Esq.

Cc: Jeffrey W. Brennan Esq.
Michael D. Braun, Esq.

EXHIBIT
E

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April 23, 2009

VIA FIRST CLASS MAIL

Daniel Z. Herbst, Esq.
Reed Smith LLP
1301 K Street, N.W
Suite 1100 - EastTower
Washington, DC 20005-3373

Re: Third-Party Documents in FTC/Whole Foods Litigation

Dear Mr. Herbst:

This is in regard to documents that Gelson's submitted pursuant to a subpoena issued in one or both of the proceedings *In the Matter of Whole Foods Market, Inc., Docket No. 9324 (Federal Trade Commission)* ("Administrative case"), and *FTC v. Whole Foods Market, Inc., CA No. 1:07-CV-01021-PLF (D.D.C.)* ("Federal case") (collectively, "FTC cases").

In each case, a protective order governs the handling of confidential material obtained from third parties. Both orders provide that Whole Foods is to return (or destroy) third party documents upon conclusion of the case in question. We have reason to believe that both cases will conclude in the coming weeks. Subsequent events, however, preclude Whole Foods from returning your company's documents at that time.

Whole Foods is the defendant in a private class action in the U.S. District Court for the District of Columbia, in which the plaintiff alleges that Whole Foods' acquisition of Wild Oats Markets, Inc. violates Section 7 of the Clayton Act. *Kottaras v. Whole Foods Market, Inc., Case No. 1:08-cv-01832-PLF (D.D.C.)*. The allegations in *Kottaras* are substantially similar to the allegations in the FTC cases.

We have a reasonable belief that your documents received by Whole Foods counsel in the FTC cases may be relevant to the *Kottaras* case. Plaintiff class counsel has expressly asserted a duty to Whole Foods to preserve the documents, and we acknowledge that duty.

Merits discovery has not yet begun in the *Kottaras* case. When, as we anticipate, plaintiff serves Whole Foods with a formal Rule 34 request for production of third-party documents obtained in the FTC cases Whole Foods will timely provide you with the notice required under paragraphs 12 and 18 of the protective orders issued in the Federal and Administrative cases, respectively, and abide by the waiting periods stated therein pertaining to any production of those documents.

For as long as your company's documents remain in our possession, we will of course continue to abide fully with both protective orders.

We appreciate your attention to this matter.

Sincerely,

Jeffrey W. Brennan

FAL

Enclosures

EXHIBIT
F

FAEGRE & BENSON LLP

UNITED STATES | ENGLAND | GERMANY | CHINA

CRAIG COLEMAN
ccoleman@faegre.com
(612) 766-6981

April 29, 2009

BY EMAIL

Jeffrey Brennan, Esq.
Dechert LLP
1775 I Sreet, N.W.
Washington, D.C. 20006-2401
Jeffrey.brennan@dechert.com

Re: Target Corporation's Documents in FTC/Whole Foods Litigation

Dear Mr. Brennan:

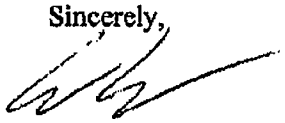
I am responding to your April 23, 2009, letter regarding your firm's decision to retain Target Corporation's documents after the conclusion of *FTC v. Whole Foods Market, Inc.*, CA No. 1:07-CV-01021-PLF (D.D.C.). Target strongly objects to retention of its documents and rejects your assertion that Whole Foods has any justification for retaining highly sensitive documents after conclusion of the litigation.

As you note in your letter, two court orders require Whole Foods to return third-party documents that have been designated as confidential under court protective orders. Your letter does not claim that the existing orders have been modified, nor do you claim that Whole Foods has obtained leave of the court to ignore binding court orders. Your letter does not set forth any justification for refusal to comply with court orders mandating destruction of Target's documents. In particular, nothing in the protective orders can be construed as license to retain Target's confidential documents for use in subsequent litigations, and doing so violates the protections afforded by the protective orders.

Documents from Target in your possession include highly sensitive commercial information, and Target produced that information in reliance on the protective orders. Target reserves all rights and remedies if Whole Foods violates court orders by retaining Target's documents.

Target requests that Whole Foods provide confirmation by May 8 that Target's documents will be destroyed in compliance with the protective orders. I am available to discuss this matter.

Sincerely,



Craig Coleman

COLCS

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Daniel Z. Herbst
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Email: dherbst@reedsmith.com

April 30, 2009

Via Messenger

Jeffrey W. Brennan, Esq.
Dechert LLP
1775 I Street, NW
Washington, DC 20006-2401

Gelson's Confidential Documents in FTC/Whole Foods Administrative Proceeding

I write to respond to your April 23, 2009 letter concerning Dechert LLP's intention to retain confidential documents produced by Gelson's Markets ("Gelson's") in response to Whole Foods Market's subpoena in the Federal Trade Commission adjudicative proceeding *In re Whole Foods Markets, Inc.*, Docket No. 9324. Dechert's retention of Gelson's confidential documents produced pursuant to the administrative subpoena for any purpose beyond the administrative proceeding is in violation of the governing protective order. Accordingly, Gelson's requests that you return all its documents immediately without retaining copies or summaries thereof.[1]

As you know, the protective order governing the FTC proceedings provides that confidential material may only be disclosed to certain prescribed individuals, including outside counsel for Whole Foods. The protective order provides that such disclosure of confidential material to outside counsel "shall be *only for the purposes of the preparation and hearing of this proceeding, or any appeal therefrom, and for no other purpose whatsoever . . .*" Protective Order in Administrative Proceeding, Paragraph 8 (emphasis added). The protective order provides procedures for limited disclosure only "If any party *receives* a discovery request in another proceeding." Protective Order in Administrative Proceeding, Paragraph 11 (emphasis added). As you note in your letter, the protective order also provides that Whole Foods is to return or destroy third party documents at the conclusion of the case.

Retention of Gelson's documents because Dechert has a "reasonable belief that the documents received by Whole Foods' counsel in the FTC case may be relevant to the *Kottaras* case" is not a permissible basis under the protective order. Even assuming Gelson's documents were relevant to the *Kottaras* matter, this is a separate matter and not "preparation and hearing" of the FTC administrative proceeding. Therefore, Dechert plainly is not permitted to retain Gelson's documents under the protective order for this "other purpose."

---

[1] The April 23 letter states that "both cases will conclude in the coming weeks." However, according to several press releases, the Federal Trade Commission and Whole Foods reached a settlement agreement nearly two months ago. As the proceedings have essentially concluded, Gelson's requests the return of all of their documents immediately, in light of your statements suggesting impermissible use of the confidential documents under the protective order.

As outlined in your letter, Whole Foods has yet to "receive" a third party document request and has no basis to initiate the procedures outlined for such disclosures. There are no provisions in the protective order for counsel to retain documents or to disclose them upon suspicion that it may receive a discovery request, only after receipt of a request. Pursuant to the protective order, the documents are to be returned upon conclusion of the FTC proceeding, which Whole Foods resolved in March.

Further, Whole Foods has no "duty to preserve" Gelson's confidential and proprietary documents. Regardless of what Whole Foods' counsel and the plaintiffs in the *Kottaras* case assert, the produced confidential documents are *Gelson's.* Dechert's duty starts and ends with the protective order. Once the documents are returned, the parties later may seek to subpoena documents from Gelson's.

It is clear from the course of conduct that Whole Foods and its counsel desire to retain the Gelson's confidential documents to serve their own ends, which are beyond the scope of the administrative proceedings and protective order. Gelson's produced these documents only in response to Whole Foods' subpoena after it repeatedly articulated its concerns to Whole Foods' counsel James Fishkin concerning production of its store specific sales data and projections – its most critical, confidential and proprietary business records.[2] Gelson's proposed several alternatives to lessen the risks associated with producing its confidential business data. Mr. Fishkin insisted that Whole Foods "needed" the confidential documents as requested for its defenses to the FTC's administrative allegations and rejected all of Gelson's proposals to compromise. Mr. Fishkin assured Gelson's that the protective order was as "strong as it possibly could be" and that they would take all possible steps to protect Gelson's confidential documents. After its compromises were rejected, Gelson's moved for a protective order or to quash Whole Foods' subpoena. The administrative law judge denied the motion because he determined that the protections afforded by the protective order were sufficient to protect Gelson's interests.

Dechert's attempts to expand permissible uses of Gelson's confidential documents beyond the protective order are unfounded and would constitute a clear violation of the protective order. Gelson's demands that counsel return these documents within 5 business days without retaining copies or summaries thereof. If not returned, Gelson's will seek any and all legal remedies available, including reimbursement of legal fees, to enforce the protective order.

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[2] Counsel for Gelson's spoke with James Fishkin from Dechert, counsel for Whole Foods, on October 24, 2008 at 10:30 a.m., November 20, 2008 at 1:00 p.m., and December 5, 2008 at 10:40 a.m. and exchanged written correspondence with Mr. Fishkin on November 19, 2008 and December 2, 2008

Please contact me if you have any questions.

Very truly yours,

Daniel Z. Herbst

DZH:rf

Davis Wright Tremaine LLP

Suite 2300
1300 SW Fifth Avenue
Portland, OR 97201-5630

Robert D. Newell
503.778.5234 tel
503.778.5299 fax

bobnewell@dwt.com

April 28, 2009

Via email: jeffrey.brennan@dechert.com
Jeffrey W. Brennan
Dechert LLP
1775 I Street, NW
Washington, DC 20006-2401

Re: New Seasons Market Subpoena
In the Matter of Whole Foods Market, Inc. / Federal Trade Commission

Dear Mr. Brennan:

Further to my email to your partner Jim Fishkin and in response to your letter of April 23, 2009, I hereby demand on behalf of my client New Seasons Market the immediate return of all documents produced by New Seasons in the FTC cases referenced in your letter. We believe that the immediate return of all such documents is mandated by the protective order in reliance upon which New Seasons Market produced those documents.

We look forward to your prompt compliance with the order and with our demand.

Very truly yours,

Davis Wright Tremaine LLP

Robert D. Newell

cc: Brian Rohter (via email)

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April 28, 2009

Jeffrey W. Brennan
Dechert L.L.P.
1775 I Street, N.W.
Washington, D.C. 20006-2401

Re: **Third-Party Documents in FTC/Whole Foods Litigation**

Dear Mr. Brennan:

I am in receipt of your letter dated April 28, 2009 regarding future use of documents submitted by Schnuck Markets, Inc. ("SMI") in response to a subpoena issued in the following proceedings: In the Matter of Whole Foods Market, Inc., Docket No. 9324 (Federal Trade Commission) and FTC v. Whole Foods Market, Inc., CA No. 1:07-CV-01021 PLF (D.D.C.) ("the FTC/Whole Foods proceedings").

As acknowledged in your letter, the handling and future use of SMI's confidential documents is governed by a protective order issued by the Federal Trade Commission ("FTC") on October 8, 2008. This order provides that all documents and all copies and portions of documents subject to the protective order are to be returned to SMI's counsel upon completion of the FTC proceedings. See Protective Order, at ¶ 12.

Please be advised that SMI does not consent to your use or disclosure of these documents in the case of Kotteras v. Whole Foods Market, Inc., Case No. 1:08-CV-01832-PLF (D.D.C.), or any other matter. Moreover, pursuant to the terms of the protective order, you are not permitted to disclose SMI's confidential documents and/or information to anyone other than those individuals identified by the protective order. See Protective Order, at ¶ 7. You are under the ongoing obligation to return all documents, copies, and information provided by SMI to SMI's counsel upon completion of the FTC proceedings.

If you have any questions, please do not hesitate to contact me.

Sincerely,

GREENSFELDER, HEMKER & GALE, P.C.

By Edward M. Goldenhersh

Edward M. Goldenhersh

EMG/mrb
1128212

cc: Brian Brink, Esq.

Brennan, Jeffrey

From: Justin.Mallot@treeoflife.com
Sent: Thursday, April 30, 2009 4:02 PM
To: Brennan, Jeffrey
Cc: Kelly.Kosmin@treeoflife.com; Cynthia.Kippur@treeoflife.com
Subject: Whole Foods Litigation - Document Retention

Jeff:

This email follows our conversation concerning documents produced by Tree of Life, Inc. ("TOL") pursuant to Whole Foods' subpoena in the FTC administrative action, FTC Docket No. 9324. As discussed, TOL objects to the retention of documents by Dechert and/or Whole Foods beyond any time periods provided in the Protective Order in place in that matter. I understand the concern and request by plaintiffs in the class action suit against Whole Foods; however, according to the Protective Order, such documents were not to be used beyond the scope of the FTC administrative action. Indeed, TOL only agreed to produce the highly sensitive materials because the Protective Order was in place.

Therefore, Tree of Life requests that you return all materials produced to you upon the conclusion of the FTC matter as provided in the Protective Order. Should you have any comments, questions or concerns, do not hesitate to contact me.

Thanks,

Justin A. Mallot
Corporate Counsel

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405 Golfway West Drive
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ph: 904-940-2127
fx: 904-940-2410
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Arent Fox

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202.857.6493 DIRECT
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evans.david@arentfox.com

May 5, 2009

VIA UNITED STATES FIRST CLASS MAIL

Jeffrey W. Brennan, Esq.
Dechert LLP
1775 I Street, NW
Washington, D.C. 20006-2401

Re: The Fresh Market, Inc.

Dear Mr. Brennan:

Thank you for your letter of April 23, 2009, regarding the documents and other information The Fresh Market, Inc. (**TFM**), produced pursuant to various subpoenas and civil investigative demands in the matters *In the Matter of Whole Foods Market, Inc.*, Docket No. 9324 (Federal Trade Commission)(**Administrative Case**) and *FTC v. Whole Foods Market, Inc.*, CA No. 1: 07-CV-01021-PLF (D. D. C.)(**District Court Case**).

In your letter, you indicated that Whole Foods, Inc. (**Whole Foods**) is a defendant in a private class action in the United States District Court for the District of Columbia, *Kottaras v. Whole Foods Market, Inc.*, Case No. 1: 08-cv-01832-PLF (D.D.C.)(**Kottaras Case**). You further indicated that the plaintiffs in that case are alleging that Whole Foods' acquisition of Wild Oats violates Section 7 of the Clayton Act. You stated that the allegations in the Kottaras Case are substantially similar to those in the Administrative and District Court Cases. You further stated that you have a reasonable belief that TFM's documents and other information may be relevant in the Kottaras Case, that plaintiffs' counsel in the Kottaras Case have asserted a duty to Whole Foods to preserve the documents, and that you have acknowledged that duty. You speculated that you might receive discovery requests from the plaintiffs in the Kottaras Case but stated that you had yet not received those requests. You did acknowledge that the protective orders in the Administrative and the District Court Cases require Whole Foods and its agents to return or destroy all of TFM's documents and other information, including expert reports that contain or otherwise reflect TFM's information, in its possession, custody or control at the conclusion of those matters. You concluded by informing us that you will not be returning any of TFM's documents or information. You suggested that was so because you believe that the duty to preserve the documents imposed in the Kottaras Case supersedes the explicit order of the court in both the Administrative and District Court Cases.

Arent Fox

As your letter acknowledges, one of Whole Foods' duties under the protective orders is to return to TFM at the conclusion of the Administrative and District Court Cases all documents and information provided by TFM. Whole Foods' duty to preserve documents now in its possession with respect to the Kottaras Case does not supersede the duties imposed by the protective orders with respect to TFM's documents. Nevertheless, TFM understands that the plaintiff in the Kottaras Case might not agree. Litigating this issue would be costly. And, as we understand, the plaintiff in the Kottaras Case has not yet propounded discovery. TFM is not presently demanding the return of its documents and information pursuant to the protective order, but TFM reserves its right to do so in the future.

TFM is a Non-Party to both this transaction and this litigation and has devoted significant time and effort in accommodating Whole Foods and the government. TFM stands to suffer significant competitive harm if its documents and information are shared with competitors, including Whole Foods' business people and the plaintiff in the Kottaras Case. Please be reminded that Whole Foods is required to prevent disclosure of TFM's documents and information to Whole Foods' in-house and business people; that you are required to obtain return of all documents that contain, refer or relate to TFM's documents or information from experts who have concluded their role; that Whole Foods is prohibited from using the information provided by TFM for any purpose (including the defense of the Kottaras Case) other than defense of the nearly concluded Administrative and District Court Cases; and that Whole Foods' duties under the protective order continue after the Administrative and District Court Cases are concluded. We expect that you and Whole Foods will continue to abide by the protective orders so long as TFM's documents and information are in your or Whole Foods' possession, custody or control, and that you will immediately inform us of any request from a third party that would require Whole Foods or its counsel to produce TFM's documents or information.

Very truly yours,

David H. Evans

KOLEYJESSEN.COM

KOLEY JESSEN P.C., L.L.O.
ATTORNEYS AT LAW
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FAX. 402.390.9005

KOLEY ■ JESSEN

May 5, 2009

VIA E-MAIL TRANSMISSION AND REGULAR U.S. MAIL
jeffrey.brennan@dechert.com

Jeffrey W. Brennan
Dechert, LLP
1775 I Street, N.W.
Washington, DC 20006-2401

Re: Third-Party Documents in FTC/Whole Foods Litigation
Our File No. 11105-0000

Dear Mr. Brennan:

We represent Bag 'N Save, Inc. with respect to your letter of April 23, 2009, regarding you and your client's continued retention of the records we produced in the "Administrative Case" notwithstanding your belief that the matter will be concluded in the coming weeks.[1] Under the Protective Order in the "Administrative Case", you are required to forward the documents to us once the matter is concluded. Notwithstanding the fact that you have not received any discovery requests, as the Order contemplates, you believe you are entitled to retain the documents for potential responsive discovery purposes in the class action case you described in your letter. We do not believe the Protective Order applies to potential discovery requests but only to actual discovery requests. Accordingly, we believe that should the "Administrative Case" conclude in the upcoming weeks, you are obligated to comply with the Protective Order in the absence of any outstanding discovery requests.

To the extent the plaintiff in the class action suit seeks those materials from my client, we can address that at that time. In this regard, we do not believe the alleged "duty" you reference in the fourth paragraph of your letter trumps the Order entered into by the Commission under the basis of which we provided you the documents.

[1] Please note that my name is Michael C. Cox not "Fox".

MICHAEL C. COX
DIRECT. 402.343.3703
MIKE.COX@KOLEYJESSEN.COM

Please contact me to discuss this matter at your earliest convenience.

Very truly yours,

Mike

Michael C. Cox

MCC/pjs

Cc: Leon Shrago

ANTOINETTE M. COAKLEY
Director of Business Law
Ahold USA, Inc.
c/o The Stop & Shop Supermarket Company LLC
1385 Hancock Street
Quincy, MA 02169
617-770-6424
617-770-6980 - Fax

May 11, 2009

VIA EMAIL AND FIRST CLASS MAIL

Jeffrey W. Brennan, Esq.
Dechert LLP
1775 I Street, NW
Washington, DC 20006-2401

Re: Ahold U.S.A., Inc. – Demand for Return of Confidential Records

Dear Attorney Brennan:

This letter is in response to your April 23, 2009 letter to me. Ahold U.S.A., Inc. ("Ahold") produced documents and other information containing confidential material on behalf of itself and its retail operating companies pursuant to a subpoena from Whole Foods Market, Inc. ("Whole Foods") in the administrative proceeding *In the Matter of Whole Foods Market, Inc.*, Docket No. 9324 (Federal Trade Commission) and the related matter of *FTC v. Whole Foods Market, Inc.*, CA No. 1:07-CV-01021-PLF (D.D.C.) (collectively the "Cases").

As you noted in your April 23, 2009 letter, Protective Orders in the Cases govern the handling of the confidential material obtained from Ahold, and the Protective Orders require Whole Foods to return Ahold's confidential material at the conclusion of the Cases. You also indicated that both Cases soon will conclude.

All the documents and information produced to Whole Foods by Ahold were designated as confidential materials pursuant to the Protective Orders. Consequently, Ahold demands that Whole Foods return all Ahold documents and information in its possession, custody or control as soon as possible, or in any event, within ten (10) business days of the conclusion of the Cases. At that time, Ahold also demands that Whole Foods certify that: (i) all copies of Ahold documents and information were returned to Ahold; and (ii) no copies or summaries were retained by Whole Foods, any experts or consultants working for Whole Foods, or any other party covered by the Protective Orders that received any Ahold documents or information from Whole Foods.

Whole Foods has a duty to comply with the Protective Orders and return Ahold's confidential material at the conclusion of the Cases, notwithstanding Whole Foods involvement in other matters not covered by the Protective Orders. Whole Foods' agreement in another matter with Plaintiff class counsel to preserve Ahold's confidential material violates the Protective Orders and ignores Ahold's rights to protect its confidential material. Ahold is in the best position to determine if any obligation to preserve Ahold's own confidential material exists. If so, Ahold will comply with all applicable rules and regulations regarding the preservation of the confidential material.

Ahold USA

ANTOINETTE M. COAKLEY
Director of Business Law
Ahold USA, Inc.
c/o The Stop & Shop Supermarket Company LLC
1385 Hancock Street
Quincy, MA 02169
617-770-6424
617-770-6980 - Fax

At the conclusion of the Cases, Whole Foods should return Ahold's confidential materials and the certification of compliance with the Protective Orders to me at:

Antoinette M. Coakley, Esq.
Director of Business Law
Ahold U.S.A., Inc.
1385 Hancock Street
Quincy, MA 02169
Phone: 617-770-6424 (tel.)
Email: acoakley@aholdusa.com

Please contact me if you have any questions. Thank you.

Sincerely,

Antoinette M. Coakley

Antoinette M. Coakley, Esq.
Director, Business Law

EXHIBIT
G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EKATERINI KOTTARAS, individually On Behalf Of Herself And On Behalf Of All Others Similarly Situated	
V.	
WHOLE FOODS MARKET, INC.	Case: 1:08-cv-01832 Assigned To: Friedman, Paul L. Assign. Date: 10/27/2008 Description: Antitrust

MOTION FOR DIRECTION WITH RESPECT TO THIRD PARTY DOCUMENTS

Whole Foods Market, Inc. ("Whole Foods") moves the Court for an Order establishing a procedure for determining the disposition of certain documents produced by third parties in the underlying merger litigation. The grounds for the motion are more fully set forth in the accompanying Memorandum.

Respectfully submitted,

/s/ Jeffrey W. Brennan

Jeffrey W. Brennan (DC Bar No. 447438)
Christine C. Levin (*Pro Hac Vice*)
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jeffrey.brennan@dechert.com
Attorneys for Whole Foods Market, Inc.

Dated: May 1, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EKATERINI KOTTARAS, individually On Behalf Of Herself And On Behalf Of All Others Similarly Situated	
V.	
WHOLE FOODS MARKET, INC.	Case: 1:08-cv-01832 Assigned To: Friedman, Paul L. Assign. Date: 10/27/2008 Description: Antitrust

MEMORANDUM IN SUPPORT OF MOTION FOR DIRECTION WITH RESPECT TO THIRD PARTY DOCUMENTS

Whole Foods Market, Inc. ("Whole Foods") moves the Court for an order establishing a procedure by which a determination will be made as to the disposition of certain documents subpoenaed in the underlying merger litigation. Whole Foods finds itself in the untenable position of being asked to respond to conflicting demands with respect to those documents: the parties that produced the documents pursuant to subpoena demand their return, pursuant to the governing Protective Order, and class counsel in this action demands that they be preserved. Whole Foods does not oppose returning the documents but cannot take any action without risking a motion for sanctions by either the third parties or class counsel. Accordingly, Whole Foods suggests that the Court establish a procedure for resolving the dispute.

BACKGROUND

As the Court knows, this putative class action arises out of the acquisition by Whole Foods of Wild Oats Markets, Inc. ("Wild Oats"). The Federal Trade Commission

("FTC") challenged the acquisition. This Court denied the FTC's request for a preliminary injunction and the acquisition went forward. The Court of Appeals reversed this Court's decision and remanded to this Court for further proceedings. At the same time, the FTC elected to pursue its administrative proceeding. Plaintiff alleges that the acquisition was wrongful and that as a result she and members of the putative class overpaid for purchases at Whole Foods following the acquisition.[1]

During the course of both the preliminary injunction proceeding and the administrative proceeding following the remand, Whole Foods subpoenaed documents from over 90 suppliers and competing grocery retailers, and received additional third party documents from the FTC. All documents produced to Whole Foods are subject to Protective Orders entered by this 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.[2] Whole Foods has since settled with the FTC and anticipates that the proceedings will soon be final.

Aware of the potential relevance of the subpoenaed documents to this case and case law governing the preservation of documents,[3] and also aware of the provisions of the

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1 Whole Foods denies the allegations of the complaint and believes that the class should not be certified.

2 This 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)

3 *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

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. (*See* Exhibit E)[4] This course of action has evoked a steady stream of correspondence – so far, from four 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) Whole Foods is between the proverbial rock and a hard place.

ARGUMENT

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 is willing to proceed in any manner directed by the Court but proposes that the Court enter an order, which Whole Foods will serve on all interested parties, establishing a schedule for briefing the issues. If the Court believes it is more appropriate for this issue to be resolved by the FTC, Whole Foods will initiate those proceedings instead. In the interim, Whole Foods will abide by the Court's direction with respect to the documents.

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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").

4 Whole Foods sent identical letters to each of the approximately 90 parties that had produced documents. For purposes of this motion, we have attached only one sample letter.

CONCLUSION

For all of the foregoing reasons, Whole Foods requests that the Court enter an order establishing a schedule for resolving disposition of documents received by Whole Foods in the underlying merger litigation.

Respectfully submitted,

/s/ Jeffrey W. Brennan
Jeffrey W. Brennan (DC Bar No. 447438)
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Attorneys for Whole Foods Market, Inc.

Dated: May 1, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EKATERINI KOTTARAS, individually On Behalf Of Herself And On Behalf Of All Others Similarly Situated	
V.	
WHOLE FOODS MARKET, INC.	Case: 1:08-cv-01832 Assigned To: Friedman, Paul L. Assign. Date: 10/27/2008 Description: Antitrust

PROPOSED ORDER

AND NOW, this _____ day of May, 2009, upon consideration of Whole Foods Market Inc.'s Motion for Direction With Respect to Third Party Documents, and the response thereto, it is hereby ORDERED as follows:

(1) Any party seeking to enforce the terms of the Protective Orders entered in *In the Matter of Whole Foods Market, Inc., Docket No. 9324 (Federal Trade Commission)* ("Administrative Case") or *FTC v. Whole Foods Market, Inc., CA No. 1:07-CV-01021-PLF (D.D.C)* ("Federal Case") with respect to subpoenaed documents shall file a motion and memorandum of law on or before May _____, 2009.

(2) Any party opposing such motions shall file a response no later than May _____, 2009.

(3) Whole Foods shall serve a copy of this Order on each party that produced documents subject to a Protective Order in either the Administrative or Federal Cases within seven business days of the date hereof.

SO ORDERED:

_____

Paul L. Friedman, U.S.D.J.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Motion For Direction With Respect to Third Party Documents, Memorandum in Support, Exhibits, and Proposed Order were served this 1st day of May, 2009, by operation of the Court's Electronic Filing System on counsel for plaintiff:

Roy A. Katriel
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1101 30th Street, NW
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Michael D. Braun
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/s/ Jeffrey W. Brennan
Jeffrey W. Brennan

Dated: May 1, 2009