

- EXPEDITE
- No Hearing Set
- Hearing is Set

Date:  
Time:  
The Honorable Erik D. Price

**FILED**

JUN 12 2015

Superior Court  
Linda Myhre Enlow  
Thurston County Clerk

**STATE OF WASHINGTON  
THURSTON COUNTY SUPERIOR COURT**

STATE OF WASHINGTON,  
  
Plaintiff,

NO. 13-2-02156-8  
14-2-00027-5

v.

~~[PROPOSED]~~ AGREED  
PROTECTIVE ORDER  
REGARDING TREATMENT OF  
CERTAIN DOCUMENTS OR  
INFORMATION PRODUCED BY  
THIRD PARTIES DURING  
DISCOVERY

GROCERY MANUFACTURERS  
ASSOCIATION,  
  
Defendant.

GROCERY MANUFACTURERS  
ASSOCIATION,  
  
Plaintiff,

v.

ROBERT W. FERGUSON,  
Attorney General of the State of  
Washington, in his official capacity,  
  
Defendant.

THIS MATTER comes before the Court on the parties' and the subjects of a third party subpoena, Heather Clarke, Brad Harwood, Mark Funk, and No on 522 Committee's (collectively "No on 522"), joint motion for a protective order concerning documents and information responsive to the subpoenas served by Plaintiff State of Washington ("State"). In order to facilitate the exchange of, and resolution of any dispute over, responsive documents

1 and/or information that No on 522 asserts contains confidential, trade secret, sensitive, or  
2 proprietary information that should be treated as "confidential," the Court hereby finds good  
3 cause exists for entry of this protective order under CR 26(c) and hereby ORDERS the  
4 following process be used:

- 5 1. No on 522 will produce all relevant and discoverable, non-privileged documents  
6 responsive to the State's subpoena subject to the State and No on 522's agreement as to  
7 the scope of the production and any valid objections submitted by No on 522.
- 8 2. No on 522 may not designate as "confidential" any documents and/or information that is  
9 already in the public domain or becomes part of the public domain through trial or  
10 otherwise; information that the State can show was obtained (without any benefit or use of  
11 the No on 522's "confidential" material) from Grocery Manufacturers Association  
12 ("GMA") or another third party having the right to disclose such information to the  
13 receiving party without restriction or obligation of confidentiality; information which, after  
14 its disclosure, is published to the general public by a third party having the right to publish  
15 such information; or information that the State can show by written record was  
16 independently developed by it after the time of disclosure by persons who did not have  
17 access to the other party's "confidential" material.
- 18 3. Subject to the process for objecting below, No on 522 may mark certain documents and/or  
19 information as "confidential" if it has a reasonable, good faith belief and legal basis for so  
20 designating those documents and/or information. Designating a document as  
21 "confidential" does not prevent production of that document if it is properly responsive to a  
22 discovery request. Rather, any document or information produced or provided by No on  
23 522 in response to the State's third party subpoena that is marked "confidential" pursuant  
24 to this Protective Order shall be held in confidence by the parties and their attorneys, and  
25 shall not be disclosed to any other person nor used for any other purpose except as  
26

1 necessary in the prosecution or defense of this lawsuit and in compliance with this  
2 protective order, and as subject to the process for objecting below.

- 3 4. If any participant to this agreed protective order objects to any "confidential" designation  
4 on any document or portion provided by No on 522, the objecting person shall provide  
5 each participant to this agreed protective order with written notice of its objections, stating  
6 the basis for each objection. If, after conducting a discovery conference, the participants  
7 cannot resolve the objection, the objecting person may file a motion with this Court,  
8 including a request for an in-camera review, to determine whether there is a legal basis for  
9 the document and/or information to be treated as "confidential."
- 10 5. To the extent that depositions of any person in this proceeding involve a specific discussion  
11 of the contents (as opposed to the existence) of "confidential" material, then those portions  
12 of the depositions should also be treated as "confidential" and designated as such. The  
13 duty to mark the depositions or portions of depositions, as "confidential" shall rest with the  
14 person claiming confidentiality. All depositions shall be treated as "confidential" until ten  
15 days after each participant to this agreed protective order receives the deposition transcript.
- 16 6. No on 522 shall be notified when "confidential" material designated by No on 522 is  
17 referred to or used by the State or GMA, respectively, during a deposition by providing No  
18 on 522 with copies of the deposition transcript not later than ten working days following  
19 the parties' receipt of the transcript. No on 522 will then have an additional ten days to  
20 mark certain portions of the deposition as "confidential" on the record.
- 21 7. "Confidential" material, including the contents thereof, may be disseminated only to:
- 22 a. The parties, attorneys for the parties in this litigation, and their  
23 partners/supervisors, associates/attorney colleagues, secretaries, legal assistants,  
24 paralegals/paralegal assistants, and other employees of the parties to whom it is  
25 reasonably necessary to disclose the information for the prosecution or defense of  
26 this litigation; experts retained for the purpose of consulting or testifying in this

1 litigation to whom disclosure is reasonably necessary for this litigation and who  
2 has been provided with this Protective Order and agreed to abide by its terms in  
3 writing;

4 b. Court officials other than the Court and/or its staff, involved in this litigation,  
5 including court reporters and persons operating video recording equipment at  
6 depositions, as may be required for purposes of attaching exhibits to depositions;

7 c. Copy or imaging services retained by counsel to assist in the duplication of  
8 "confidential" material, provided that counsel for the party retaining the copy or  
9 imaging service instructs the service not to disclose any "confidential" material to  
10 third parties and to immediately return all originals and copies of "confidential"  
11 material;

12 d. Mediators involved in resolving this matter should the parties choose to proceed  
13 through alternative dispute resolution, who will be provided with this Protective  
14 Order and agree to abide by its terms in writing; and

15 e. During their depositions, witnesses to whom disclosure is reasonably necessary  
16 and who have been provided with this Protective Order and agreed to abide by its  
17 terms in writing or on the record, unless otherwise agreed to by the parties or  
18 ordered by the Court. "Confidential" material must be separately bound by the

19 court reporter and may not be disclosed to anyone except as permitted under this  
20 Protective Order.

21 8. All expert witnesses who receive "confidential" material shall use the "confidential"  
22 material only for this litigation, and shall not disclose any "confidential" information to any  
23 third person for any purpose without written consent of the parties or as ordered by the  
24 Court.

25 9. Neither counsel, employees of the law firms representing the parties or third parties in this  
26 litigation, nor experts retained for purposes of consulting or testifying shall disclose or

1 disseminate any "confidential" material to any third person, whether by oral description or  
2 by writing, or by any other means, outside the group of persons listed in paragraph 7  
3 without a court order.

4 10. If the State receives a request for public disclosure of any "confidential" material under the  
5 state Public Records Act (Ch. 42.56 RCW), the State will provide No on 522 through  
6 counsel, with notice and an opportunity, per RCW 42.56.520 and .540, to seek an order  
7 prohibiting the State from releasing any "confidential" material, or take other appropriate  
8 action within No on 522's discretion. The State will provide such notice no later than five  
9 working days after receiving the request. If No on 522 does not seek and obtain an order  
10 prohibiting the State from releasing any "confidential" material within 14 days of being  
11 provided notice of the request for disclosure of any "confidential" material by the State, the  
12 State may release the requested "confidential" material. The State shall not release the  
13 requested "confidential" material during the pendency of any ruling(s) on No on 522's  
14 motion to prevent disclosure. The participants to this Protective Order further agree  
15 exemptions to the Public Records Act may apply to any and all documents and/or  
16 information marked as "confidential."

17 11. When "confidential" material (or any pleading, motion, or memorandum referring to such  
18 material) is to be filed with the Court, the filing must be under seal and the party making  
19 the filing must submit an appropriate motion and proposed order in accordance with the  
20 applicable rules. In lieu of, or in addition to, filing papers under seal that include or  
21 otherwise reveal "confidential" material, a party may file a redacted version to remove  
22 "confidential" material. A party choosing to do so, however, must first confirm with  
23 counsel for the producing party that the redactions are sufficient.

24 12. In the event that any participant of this agreement, its attorneys, experts, agents, or  
25 employees learns of any breach of the confidentiality of, or the misappropriation of, any of  
26 the "confidential" material, that individual or entity shall promptly give notice thereof to

1 participant to this agreement shall be entitled, without limitation of any other remedies to  
2 which they may be entitled by law, to seek injunctive relief and to enforcement of specific  
3 performance of this Protective Order.

4 13. Nothing in this Order shall preclude reconsideration by the Court of any of the terms of the  
5 Protective Order upon written application, with notice to the other parties, and for good  
6 cause shown.

7 DONE this 12 day of June, 2015.

8 REBEKAH ZINN  
9 COURT COMMISSIONER

~~JUDGE ERIK D. PRICE~~

10 PRESENTED BY:

11 ROBERT W. FERGUSON

12 Attorney General

Linda A Dalton  
LINDA A. DALTON, WSBA No. 15467

13 Senior Assistant Attorney General

14 CALLIE A. CASTILLO, WSBA No. 38214

15 Deputy Solicitor General

Attorneys for Plaintiff State of Washington/Defendant Robert W. Ferguson

16 APPROVED AS TO FORM:

Linda A Dalton for per agreement from counsel

17 MICHAEL K. RYAN, WSBA No. 32091

18 AARON E. MILLSTEIN, WSBA No. 44135

19 K&L GATES, LLP

20 BERT W. REIN, (admitted *pro hac vice*)

21 CAROL A. LAHAM (admitted *pro hac vice*)

22 WILEY REIN LLP

Attorneys for Defendant/Plaintiff Grocery Manufacturers Association

Michele Radosavich

23 ROBERT J. MAGUIRE, WSBA No. 29909

24 MICHELE RADOSAVICH, WSBA No. 24282

25 DAVIS WRIGHT TREMAINE, LLP

26 Attorneys for Heather Clarke, Brad Harwood, Mark Funk, and No on 522 Committee