

**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 Moreover, because the current adjudication before the Commission has been withdrawn in advance of the Commission’s final acceptance of the March 6, 2009 consent orders, Whole Foods’ need for Gelson’s documents “to prepare for the hearing” has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

