

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FEDERAL TRADE COMMISSION,)	
)	
Plaintiff,)	
)	
v.)	Civ. No. 07-cv-01021-PLF
)	
WHOLE FOODS MARKET, INC.,)	
)	
- and -)	
)	
WILD OATS MARKETS, INC.,)	
)	
Defendants.)	

**PLAINTIFF’S MEMORANDUM IN OPPOSITION TO DEFENDANT WHOLE FOOD
MARKET, INC.’S MOTION FOR ENTRY OF A FINAL PROTECTIVE ORDER**

Defendant Whole Foods Market, Inc.’s (“Whole Foods”) effort to amend the current Protective Order to allow its General Counsel unfettered access to all third party documents – including sensitive commercial information – should be denied for several reasons. *First*, contrary to the stated conclusions in her incomplete Declaration, Whole Foods’ General Counsel serves in non-legal roles that appear inherently involved in competitive dec

terms allowed by the District Court in the protective order issued in *FTC v. Foster*, No. CIV 07-532 JB/ACT (D.N.M. April 26, 2007) (Exhibit D to Doc. No. 12), a decision relied on heavily by Whole Foods. In that case, the district court permitted the general counsels of the merging firms access *only* to un-redacted legal briefs and deposition and investigational hearing transcripts (without exhibits), and *only* in their outside counsel's offices where they could not remove any notes taken therein. *Id.* at 15.

is far too narrow. In addition, as detailed below, Ms. Lang's role is far broader than depicted in her June 11, 2007 Declaration submitted in support of Whole Foods' motion.

The starting point is the decision in *United States Steel Corp. v. United States*, 730 F.2d 1465 (Fed. Cir. 1984), in which the court rejected the view that counsel could be denied access to discovery *solely* due to his in-house status. However, contrary to Whole Foods' suggestion, the court did not then extend access to discovery to all in-house counsel except those who made operational "pricing" or "product design" decisions. Instead,

"competitive decisionmaking' . . . would appear serviceable as shorthand for a counsel's activities, association, and relationship with a client that are such as to involve *counsel's advice and participation in any or all of the client's decisions* (pricing, product design, etc.) made in light of similar or corresponding information about a competitor." *Id.* at 1468 n.3 (italics added).

In other words, an attorney who gives any legal advice to management about the competitive business decisions is intimately involved in the "competitive decisionmaking" itself.

The decisions cited by Whole Foods suggest that, under *United States Steel*, the release of discovery to a general counsel like Ms. Lang is inappropriate. Instead, disclosure is limited to an attorney with responsibilities unique to the litigation at hand. In *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465 (1992), for example, the court precluded the party's sole in-house counsel from access to discovery because disclosure "would place in-house counsel in the 'untenable position' of having to refuse his employer legal advice on a host of contract, employment, and competitive marketing decisions lest he improperly or indirectly reveal" the confidential discovery. *Id.* at 1471. On the other hand, a specialized staff attorney who had dedicated responsibility for hiring and monitoring outside counsel was given access to discovery, but only because she had "no responsibility for and *give[s] no advice* to management . . .about

competitive sales, marketing, pricing, product design, development or research . . . employment matters or scientific or technical matters.” *Volvo Penta, Inc. v. Brunswick Corp.*, 187 F.R.D. 240 (E.D. Va. 1990) (italics added).

Finally, perhaps the most instructive decision for the pending motion is *Carpenter Tech. Corp. v. Armco*, 132 F.R.D. 24 (E.D. Pa. 1991), also cited by Whole Foods. There, the plaintiff’s staff attorney with “absolutely no involvement” in the business decisions was given access to confidential materials. *Id.* at 27-28. At the same time, the company’s Director of Law, who inevitably was involved in all the company’s legal affairs, was denied access to discovery. *Id.*

With this backdrop, Ms. Lang’s responsibilities as Whole Foods’ General Counsel, as a member of Whole Foods’ self-described “Leadership Team,” and as an officer and/or director of approximately seventy (70) Whole Foods’ subsidiaries, betray the notion that she is not involved in competitive decisionmaking. Ms. Lang admits that she gives “legal advice” to Whole Foods’ “Eteam” which makes “decisions about Whole Foods business and policy at a national level.” (Roberta Lang Decl. at ¶5). She affirms that she is also one of only 27 voting members of the Whole Foods Leadership Network, which she admits “may discuss the competitive landscape generally....” *Id.* at ¶7. Ms. Lang also concedes that she is the “inside lawyer who worked on the negotiation of the transaction at issue,” *Id.* at ¶8. She also acknowledges that she is “called upon daily to provide legal advice to the Eteam, the board of directions, and our senior leadership concerning this transaction.” *Id.* at 10. Finally, although Ms. Lang may not, as she affirms in her declaration (*see* ¶ 4), personally select vendors or make purchasing decisions, she carefully does not deny providing the necessary legal “advice . . . on any or all of these decisions.” *United States Steel*, 730 F.2d at 1468 n.3

³ For example, Ms. Lang is a Vice President, Treasurer, Officer and Director of Whole Foods Market Group, Inc. *See Franc*

II. Granting Access to Whole Foods' General Counsel Would Chill Future Third Party Cooperation in Commission Investigations.

The public at large is also potentially prejudiced if Whole Foods' General Counsel is permitted access to the competitive information of third parties in an investigation. It is axiomatic that if business secrets turned over to the Federal Trade Commission in furtherance of law enforcement efforts are thereby made available to firms in the same industry, companies will be less willing to provide that information to the Commission in the first instance. As a result, the Commission's ability to enforce the antitrust laws, among others, is impeded to the public's detriment. As the Federal Circuit noted (in reference to the International Trade Commission)

The Commission's reluctance to grant . . . an in-house counsel access to the confidential business information is that, in order to discharge its statutory responsibilities within the strict statutory time limits, the Commission is heavily dependent on the voluntary submission of information. Disclosure of sensitive materials to an adversary would undoubtedly have a chilling effect on the parties willingness to provide confidential information essential to the Commission's fact-finding processes.

Akzo N.V. v. ITC, 808 F.2d 1471, 1483 (Fed. Cir. 1986).

The same is true here for the Federal Trade Commission. Given the particularly tight law enforcement schedule imposed by the Hart-Scott-Rodino Act, prompt availability to this Commission of competitively sensitive information from industry participants other than the merging parties is essential. As in *Akzo*, disclosure of sensitive information to another firm's chief legal officer would have a "chilling effect" on the cooperation of firms whose confidential information is essential to the Commission's fact finding and law enforcement functions.

III. The Interim Protective Order is Typical for Merger Litigation in this Court.

The Commission believes that the operative IPO should be made final. This is

appropriate under Rule 26(c) of the Federal Rules of Civil Procedure, which provides:

Upon motion by a party or by the person from whom discovery is sought . . . and for good cause shown, the court in which the action is pending . . . may make any order for which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . .

- (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way . . .

Fed. R. Civ. P. 26(c). The material submitted by third parties is also entitled to confidential treatment under Sections 6(f) and 21 of the FTC Act, 15 U.S.C. §§ 46(f), 57b-2. Section 21(d)(2) of the FTC Act.

The same protections and access provisions found in the operative IPO have been implemented in protective orders entered in previous merger cases in this court. For example, in *FTC v. Cardinal Health, Inc.*, Civ. Action No. 98-595(SS) (D.D.C., March 11, 1998), the parties implemented a one-tier system for the designation of materials as “Confidential,” where none of the designated materials could be disseminated to in-house counsel. (*See*

⁴ Whole Foods argues that any concern by the Commission (or third parties) about its General Counsel’s access to third party competitive information somehow undermines the Commission’s allegation of a relevant product market that does not include the third parties. *See* Whole Foods’ Mem. at 2. However, nothing could be further from the truth. The Commission’s position is clear that while there is some level of competition between the merging parties and supermarkets operated by the third parties whose information is at issue here, there is distinct and unique competition between Whole Foods and Wild Oats in the premium natural and organic supermarket market:

IV. At a Minimum, The Court Should Impose Restrictions on Access Equivalent to those in *FTC v. Foster*.

Finally, the cases cited by Whole Foods clearly endorse the notion that, if in-house counsel is given access to the third party discovery, she should be carefully restricted in how the discovery is made available to her. Some restrictions that are regularly endorsed by the courts may be difficult to implement here.⁵ On the other hand, the limitations established in *Federal Trade Commission v. Foster*, No. CIV 07-532 JB/ACRT (D.N.M., April 26, 2007) (Exhibit D to Doc. No. 12), a case which is cited and relied by Whole Foods, offers sound guidance. There, the district court granted in-house counsel access to certain third party materials that would otherwise have been confidential and not accessible. However, the court severely limited the type and scope of the access granted to the in-house counsel and third

The Federal Trade Commission does not for a moment contend that premium natural and organic supermarkets to not compete at some level with other supermarkets. We know they do. The question is whether despite that competition there is unique and important competition between and among premium natural and organic supermarkets such that one constrains another.

6/11/2007 Status Conference, 21:5-11. Thus, it is perfectly consistent with the Commission's product market definition that both the Commission – and third parties who compete at some level outside the premium natural and organic supermarket market with Whole Foods – are concerned about their business plans, revenues, net sales, margins, price indices and other competitively sensitive information being reviewed by the chief legal officer of another firm operating in the same industry and who may compete in some manner with Whole Foods.

⁵ For example, in *Glaxo Inc. v. Genpharm Pharmaceuticals, Inc.*, 796 F. Supp. 872, 874 (E.D.N.C. 1992), in-house counsel agreed not to be involved in any other aspect of the company's operations except for the specific legal issues raised in the litigation. And, the two decisions entered by Magistrate Facciola, *Intervet, Inc. v. Merial Ltd.*, 241 F.R.D. 55 (D.D.C. 2007), and *United States v. Sungard Data Systems, Inc.*, 173 F. Supp.2d 20 (D.D.C. 2001), imposed a strict \$250,000 personal fine on the in-house counsel for any violation of the protective order.

counsel for the defendant could have access to only certain specified documents, specifically “confidential deposition transcripts, transcripts of FTC investigative hearings and un-redacted pleadings, without exhibits.” Further, any review of those few categories of confidential materials was allowed only in the offices of the defendants’ outside counsel and, while in-house counsel could take notes, he could not remove these notes from outside counsels’ offices. *Id.* at 15.

These strict limitations are necessary and appropriate here if the Court is going to allow Whole Foods General Counsel to see competitive information about third parties. If Ms. Lang is permitted to read unredacted briefs, deposition transcripts and investigational hearings she does not also need to see actual competitively sensitive documents or data submitted by third parties and she certainly does not need to have those documents in her office in Austin, Texas. The delivery and retention of those third party business records at Whole Foods’ headquarters creates too many uncertainties regarding the integrity of those materials as files can be lost or compromised. Therefore, in the alternative, the Commission proposes the addition of a new paragraph to the Protective Order specifying that Ms. Lang may have access to confidential deposition transcripts, transcripts of FTC investigative hearings and un-redacted pleadings, without exhibits, in the office of Whole Food’s outside counsel and may take notes regarding such material but may not remove these notices for the offices of Whole Foods’ outside counsel.

CONCLUSION

For the foregoing reasons, the Interim Protective Order dated June 8, 2007, should be entered as a final Protective Order, or amended in conformance with the above proposal.

Respectfully submitted,

Dated: June 20, 2007

/s/ **Thomas J. Lang**
Thomas J. Lang (DC Bar # 452398)
Thomas H. Brock (DC Bar # 939207)
Federal Trade Commission
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Washington, D.C. 20580
Telephone: (202) 326-2813
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tlang@FTC.gov

Counsel for the Federal Trade Commission

CERTIFICATE OF SERVICE

This 20th day of June, 2007, I certify that a copy of the foregoing papers were uploaded to the CM/ECF system. In addition, a copy was served on the following counsel via e-mail:

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202-783-0800
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Attorney for Movants Publix Super Markets, Inc.; SUPERVALU Inc.; & Wegmans Food Markets, Inc.
1299 Pennsylvania Ave., N.W.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Plaintiff,

v.

WHOLE FOODS MARKET, INC.,

- and -

WILD CATS MARKETS, INC.

Civ. No. 07-cv-01021-PLF

Defendants

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,)
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 Plaintiff,)
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 v.)
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 WHOLE FOODS MARKET, INC.,)
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 - and -)
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 WILD OATS MARKETS, INC.,)
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 Defendants.)

Civ. No. 07-cv-01021-PLF

DECLARATION OF MICHAEL FRANCHAK

OPPOSING DEFENDANT WHOLE FOOD MARKET INC'S MOTION FOR ENTRY

OF A FINAL PROTECTIVE ORDER

My name is Michael Franchak. I am an attorney with the Federal Trade

Whole Foods Market, Inc. - General Counsel, Vice President Legal Affairs, Secretary and Co-Treasurer

Whole Foods Market California, Inc. - Northern California Region - Sole Director, Officer, VP & Treasurer

WFM Northern Nevada, Inc. - Northern California Region - Sole Director, Officer, VP & Treasurer

Whole Foods Market Pacific Northwest, Inc. - Sole Director, Officer, VP & Treasurer

Mrs. Gooch's Natural Food Markets, Inc. - Southern Pacific Region - Sole Director, VP & Treasurer

Whole Foods Market, Inc. - General Counsel, Vice President Legal Affairs, Secretary and Co-Treasurer

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

WFM Procurement Investments, Inc. - Director, Officer, VP, Sec'y & Treasurer

Whole Planet Foundation - VP, Secretary and Treasurer, and Director

Whole Foods Market Canada - President and Director

Fresh & Wild Holdings Limited - Director

Fresh & Wild Limited - Director

Freshlands Holdings Limited - Director

Freshlands Limited - Director

Whole Foods Market Finance, Inc. - Officer & Asst Sec'y

Whole Foods Market Brand 365, LLC - Officer & Asst Sec'y

Whole Foods Market Procurement, Inc. - Officer & Asst Sec'y

WFM Private Label Management, Inc. - Officer & Asst Sec'y

Delk Road Brasleton GA, LLC - Officer & Asst Sec'y

Franklin & Somerset Portland ME, LLC - Officer & Asst Sec'y

Hydraulic Road Charlottesville VA, LLC - Officer & Asst Sec'y

WFM Properties - [Redacted]

Ray Road Chandler AZ, LLC - Officer & Asst Sec'y

[Redacted]
Sharon Road Charlotte NC, LLC - Officer & Asst Sec'y

Springfield Avenue Millburn, NJ, LLC - Officer & Asst Sec'y

Tunnel Road Asheville NC, LLC - Officer & Asst Sec'y

WFM Properties Cheshire - Officer & Asst Sec'y

WFM Properties - [Redacted]

WFM Properties San Jose - Officer & Asst Sec'y

WFM Properties Scottsdale - Officer & Asst Sec'y

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,)
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Plaintiff,)
)

[REDACTED]

[REDACTED]

- and -)
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WILD OATS MARKETS, INC.,)
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Defendants.)

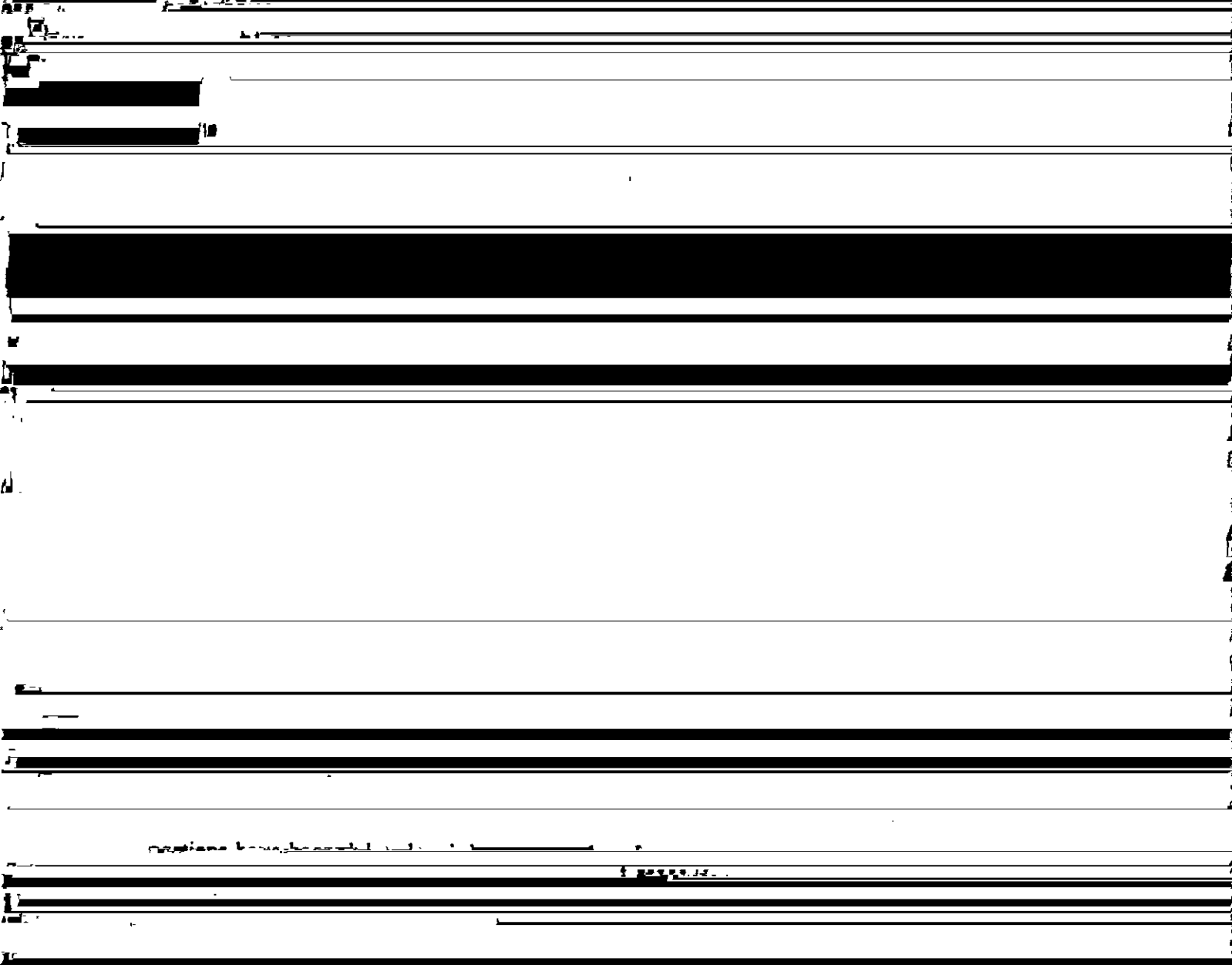
**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT WHOLE FOOD
MARKET, INC.'S MOTION FOR ENTRY OF A FINAL PROTECTIVE ORDER**

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submitted during a Federal Tax [illegible] [illegible]

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), or if an entire folder or box of documents is confidential by placing or affixing to that folder or box, the designation "CONFIDENTIAL" or any other appropriate notice, together with an indication of the portion or portions of the document considered to be confidential material. Masked copies of documents may be produced where the portions masked contain

privileged matter, provided that disclosure of such information is necessary for the



information obtained pursuant to this Order (a) in responding to a formal request (upon a majority vote or upon a Chairman's signature) or subpoena from either House of Congress or from any committee or subcommittee of the Congress, consistent with applicable law, including Section 7A(h) of the Clayton Act or Sections 6(f) and 21 of the Federal Trade Commission Act; and (b) in responding to a federal or state access request under Commission Rule 4.11(c), 16 C.F.R. § 4.11(c).

10. In the event that any confidential materials contained in this

exhibit or other papers (collectively the "papers") filed as to be filed with the Commission

allowing that party to seek an order that the document or transcript be granted in camera treatment. Except where such an order is granted, 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.

12. At the time that any consultant or other person retained to assist counsel in the

[REDACTED]

ATTORNEYS ENTITLED TO NOTICE

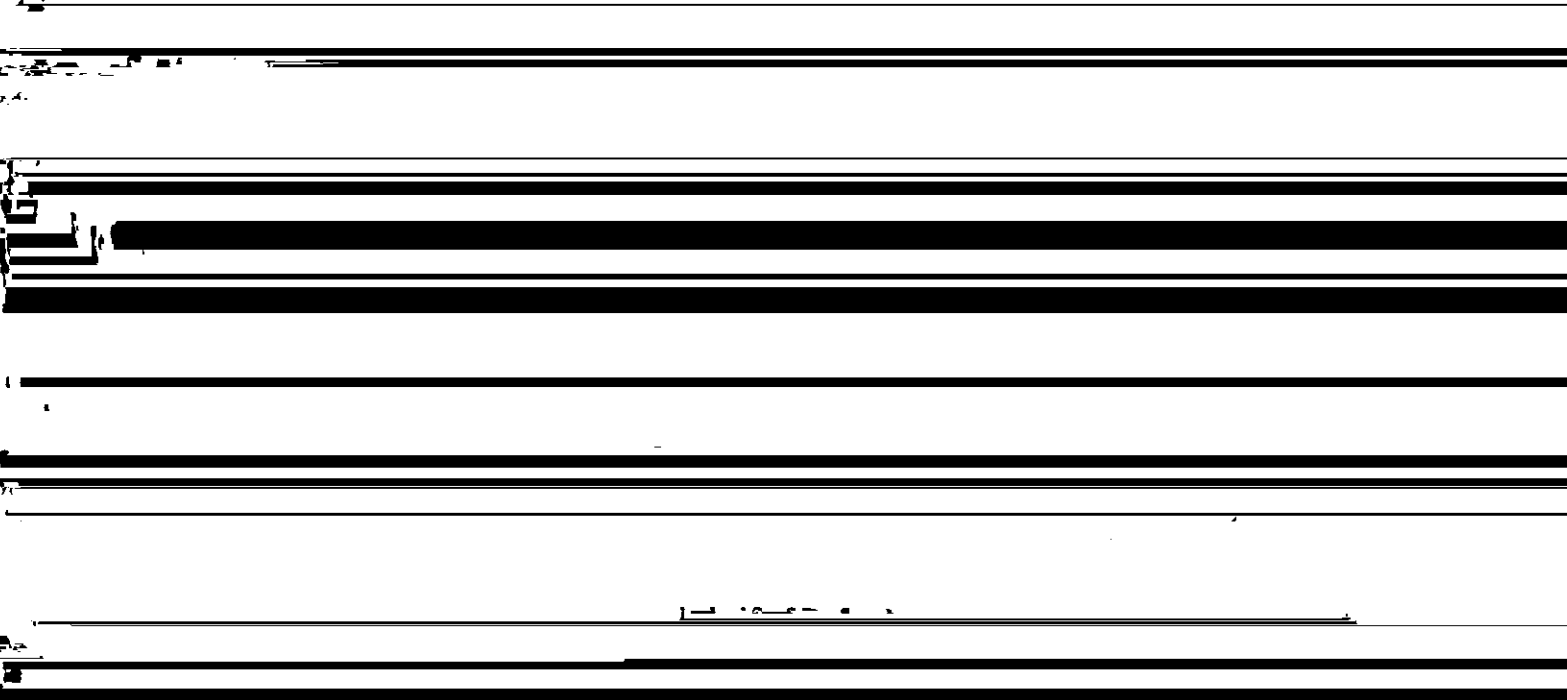
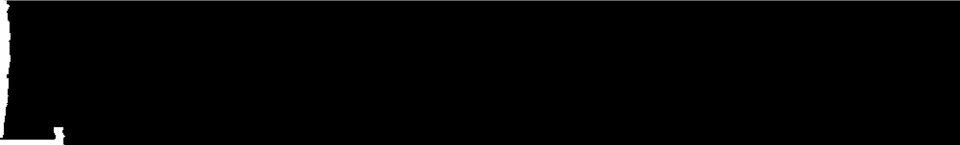
- (1) Michael E. Antalics
Federal Trade Commission
6th Street & Pennsylvania Avenue, NW
Washington, DC 20580
(202) 326-2821

on behalf of Plaintiff Federal Trade Commission,

and

- (2) Phillip A. Proger, Esq.
Jones, Day, Reavis & Pogue
1450 G Street, N.W.
Washington, DC 20005
Attorney for defendant Cardinal Health, Inc.

Steven A. Newborn, Esq.
Rogers & Wells
607 Fourteenth St., N.W.
Washington, DC 20005



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,)
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Plaintiff,)
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v.)
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WHOLE FOODS MARKET, INC.,)
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- and -)
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WILD OATS MARKETS, INC.,)
)
Defendants.)

Civ. No. 07-cv-01021-PLF

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT WHOLE FOOD

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S PROTECTIVE ORDER

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

STAPLES INC ET AL

Case No.: 1:97CV00701

Judge: TFH

PROTECTIVE ORDER

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

In the interest of ensuring that matters raised by this proceeding are open to the public,

and at the same time to ensure that confidential information submitted by a defendant or any

previously obtained by the Federal Trade Commission ("FTC") during its own complaint

investigation.

2. Any document or portion thereof submitted to the FTC during its investigation by a defendant or by a third party pursuant to compulsory process, or voluntarily in lieu of compulsory process that has been or is designated as confidential by the submitting party, or that

portions thereof submitted in response to such discovery requests as confidential material, including documents obtained by them from third parties pursuant to discovery or as otherwise obtained, where the third party has requested such confidentiality.

4. The parties, in conducting discovery from third parties, shall attach to such

A third party may designate as confidential material any document or portion thereof submitted by it in response to discovery in this proceeding.

5. A designation of confidentiality shall constitute a representation to the Court in

good faith and after careful determination that the material is not reasonably believed to be already in the public domain, that counsel believes the material so designated constitutes

document considered to be confidential material. Masked copies of documents may be produced

where the portions masked contain privileged matter, provided that the copy produced shall

indicate at the appropriate point that portions have been deleted and the reasons therefor.

provided, however, that the FTC may, subject to taking appropriate steps to preserve confidentiality, use confidential information obtained in this proceeding: (a) in responding to a formal request (upon a majority vote or upon a Chairman's signature) or subpoena from either House of Congress or from any committee or subcommittee of the Congress, consistent with applicable law, including Section 7A(b) of the Clayton Act or Sections 6(e) and 13(e) of the

Trade Commission Act; and (b) in responding to a federal access request under Commission Rule 4.11(c), 16 C.F.R. § 4.11(c), made by the Department of Justice, the Securities and Exchange Commission, or such other federal agencies as the parties may agree to or, upon application, such other federal agencies as the Court may allow.

9. In the event that any confidential material is contained in any pleading, motion, exhibit or other paper (collectively the "papers") filed or to be filed with the Clerk of the Court,

the Clerk shall be notified by the

protection for any such material exhibits a strong public interest in its disclosure.

which also contains the formerly protected material.

10. If counsel for a defendant or any other party plans to introduce into evidence any

12. Nothing in this Order shall be construed to affect an abatement under

