

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

In the Matter of)	
WHOLE FOODS MARKET, INC.,)	Docket No. 9324
a corporation.)	Public
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GELSON’S MARKETS’ MOTION TO ENFORCE PROTECTIVE ORDER

Gelson’s Markets (“Gelson’s”) respectfully requests that the Commission enforce the “Protective Order Governing Confidential Material” (“protective order”) in *In re Whole Foods Markets, Inc.*, Docket No. 9324. Whole Foods Markets, Inc. (“Whole Foods”) and its outside counsel have violated the protective order by using Gelson’s confidential documents for purposes that are outside the scope of the administrative proceeding. Moreover, because the current adjudication before the Commission has been withdrawn in advance of the Commission’s final acceptance of the March 6, 2009 consent orders, Whole Foods’ need for Gelson’s documents “to prepare for the hearing” has been extinguished. Accordingly, Gelson’s requests that this Commission enforce the protective order and direct Whole Foods’ counsel to return all of Gelson’s documents immediately without retaining copies or summaries thereof.

I. BACKGROUND

On June 28, 2007, the Federal Trade Commission (“FTC”) instituted an administrative action against Whole Foods, *In re Whole Foods Markets, Inc.*, Docket No. 9324, which challenged the legality of Whole Foods’ acquisition of Wild Oats Markets, Inc. (“Wild Oats”). Gelson’s, which operates eighteen premium grocery markets in Southern California, did not have any involvement in the facts and circumstances related to the Wild Oats acquisition by Whole Foods merger, or the administrative process related thereto.

On October 15, 2008, Whole Foods subpoenaed Gelson's in the FTC adjudication (a true and correct copy of the Subpoena is attached as Exhibit 1). Whole Foods' subpoena broadly sought Gelson's highly confidential and sensitive commercial information – weekly, store-specific sales data and projections, high level strategic planning documents, and other highly confidential and proprietary business materials and trade secrets. Gelson's objected to the dissemination of these critical proprietary documents and trade secrets on several grounds. Gelson's chief objection was that the disclosure of this information to Whole Foods, any other competitor, or to the public would provide a blueprint to Gelson's business strategies and operations that would give competitors an unfair competitive advantage which would threaten Gelson's business interests. Moreover, Gelson's argued that the protective order failed to adequately protect its interests.

Gelson's repeatedly articulated these objections to Whole Foods' counsel. Gelson's proposed several alternatives to lessen the risks associated with producing its confidential business data and trade secrets. Counsel for Whole Foods insisted that Gelson's documents were integral to its defenses *to the FTC's administrative allegations*, and rejected all of Gelson's proposals to compromise.

After its compromises were rejected, Gelson's moved to quash Whole Foods' subpoena before administrative law judge D. Michael Chappell. Gelson's argued that the protective order was not strong enough to ensure protection of its confidential information and objected to dissemination of its confidential documents, especially to Whole Foods, which Gelson's argued had demonstrated predatory business practices in Southern California. Judge Chappell denied Gelson's motion to quash upon a determination that the protective order issued by Secretary Donald Clark on October 10, 2008 for "the purpose of protecting the interest of the parties and

third parties” was sufficient to protect Gelson’s interests (a true and correct copy of the protective order is attached as Exhibit 2).

Gelson’s was ordered to produce documents by December 31, 2008 and on December 28, 2008, complied with Judge Chappell’s Order. Gelson’s designated the documents it produced as “confidential” under the protective order and labeled them “CONFIDENTIAL- FTC Docket No. 9234.”

On March 6, 2009, Whole Foods and the FTC publicly announced a resolution of the administrative action concerning the Whole Foods/Wild Oats merger and parallel action in federal court. On March 6, the Commission withdrew the Whole Foods matter from the adjudicative process pending the final acceptance of the consent order by the Commission.

On April 23, 2009, counsel for Whole Foods sent Gelson’s a letter wherein Whole Foods asserted that it intended to retain all of Gelson’s confidential documents for an indefinite period of time because counsel reasonably believes the documents may be relevant to a lawsuit currently pending in the United States District Court for the District of Columbia: *Kottaras v. Whole Foods*, docket no. 1:08-cv-01832 (a true and correct copy of the letter is attached as Exhibit 3).

On April 30, 2009, Gelson’s responded and demanded the return of its documents because Whole Food’s purported use of them was outside the scope of the protective order. On May 1, 2009, counsel for Whole Foods informed Gelson’s counsel that it would not return Gelson’s documents as demanded. Whole Foods’ counsel also disclosed to counsel for Gelson’s that Whole Foods had submitted a motion to the United States District Court for the District of Columbia which “sought direction” with respect to Gelson’s and other third party’s confidential

documents. That motion discloses the fact that the third party documents currently under the Commission's protective order could only be produced pursuant to a document request or subpoena by the plaintiffs. Thus, the effect of the motion is to elicit from the plaintiffs in *Kottaras* a request or subpoena for the documents. Whole Foods' motion deprives Gelson's of the protections afforded by the protective order because Gelson's is not a party to the private class action and has no means to enforce protection in the District Court given that no subpoena has been served on Gelson's in that matter.

At this time, Gelson's moves the Commission to enforce its protective order by requiring Whole Foods and its counsel to comply with the order and immediately return Gelson's documents without retaining copies or summaries.

II. ARGUMENT

A. Whole Foods' Use of Gelson's Confidential Documents For Impermissible Purposes Violates the Protective Order

- 1. The protective order prohibits use of confidential documents for any purpose beyond the administrative proceeding and requires Whole Foods to return such documents upon the conclusion of the administrative matter*

Whole Foods' violation of the protective order governing the FTC proceedings could not be more clear cut. The protective order unequivocally provides that confidential material may only be disclosed to certain prescribed individuals, including outside counsel for Whole Foods. Protective Order, ¶ 7. The protective order further 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, ¶ 8 (emphasis added). It contains procedures for limited disclosure only "if any party *receives* a discovery request in another proceeding." Protective Order, ¶ 11 (emphasis added).

Under the protective order, any party receiving confidential documents shall return all third party documents at the conclusion of the proceeding. Protective Order, ¶ 12.

2. *Whole Foods' has used Gelson's confidential documents for a purpose not permitted under the protective order*

Whole Foods has violated the protective order by using Gelson's confidential documents for purposes not permitted under the protective order in using the documents to assess their relevance to another, unrelated matter, without receiving a discovery request. Whole Foods also made Gelson's confidential documents the subject of a motion to the District Court to ascertain its outside counsel's duty of preservation in that unrelated matter, and invited other parties that are not involved with the FTC adjudication to request the documents as part of the discovery in the class action. Whole Foods and its counsel may not use Gelson's confidential documents for these purposes under the clear limits of the protective order. Whole Foods' counsel is a temporary custodian of Gelson's confidential documents, and was provided those documents solely for the purpose of preparing for the administrative hearing. As Whole Foods has now used Gelson's confidential documents for purposes that are not permitted under the subpoena, it must be forced to comply with the protective order and to immediately return all of Gelson's confidential documents to ensure that they receive proper protections.

3. *Whole Foods' counsel's retention of Gelson's confidential documents violates the protective order*

Furthermore, retention of Gelson's documents after the conclusion of the proceeding because Whole Foods' counsel 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 use under the protective order. The duties and limits on the use of third party confidential documents are unequivocal. Even assuming Gelson's documents were relevant to the *Kottaras* matter, this

asserted purpose relates to a separate matter and is not “preparation and hearing” of the FTC administrative proceeding. Whole Foods’ counsel plainly is not permitted to retain Gelson’s documents under the protective order for this purpose, as it has made clear is its intention.

The administrative action *In re Whole Foods Markets, Inc.*, Docket No. 9324 has concluded. The FTC and Whole Foods issued a formal press release on March 6, 2009, detailing a settlement agreement resolving the administrative adjudication and federal litigation. On March 6, the parties entered a public order and settlement agreement with the Commission, and the Commission withdrew the proceeding from adjudication. The parties have not adjudicated the matter since that date. The time for public comment concluded and Whole Foods counsel indicated in its letter on April 23, 2009, that the administrative proceeding had been finalized and would conclude in the coming days when the Commission votes to give its final approval. There is and has not been any “preparation and hearing of this proceeding,” nor plan to appeal the outcome. Therefore, the part of the proceedings wherein Whole Foods would use Gelson’s documents has come to a close, and the entire adjudication itself is set to conclude imminently. For this reason, Whole Foods no longer has any use for the Gelson’s documents related to this proceeding. Under the terms of the protective order, Gelson’s confidential documents should be returned to Gelson’s immediately.¹

Further, counsel cannot retain documents simply upon suspicion of a third party document request. 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

¹ Alternatively, should the Commission determine that the proceedings are not “concluded” and that Whole Foods and counsel have not violated the protective order, Gelson’s requests an order directing Whole Foods’ counsel to return Gelson’s confidential documents *immediately* upon entry of the final order.

protective order for counsel to retain documents or to disclose them upon suspicion that it may receive a discovery request, only after *receipt* of such a request. By inviting other parties not involved with the FTC matter to request Gelson's documents as part of the discovery in a class action, Whole Foods and its counsel have not only violated the protective order, but exacerbated the need for immediate enforcement of the protective order to avoid harm to Gelson's. Whole Foods cannot deprive Gelson's of the protections it is afforded under the protective order upon suspicion of relevance. The protective order clearly articulates Whole Foods' counsel's obligations.

Pursuant to the protective order, Gelson's confidential documents produced in response to Whole Foods subpoena in the FTC administrative proceeding must be returned immediately.

B. Whole Foods Has No Duty to Preserve Gelson's Confidential Documents and Must Obey the Protective Order

1. Whole Foods and its counsel have no duty to preserve Gelson's confidential documents

Notwithstanding Whole Foods' and its counsel's violation of the protective order, they have no "duty to preserve" Gelson's confidential and proprietary documents. Whole Foods has not and cannot point to any precedent, which imposes a duty upon a party or its counsel to violate a protective order by retaining documents that belong to a third party. The most cited spoliation and preservation cases articulate a duty with respect to a party's own documents and those of its agents. *See, e.g., Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003). Whole Foods and its counsel are not agents of Gelson's. Counsel merely has temporary access to Gelson's confidential documents subject to the protective order. Class plaintiffs and Whole Foods have not cited a single case that would suggest that the duty applies to a third party's documents

obtained by subpoena in another litigation, let alone third party confidential documents subject to a protective order.

In addition, Gelson's confidential documents belong to *Gelson's* and are not "possessed" or "controlled" by Whole Foods or its counsel. Whole Foods cannot have any duty to preserve Gelson's documents because it is not permitted to access the documents under the protective order. Whole Foods' outside counsel also does not actually "possess" Gelson's documents in a way that would attach a duty of preservation. Outside counsel serves as a temporary custodian of Gelson's confidential documents subject to the limits of the protective order. Outside counsel could not otherwise possess Gelson's confidential documents and would not have access to them. Whole Foods' counsel could not implement a "discovery hold" over the documents or be held for accountable for spoliation of Gelson's documents. Counsel's duty with respect to Gelson's confidential documents begins and ends with the protective order and it cannot obtain duties beyond the limited scope in which it has obtained temporary custody. Gelson's documents are subject to the Commission's jurisdiction and protections as outlined in the protective order and are not subject to the control of Whole Foods, its counsel, or the District Court in the *Kottaras* case. Accordingly, Whole Foods and its counsel have no duty to retain Gelson's confidential documents, but only to uphold the protective order as enforced by the Commission.

2. *The protective order should be enforced against a duty to preserve unless Whole Foods can show extraordinary circumstances or a compelling need.*

The terms of a protective order should be enforced, absent a showing of improvidence in granting the order or some extraordinary circumstance or compelling need. *Minpeco S.A. v. Conticommodity Services, Inc.*, 832 F.2d 739, 742 (2d Cir. 1987); *Palmieri v. New York*, 779 F.2d 861 (2d Cir. 1985); *Martindell v. ITT*, 594 F.2d 291 (2d Cir. 1979). Neither Whole Foods

nor class plaintiffs have shown extraordinary circumstances necessary to modify the existing protective order. Whole Foods and class plaintiffs rely on overarching principles of document preservation to suggest that because the documents “may be relevant” they need not comply with the protective order. This assumption ignores the fact that the protective order clearly and unequivocally protects Gelson’s confidential documents from disclosure or use for purposes beyond the FTC adjudication.

Moreover, courts have held that when someone has possession of a third party’s documents, but those documents were obtained pursuant to a protective order, a preservation subpoena in a separate case is not sufficient to trump the protective order. *See, e.g. In re Baldwin United Corp.*, 46 Bankr. 314 (Bankr. S.D. Ohio 1985) (refusing to require a bankruptcy examiner to preserve documents based on presumed interest in those documents by class action plaintiff); *see also In re Lazar*, 28 Fed. R. Serv. 3d (Callaghan) 52 (Bankr. D. Cal. 1993) (preventing a bankruptcy examiner from disclosing third party documents to a grand jury, because the documents were under a protective order, and the grand jury could have subpoenaed the documents directly from the subject of the investigation). Although these cases involved bankruptcy proceedings, the harm at issue is the same as in the present case – namely that requiring a party to preserve documents subject to a protective order would circumvent the normal course of discovery, and would limit the ability of the third party to exercise its rights to the fullest extent permitted by law. *Baldwin*, 46 Bankr. at 317; *explained by In re Gitto/Global Corp.*, 321 B.R. 367 (Bankr. D. Mass. 2005).

By allowing Whole Foods and its counsel to ignore the duty to uphold the protective order, where the protective order formed the basis for Judge Chappell’s compelled production of Gelson’s confidential and proprietary documents, Gelson’s rights and proprietary interests would

be harmed. Gelson's has expressed its clear objections to the dissemination of its confidential documents and the real dangers that would occur if its documents were disseminated. Upon considering Gelson's objections, Judge Chappell determined that the limitations on the use of the documents in the protective order were sufficient to protect Gelson's rights and rejected its objections. Whole Foods and putative class plaintiffs cannot seek to modify the protective order *post hoc* absent extraordinary circumstances, where the risk of harm from dissemination to Gelson's is so significant.

It is clear that Whole Foods seeks to utilize Gelson's highly sensitive documents to unfairly compete with Gelson's. By publicly encouraging other parties to seek production of Gelson's documents, Whole Foods encourages release of documents, which Gelson's has identified as highly confidential and raised serious concern over their release. Whole Foods should not be allowed to ignore the clear limits on the use of Gelson's confidential documents by seeking to elicit third party subpoenas.

Finally, there is no risk of spoliation of evidence because Whole Foods' counsel need not destroy Gelson's confidential documents under the protective order, but instead only return them to Gelson's. Once the documents are returned, the parties to the class action later may seek to subpoena documents from Gelson's.

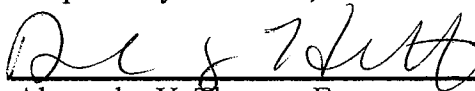
III. CONCLUSION

WHEREFORE, Gelson's requests an order of the Commission directing Whole Foods and its counsel to comply with the protective order and immediately return Gelson's confidential documents without retaining copies or summaries. The protective order prohibits use of Gelson's confidential documents for any purpose beyond the administrative proceedings. Whole

Foods and its counsel have already used the documents for an impermissible purpose in considering their relevance to an unrelated proceeding, submitting a motion to the federal court involving the documents, and by retaining them after the conclusion of the administrative proceeding upon suspicion of relevance to a separate matter. Whole Foods' counsel's asserted duty to preserve does not apply to Gelson's documents. Even if counsel had a duty to preserve, the duty is outweighed by its obligations under the protective order, the potential harm to Gelson's if the documents are disclosed, and the lack of spoliation risk.

DATED this 6th day of May, 2009

Respectfully submitted,



Alexander Y. Thomas, Esq.

Daniel Z. Herbst, Esq.

Reed Smith, LLP

1301 K. Street, N.W.

Washington, D.C. 20005

(202) 414-9200

(202) 414-9299 (fax)

Counsel for Gelson's Markets

Exhibit

1

JAMES A. FISHKIN

James.fishkin@dechert.com
+1 202 261 3421 Direct
+1 202 261 3042 Fax

October 14, 2008

VIA FEDERAL EXPRESS

Robert E. Stiles
President
Gelson's
16400 Ventura Blvd., Suite 240
Encino, CA 91436

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

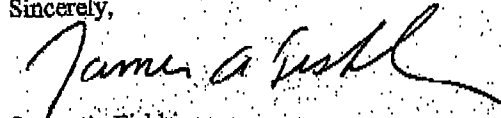
Dear Mr. Stiles:

I am an attorney representing Whole Foods Market, Inc. in the above captioned matter, which is the Federal Trade Commission's administrative litigation against Whole Foods Market, Inc. for its acquisition of Wild Oats Markets, Inc. Enclosed is a subpoena requesting documents related to this matter.

I have also included a copy of the Protective Order in this matter which provides instructions regarding the designation of confidential material and limits who may see material designated as confidential.

Please call me at 202-261-3421 or Gorav Jindal at 202-261-3435 if you have any questions. Thank you for your time and attention to this matter.

Sincerely,



James A. Fishkin

Enclosures



SUBPOENA DUCES TECUM

Issued Pursuant to Rule 3.34(b), 16 C.F.R. § 3.34(b)(1997)

<p>1. TO</p> <p>Robert E. Stiles President Gelson's 16400 Ventura Blvd., Suite 240 Encino, CA 91436</p>	<p>2. FROM</p> <p style="text-align: center;">UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</p>
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This subpoena requires you to produce and permit inspection and copying of designated books, documents (as defined in Rule 3.34(b)), or tangible things - or to permit inspection of premises - at the date and time specified in Item 5, at the request of Counsel listed in Item 9, in the proceeding described in Item 6.

<p>3. PLACE OF PRODUCTION OR INSPECTION</p> <p>See Attachment A, Part II, No. 1</p>	<p>4. MATERIAL WILL BE PRODUCED TO</p> <p style="text-align: center;">James A. Fishkin</p>
<p>5. DATE AND TIME OF PRODUCTION OR INSPECTION</p> <p style="text-align: center;">November 5, 2008 at 10:00 am</p>	

6. SUBJECT OF PROCEEDING

In the Matter of Whole Foods Market Inc., et al, Docket No. 9324

7. MATERIAL TO BE PRODUCED

See Attachment A, Part III

<p>8. ADMINISTRATIVE LAW JUDGE</p> <p style="text-align: center;">Federal Trade Commission Washington, D.C. 20580</p>	<p>9. COUNSEL REQUESTING SUBPOENA</p> <p style="text-align: center;">James A. Fishkin, Esq. Dechert LLP 1775 I Street, NW Washington, DC 20006-2401</p>
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<p>DATE ISSUED</p> <p style="font-size: 1.5em; font-family: cursive;">October 3, 2008</p>	<p>SECRETARY'S SIGNATURE</p> <p style="font-size: 1.5em; font-family: cursive;">Donald S. Clark</p>
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GENERAL INSTRUCTIONS

APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed with the Secretary of the Federal Trade Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 9, and upon all other parties prescribed by the Rules of Practice.

TRAVEL EXPENSES

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to counsel listed in Item 9 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from counsel listed in Item 9.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served: (check the method used)

- In person.*
- by registered mail.*
- by leaving copy at principal office or place of business, to wit:*

.....
.....
.....
.....

on the person named herein on:

.....
(Month, day, and year)

.....
(Name of person making service)

.....
(Official title)

ATTACHMENT A

DOCUMENTS TO BE PRODUCED PURSUANT TO SUBPOENA DUCES TECUM

I. Definitions

For the purposes of these Requests for Documents, the following definitions apply:

A. The term "Whole Foods" shall mean Whole Foods Market, Inc., and its predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and all directors, officers, employees, agents and representatives thereof.

B. The term "Wild Oats" shall mean Wild Oats Markets, Inc., the entity acquired by Whole Foods on August 28, 2007, and its predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and all directors, officers, employees, agents, and representatives thereof.

C. The terms "you" and "your" refer to the entity or person to whom this Subpoena is directed, and all predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and including all store formats, brands, and banners under which any of the foregoing operate, and all directors, officers, employees, agents and representatives thereof.

D. The terms "Commission" refers to the Federal Trade Commission and its commissioners, bureau directors, counsel, staff, and employees.

E. "Documents" as used herein shall mean every original and every non-identical copy of any original of all mechanically written, handwritten, typed or printed material, electronically stored data, microfilm, microfiche, sound recordings, films, photographs, videotapes, slides, and other physical objects or tangible things of every kind and description containing stored information, including but not limited to, transcripts, letters, correspondence, notes, memoranda, tapes, records, telegrams, electronic mail, facsimiles, periodicals, pamphlets,

brochures, circulars, advertisements, leaflets, reports, research studies, test data, working papers, drawings, maps, sketches, diagrams, blueprints, graphs, charts, diaries, logs, manuals, agreements, contracts, rough drafts, analyses, ledgers, inventories, financial information, bank records, receipts, books of account, understandings, minutes of meetings, minute books, resolutions, assignments, computer printouts, purchase orders, invoices, bills of lading, written memoranda or notes of oral communications, and any other tangible thing of whatever nature.

F. The terms "relate to," "related to," "relating to," "in relation to," and "concerning" shall mean mentioning, comprising, consisting, indicating, describing, reflecting, referring, evidencing, regarding, pertaining to, showing, discussing, connected with, memorializing or involving in any way whatsoever the subject matter of the request, including having a legal, factual or logical connection, relationship, correlation, or association with the subject matter of the request. A document may "relate to" or an individual or entity without specifically mentioning or discussing that individual or entity by name.

G. The terms "and" and "or" have both conjunctive and disjunctive meanings.

H. The terms "communication" and "communications" shall mean all meetings, interviews, conversations, conferences, discussions, correspondence, messages, telegrams, facsimiles, electronic mail, mailgrams, telephone conversations, and all oral, written and electronic expressions or other occurrences whereby thoughts, opinions, information or data are transmitted between two or more persons.

I. The term "Transaction" shall mean the acquisition of Wild Oats by Whole Foods that occurred on August 28, 2007.

J. The term "Geographic Area" shall mean the following metropolitan areas:

1. Albuquerque, NM;
2. Boston, MA;

3. Boulder, CO;
4. Hinsdale, IL (suburban Chicago);
5. Evanston, IL (suburban Chicago);
6. Cleveland, OH;
7. Colorado Springs, CO;
8. Columbus, OH
9. Denver, CO;
10. West Hartford, CT;
11. Henderson, NV;
12. Kansas City-Overland Park, KS;
13. Las Vegas, NV;
14. Los Angeles-Santa Monica-Brentwood, CA;
15. Louisville, KY;
16. Omaha, NE;
17. Pasadena, CA;
18. Phoenix, AZ;
19. Portland, ME;
20. Portland, OR;
21. St. Louis, MO;
22. Santa Fe, NM;
23. Palo Alto, CA;
24. Fairfield County, CT;
25. Miami Beach, FL;
26. Naples, FL;
27. Nashville, TN;
28. Reno, NV; and
29. Salt Lake City, UT.

II. Instructions

1. Submit all documents, including information or items in the possession of your staff, employees, agents, representatives, other personnel, or anyone purporting to act on your behalf, by the date listed in Item 5 on the Subpoena Duces Tecum form, to:

James A. Fishkin
 Dechert LLP
 1775 I Street, NW
 Washington, D.C. 20016

In the alternative, under FTC Rule 3.34(b), 16 C.F.R. § 3.34(b), you must produce and permit inspection and copying of the designated books, documents (as defined in Rule 3.34(b)), or

tangible things -- or to permit inspection of the premises -- at the date and time specified in Item 5, at the request of Counsel listed in Item 9, on the Subpoena Duces Tecum form.

2. If an objection is made to any request herein, all documents and things responsive to the request not subject to the objection should be produced. Similarly, if any objection is made to production of a document, the portion(s) of that document not subject to the objection should be produced with the portion(s) objected to redacted and indicated clearly as such. Otherwise, no communication, document, file, or thing requested should be altered, changed, or modified in any respect. All communications, documents, and files shall be produced in full and unexpurgated form, including all attachments and enclosures either as they are kept in your ordinary course of business or organized to correspond with those requests. No communication, document, file, or thing requested should be disposed of or destroyed.

3. If you object to any request, or otherwise withhold responsive information because of the claim of privilege, work product, or other grounds:

- a. Identify the Request for Documents to which objection or claim of privilege is made;
- b. Identify every Document withheld, the author, the date of creation, and all recipients;
- c. Identify all grounds for objection or assertion of privilege, and set forth the factual basis for assertion of the objection or claim of privilege;
- d. Identify the information withheld by description of the topic or subject matter, the date of the communication, and the participants; and
- e. Identify all persons having knowledge of any facts relating to your claim of privilege.

4. Your responses should reflect all knowledge, information, and documents in your possession, custody, or control, and includes, unless otherwise specifically indicated, your counsel, staff, employees, agents, representatives, other personnel, or anyone purporting to act on your behalf.

5. Your response to the document request should include any document created, prepared or received from January 1, 2006 to the present.

6. Any questions regarding this subpoena should be directed to James A. Fishkin at 202-261-3421 or Gorav Jindal at 202-261-3435.

III. Requests For Documents

Please provide the following:

1. All documents you have provided to the Commission in connection with (a) the Transaction or any investigation of the Transaction; (b) *FTC v. Whole Foods Market, Inc.*, Civil Action No. 1:07-CV-01021-PLF (D.D.C. 2007); or (c) this matter, which is *In re Whole Foods Market, Inc.*, FTC Docket No. 9324.
2. All documents relating to any communications you have had with the Commission in connection with (a) the Transaction; (b) *FTC v. Whole Foods Market, Inc.*, Civil Action No. 1:07-CV-01021-PLF (D.D.C. 2007); or (c) this matter, which is *In re Whole Foods Market, Inc.*, FTC Docket No. 9324.
3. All documents relating to Whole Foods' acquisition of Wild Oats, including documents discussing the effect of the merger on you.
4. All documents discussing competition with Whole Foods or Wild Oats, including responses by you to a new Whole Foods or Wild Oats store and responses by you to

prices, promotions, product selection, quality, or services at Whole Foods or Wild Oats stores.

5. All market studies, strategic plans or competitive analyses relating to competition in each Geographic Area, including documents discussing market shares.
6. All market studies, strategic plans or competitive analyses relating to the sale of natural and organic products, including the sale of natural and organic products in your stores.
7. All documents relating to your plans to increase the shelf space at your stores allocated to natural and organic products, the number of natural and organic products sold in your stores, or the sales of natural or organic products in your stores.
8. All documents discussing your plans to renovate or improve your stores to sell additional natural and organic products or to open stores emphasizing natural and organic products.
9. Provide documents sufficient to show, or in the alternative submit a spread sheet showing: (a) the store name and address of each of your stores separately in each Geographic Area; and (b) for each store provide the total weekly sales for each week since January 1, 2006 to the current date.

CERTIFICATE OF SERVICE

I certify that I served the foregoing Subpoena Duces Tecum and all Attachments via overnight mail delivery to:

Robert E. Stiles
President
Gelson's
16400 Ventura Blvd., Suite 240
Encino, CA 91436

By E-Mail:

J. Robert Robertson, Esq.
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Matthew J. Reilly, Esq.
Catharine M. Moscatelli, Esq.
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, DC 20001

Complaint Counsel

Dated: October 14, 2008

/s/ James A. Fishkin
James A. Fishkin, Esq.

Exhibit

2

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

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

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

PROTECTIVE ORDER GOVERNING CONFIDENTIAL MATERIAL

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

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

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

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

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

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

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

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

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

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

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

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

8. Disclosure of confidential material to any person described in Paragraph 7 of this Order shall be only for the purposes of the preparation and hearing of this proceeding, or any appeal therefrom, and for no other purpose whatsoever, provided, however, that the Commission may, subject to taking appropriate steps to preserve the confidentiality of such material, use or disclose confidential material as provided by its Rules of Practice; Sections 6(f) and 21 of the Federal Trade Commission Act; or any other legal obligation imposed upon the Commission.

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

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

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

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

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

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

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

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

By the Commission.

Donald S. Clark
Secretary

ISSUED: October 10, 2008

Exhibit

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JEFFREY W. BRENNAN

jeffrey.brennan@dechert.com
+1 (202) 261-3326 Direct
+1 (202) 261-3020 Fax

April 23, 2009

VIA FIRST CLASS MAIL

Daniel Z. Herbst, Esq.
Reed Smith LLP
1301 K Street, N.W
Suite 1100 - East Tower
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

CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing to be hand delivered on the this 6th day of May 2009, to:

Secretary Donald S. Clark
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

I certify that I caused a copy of the foregoing to be sent via UPS overnight courier in a sealed, prepaid envelope, on the this 6th day of May 2009, to:

James Fishkin/Jeffrey Brennan
Dechert LLP
1775 I Street, NW
Washington, DC 20006-2401
Counsel for Whole Foods Market Inc.

Matthew J. Reilly
Catherine M. Moscatelli
Federal Trade Commission
601 New Jersey Avenue, NW
Washington, DC 20001
Counsel for the Federal Trade Commission

J. Robert Robertson
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
Counsel for the Federal Trade Commission

D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580



Alexander Y. Thomas, Esq.
Daniel Z. Herbst, Esq.
Reed Smith, LLP
1301 K. Street, N.W.
Washington, D.C. 20005
Counsel for Gelson's Markets