

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.

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

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

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

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.

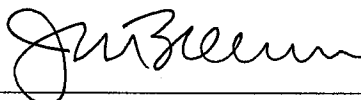
Indeed, Whole Foods brought this issue to a head before the Protective Order obligations are triggered, which Gelson’s dubiously characterizes as “inviting” class counsel to subpoena the documents. (Mot. at 7) To the contrary, Whole Foods has attempted to act responsibly by alerting all concerned parties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

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,



Jeffrey W. Brennan
Christine C. Levin
Carolyn E. Budzinski
Dechert LLP
1775 I Street, N.W.
Washington, D.C. 20006-2401
Tel: (202) 261-3326
Fax: (202) 261-3333
jeffrey.brennan@dechert.com
Attorneys for Whole Foods Market, Inc.

Dated: May 14, 2009

CERTIFICATE OF SERVICE

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

By Hand Delivery:

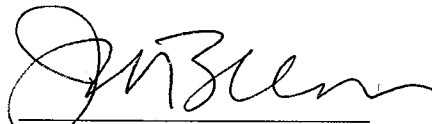
Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

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

JEFFREY W. BRENNAN

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

May 14, 2009

VIA HAND DELIVERY

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

Dear Secretary Clark:

Enclosed please find the Response of Whole Foods Market, Inc. to Gelson's Markets' Motion to Enforce Protective Order. This package contains the original plus twelve copies, plus an electronic copy.

I certify that the electronic copy is a true and correct copy of the paper original.

Sincerely,



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

EXHIBIT

A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

JUL 10 2007

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

FEDERAL TRADE COMMISSION)

Plaintiff,)

v.)

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

WHOLE FOODS MARKET, INC.)

and)

WILD OATS MARKETS, INC.)

Defendants.)

PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL

For the purpose of protecting the interests of the Parties and Third Parties against the improper use and disclosure of confidential information submitted or produced in connection with this Matter:

IT IS HEREBY ORDERED THAT this Protective Order Governing Discovery Material (the "Protective Order") shall govern the handling of all Discovery Material in the above captioned Matter.

DEFINITIONS

For purposes of this Protective Order, the following definitions shall apply:

1. "Whole Foods" means defendant Whole Foods Market, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business at 550 Bowie Street, Austin, Texas 78703, and its predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures.

2. "Wild Oats" means defendant Wild Oats Markets, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 3375 Mitchell Lane, Boulder, Colorado 80301, and its predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures.

3. "Commission" or "FTC" means the Federal Trade Commission, or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for the purposes of this Matter.

4. "Confidential Discovery Material" means all Discovery Material that is confidential or proprietary information produced in discovery. Such material is referred to in, and protected by, Rule 26(c)(7) of the Federal Rules of Civil Procedure. Confidential Discovery Material shall include non-public trade secret or other research, development, or commercial information, the disclosure of which would likely cause commercial harm to the Producing Party or to Defendants, in instances where the Producing Party produces information generated by the Defendants. The following is a non-exhaustive list of examples of information that likely will qualify for treatment as Confidential Discovery Material: strategic plans (involving pricing, marketing, research and development, product road maps, corporate alliances, or mergers and acquisitions) that have not been fully implemented or revealed to the public; trade secrets; customer-specific evaluations or data (e.g., prices, volumes, or revenues); sales contracts; system maps; personnel files and evaluations; information subject to confidentiality or non-disclosure agreements; proprietary technical or engineering information; proprietary financial data or projections; and proprietary consumer, customer, or market research or analyses applicable to current or future market conditions, the disclosure of which could reveal Confidential Discovery Material. Discovery Material will not be considered confidential if it is in the public domain.

