Interlocutory Orders, Etc.

WHOLE FOODS MARKET, INC.

Docket No. 9324, Order, July 9, 2009

Order granting the Motion by Ahold U.S.A., Inc., New Seasons Market, Inc., Save Mart Supermarkets, Gelson's Markets, Safeway, Inc., Harris Teeter, Inc., and Apollo Management Holding L.P. and ordering Respondent to return any third-party documents that were subject to any outstanding discovery requests in *Kottaras v. Whole Foods Market, Inc.*

ORDER GRANTING THIRD PARTIES' MOTION TO ENFORCE PROTECTIVE ORDER

Ahold U.S.A., Inc., New Seasons Market, Inc., Save Mart Supermarkets, Gelson's Markets, Safeway, Inc., Harris Teeter, Inc., and Apollo Management Holding L.P. ("Moving Third Parties") have filed a motion requesting that the Commission enforce the Protective Order Governing Confidential Information ("Protective Order") issued in this matter. On May 21, 2009, the Commission issued an Order relieving Respondent Whole Foods Market, Inc. ("Whole Foods") of its obligation under Paragraph 12 of the Protective Order to return any third-party documents that were subject to any outstanding discovery requests in related federal court litigation,[1] provided that Whole Foods complied with its obligations under Paragraph 11 of the Protective Order. The Commission did so reluctantly. The Commission's investigations and cases rely heavily on the good faith cooperation of Third Parties. Third Party cooperation in turn is based in no small part on the expectation that their documents and testimony will be used only in the Commission action at issue. The purpose of the Commission's May 21, 2009 Order was to allow the United States District Court to rule on the appropriateness of the discovery requests pending before it. Absent such an order from the Commission, the documents could have been returned immediately, thus mooting the issue and depriving the District Court of the opportunity to rule.

[1] The discovery requests covered included but were not limited to outstanding discovery requests in *Kottaras v. Whole Foods Market, Inc*., No. 1:08-cv-01832 (D.D.C.) (*Kottaras*).

The Commission issued its final Decision and Order in this matter on May 28, 2009. The Moving Third Parties filed the present motion on July 2, 2009. The Moving Third Parties request an order instructing Whole Foods to return immediately to the Moving Third Parties all documents upon entry of an order permitting as much by the District Court in *Kottaras*. That request reflects the intent of the Commission's May 21, 2009 Order. Moreover, Whole Foods has advised the Moving Third Parties that it does not oppose returning the documents, consistent with its obligations in the District Court. Accordingly,

IT IS ORDERED THAT Whole Foods shall return immediately to the Moving Third Parties all documents produced by the Moving Third Parties in this matter, when so directed by the United States District Court in *Kottaras v. Whole Foods Market, Inc*., Case No. 1:08CV-01832 (D.D.C.).

By the Commission.

Interlocutory Orders, Etc.

WHOLE FOODS MARKET, INC.

Docket No. 9324, Order, July 20, 2009

Order granting Kroger's request for joinder with Ahold U.S.A., Inc., New Seasons Market, Inc., Save Mart Supermarkets, Gelson's Markets, Safeway, Inc., Harris Teeter, Inc., and Apollo Management Holding L.P.

ORDER GRANTING KROGER CO. REQUEST

The Kroger Co. ("Kroger") has effected a filing joining and incorporating by reference the Motion to Enforce Protective Order ("Third Parties' Motion") which Ahold U.S.A., Inc., New Seasons Market, Inc., Save Mart Supermarkets, Gelson's Markets, Safeway, Inc., Harris Teeter, Inc., and Apollo Management Holding L.P. filed on July 2, 2009. The Commission issued an Order granting that Motion on July 9, 2009 (copy attached) and Kroger filed its joinder on July 13, 2009. The Kroger filing therefore will be treated as a request for the same relief granted by the July 9 Order.

For the reasons detailed in the July 9 Order, the Commission has determined to grant the Kroger request. Accordingly,

IT IS ORDERED THAT Whole Foods shall return immediately to Kroger all documents produced by Kroger in this matter, when so directed by the United States District Court in *Kottaras v. Whole Foods Market, Inc*., Case No. 1:08CV-01832 (D.D.C.).

By the Commission.